WORKPLACE SPEECH AND CONDUCT POLICIES: RECONSIDERING THE LEGAL MODEL

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Workplace conduct policies have been created in response to claims from equality-seeking groups. These provide evidence of an employer's due diligence in preventing harassment or other forms of discrimination. These policies have tended to follow a legal model. The author questions whether the aim of the policies - a change in the workplace culture - is best achieved by the legal model and tentatively concludes that these are ineffective.

Les politiques de conduites au travail ont été crées en réponse aux demandes de groupes prônant l'égalité. Ces dernières fournissent l'évidence de l'application d'un employeur à prévenir le harcèlement ou d'autres formes de discrimination. Ces politiques ont généralement suivi le modèle légal. L'auteur questionne si le but des politiques - un changement dans la culture du milieu de travail - est accompli efficacement par le modèle légal et avec une certaine hésitation conclut que celles-ci sont inefficaces.

I. *Introduction*

The last decade has seen a proliferation of workplace conduct and speech policies designed to promote equality in the workplace.[1] Although they vary in detail, these codes typically include more or less detailed enforcement provisions which may resemble "natural justice" requirements in the public legal system. As I suggest below, there are advantages to this approach; however, this article asks whether the disadvantages of "the legal model" outweigh its advantages in light of the objectives of these policies. It may be that the use of the legal model is actually counterproductive given the purpose of the policies. My focus on workplace

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[1] Or, put negatively, to diminish harassment and other forms of discrimination in the workplace. Speech and conduct policies include anti-harassment, anti-racist and other equality-driven policies.

speech and conduct policies should be seen as one example of a larger question about the appropriate or most useful application of legal processes.

By "legal model" I mean the operationalization of the "rule of law", the procedures which are generally applied to guarantee a "fair hearing" through an orderly process. These may be very formal, as in the courtroom, less formal, as practised by some administrative tribunals or quite informal, as in disciplinary hearings in the workplace. It is the pattern which constitutes the legal model: the systematic process of allowing each "party" to make his or her case and of then allowing the other party to respond; the sifting of the information presented to determine its "legal" relevance to a complaint that has been made according to pre-determined categories of allowable complaints under the policy; the reaching of a conclusion and granting of a remedy within specified bounds. It is based on an "adversarial" relationship in which one party asserts wrong-doing and the other defends him or herself. Under this system, honest forgetting and confusion, self-doubts and self-questioning are all too easily translated into lying, evasion or admission of wrong-doing. As a result, even the informal procedures for which these policies commonly provide may be beset by fears that whatever a party says may be used against her or him later if the complaint moves to the formal stage.

These procedures are intended to ensure equal treatment of the parties; they manifest the "scientific" rules or method by which the disinterested adjudicator can decide which version of events is more likely to have occurred. While almost no one today would maintain that this process is in fact "scientific", we do maintain a legal fiction that the process has some power to produce the "right" result. Indeed, anyone quickly searching for a meaning of the rule of law would find Black's Law Dictionary limiting it to process (and a limited kind of process, at that), the making of decisions "by the application of known principles or laws without the intervention of discretion in their application." It is that lack of discretion, however, which grounds complaints about the law, as I discuss below. Similarly, the Dictionary of Canadian Law, with a mix of hope and cynicism, refers to "[p]rocesses which are ultimately predicated on fair and just methods and which theoretically adhere to standards of consistency, predictability of result, and impartiality".

The legal model may well be effective for dealing with certain kinds of disputes. My interest here is whether it is effective or appropriate, even in modified form, as the mainstay of internal workplace speech and conduct policies as a contribution to the larger question of when the legal model is appropriate. I do not intend to argue here that "the legal model" is no longer appropriate in society at large: I leave that to another day. My narrower point is that even if it is appropriate in its present form, or (more likely) in a modified form, in society at large, its extension to more specific and particularized surroundings is not necessary and may, indeed, be counterproductive. In short, I am not so much concerned with what ought to be "the law's business" as with where "the law's business" should be performed. My argument focuses primarily on the inapt conjunction between a process based on the legal model and

what I see to be the most important purpose of the workplace policies, changing the culture of the workplace.[2] In a 1984 article, David Trubek suggested that "the study of dispute transformation offers a rich field for concrete studies of how legal ideas and legal organization affect social order and disorder. Numerous studies have shown how the lawyer's definition of a valid claim influences the kind of disputes that emerge and do not emerge."[3] The legal structure within which the lawyer works also affects the characterization of the dispute and the purpose to which the resolution of the dispute may be put (as the resolution of an individual complaint or as social transformation, even on a minor scale).

In considering this question, I set out first my understanding of the purpose of workplace policies, then briefly discuss the evolution and application of "the rule of law" and conclude by exploring whether the objectives might be better met by methods which are not as reflective of the rule of law writ small.

II. *Workplace Speech and Conduct Policies*

The implementation of speech and conduct policies by employers has followed an increase in social consciousness and developments in public law promoting equality in response to claims by majority women and by male and female members of other marginalised groups. Sometimes, these policies are specific and devoted to a particular harm (sexual harassment policies, for example), but others are more generic, intended to cover a range of different unacceptable conduct, from racism to rudeness.[4]

The main objectives of these policies are to educate, set out standards to be met and to provide for enforcement of the standards. It is in the enforcement provisions where they import the "legal model". These policies also serve to support a "due diligence" defence for an employer named as a respondent under human rights legislation in connection with acts of misconduct of particular kinds (such as sexual or racial harassment) committed by their employees.[5] A

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[2] To be clear, my discussion is about policies internal to the workplace, not about requirements imposed on the workplace by human rights, criminal or civil law.

[3] D. M. Trubek, "Where the Action Is: Critical Legal Studies and Empiricism" (1984) 36 Stanford L. Rev. 575, 621.

[4] I do not intend to discuss the detailed format of policies. On dispute resolution mechanisms, including recourse to human rights commissions and civil actions, see A. P. Aggarwal, "Dispute Resolution Processes for Sexual Harassment Complaints" (1994) 3 CLELJ 61. Also see M. Cornish and S. Lopez, "Changing the Workplace Culture Through Effective Harassment Remedies" (1994) 3 CLELJ 95. Specific examples of harassment policies can be found in Aggarwal, *Sexual Harassment in the Workplace* (2d ed) (Toronto: Butterworths, 1992).

[5] Employer liability for sexual harassment by an employee was established in *Robichaud* v. *Brennan*, [1987] 2 S.C.R. 84 at 94, although there is some question as to the nature of this liability. Human right legislation may provide specifically for employer liability: for example, see *Human Rights Act*, S.N.B. 1973, s.7.1(6). More generally, see K. Schucher, "Achieving a Workplace Free of Sexual Harassment: The Employer's Obligations" (1994) 3 CLELJ 171.

detailed procedural code will most easily, albeit perhaps superficially, satisfy this legal requirement. Not insignificantly, a clear policy will permit employers to discipline offenders more easily, particularly if the discipline is termination of employment. The courts have said that policies may be necessary to dismiss an employee summarily rather than as a question of just cause:

> The advantages of a written, published, known policy are several, including the educative function of informing employees of what type of conduct is considered sexual harassment (which can manifest itself in various ways), and also that they know the consequences of any transgression. A formal policy that is made part of the contractual terms of employment can mean that there can be a dismissal for any misconduct that is spelled out in that policy as having the consequence of resulting in dismissal.
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> In the absence of a formal policy that forms part of the conditions of employment, the issue of dismissal as in the instant situation turns solely upon the question as to whether or not there was just cause as seen by the common law.[6]

On their face these detailed codes are desirable as a message that harassment and discrimination in the workplace are not permitted; the employer, or employer and union, are prepared, the legal model tells us, to put their workplace mechanisms to work in aid of a safe workplace. They permit complaints to be dealt with "in house", rather than forcing complainants out into the cold world of the real legal system, yet without losing many of the ostensible benefits of the legal system. They are designed to tell those who have suffered harassment or other discrimination that they have a well-developed complaint mechanism to invoke; they are designed to reassure persons alleged to have committed the offence that they or she will have an opportunity to defend themselves. The policies seek to make everyone feel secure that we can deal with real or perceived violations of the policy. The policies are more or less successful in accomplishing these goals, all of which are worthy.

The problems of harassment and other discriminatory conduct in the workplace are serious; the consequences for the employment opportunities of members of excluded groups may be very serious. Nevertheless, I want to consider whether the objective of changing workplace culture could be accomplished by a clear statement that harassing and otherwise discriminatory conduct or words are not permitted, education programs which communicated the nature of impermissible activity (and promote mutually respectful conduct and speech) and establishing that a failure to observe the appropriate standards would result in discipline up to and including dismissal. A document with these components would not contain a detailed procedural code for hearing complaints of breach of the policy. It would lack, in other words, the component which most reflects the "rule

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[6] *Tse* v. *Trow Consulting Engineers Ltd.*, [1995] O.J. No. 2529 (Gen. Div.). Whether a policy is required (as a warning) may depend on the nature or seriousness of the harassment, but whether particular conduct satisfies that standard would be determined by the court in a suit for unjust dismissal.

of law" or the legal model; in some eyes, therefore, it might seem to lack sincerity, while in others, it might appear to lack necessary protections. Both concerns would have to be addressed.

Of equal importance, the development of these policies and their adoption in an increasing number of workplaces may seem to be of the successes of excluded groups. One does not lightly tamper with advances or wish to be seen to diminish that which has been gained. Yet adoption of a detailed code, following the legal model, delivers negative messages, perhaps more subtle than the positive ones to which I referred earlier. The legal model of enforcement suggests that these are individual problems for the most part, between employee A and employee B or supervisor C and employee D.[7] It suggests that the experience of employee A and the understanding of employee B can be placed in containers with the label "sexual harassment" or "offensive language". The policy will become focussed on the procedure, rather than its intended systemic impact. The educational components which often also form part of the policy and which must be continuous to be successful may be viewed as subsidiary to the enforcement mechanism, while they should be the core if workplace culture is to change.[8] The goal is to make this kind of behaviour as obviously inappropriate as is theft or assault. There is also the danger that the paper procedure will become the employer's due diligence rather than any actual efforts to respond to real cases: in short, formality attracts easy reliance. It is the action employers take to prevent discriminatory conduct or speech and to respond to instances which, despite their best efforts, do occur, which is relevant to due diligence, not merely the gesture of a "paper" policy. Due diligence is best satisfied by employers' on-going efforts to educate than by a static (and perhaps ultimately stultifying) procedural code.

Disparaged as being "political correct", these policies are characterized as having a "political agenda" as if the dynamic of the workplace is otherwise politically neutral. I would argue that the policies are "political" and reflect a "political agenda" — the elimination of one of the barriers which have excluded members of minority groups from full participation in the workplace. This is their unique contribution: they are deliberately directed at changing the civic culture in the workplace from within, as part of a larger societal agenda of enhancing equality which workplace changes both reflect and reinforce. And in that sense, the "criticism" levelled at them by opponents (that they constitute an infringement of "free speech" or deprivation of personal liberty) is a valid

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[7] This is a criticism levelled at current enforcement regimes by Mary Cornish and Suzanne Lopez in their analysis of remedies: "the remedial approach of adjudicators often suffers from a failure to understand the systemic conditions which produce workplace harassment": *supra* footnote 4 at 96.

[8] Here I acknowledge the view that this time has come past due, that everyone should now know how to behave and that, therefore, there should be an enforcement mechanism to make that clear. If everyone did know, however, a special enforcement mechanism would not be necessary.

characterization, although, in my view, not a valid criticism.[9] Even the most nihilistic among us come to terms with some restraint on our behaviour. The issue is not whether we impose restraint, but why, where and how we impose or encourage it.

The introduction of speech and related policies is thus a form of politicization: that is, it is a bringing into the formulation and framing of public discourse the concerns and realities of those who have been excluded. It forces the majority to stand outside themselves and reassess their words and actions from the now recognized perspectives of the non-majority. Furthermore, this exercise is to occur in a highly significant area of our lives, the workplace. In its best form, this politicization changes the base of the norm. Speech and conduct policies attempt to ensure that everyday working relations are defined not only by what the group of "dominant" men[10] believe is legitimate, but by what diverse women and men of minorities believe is legitimate.

III. *The Rule of Law and the Legal Model*

Over the last three hundred years, the western world has trod the uneven terrain of a philosophical tradition which assumes that "Truth" can be determined

[9] Much of this debate has occurred in the university setting, not surprisingly, and in that setting the opponents frame the issue as the extent to which academic freedom is infringed by the policies: J. Fekete, Moral Panic: Biopolitics Rising (2d. ed.) (Montreal-Toronto: Robert Davies Publishing, 1995); F. DeCoste, "The Academic and the Political: A Review of Freedom and Tenure in the Academy" (1994) 1 Rev. of Const. Studies 356. The ostensible distinction between the university and other workplaces is stated succinctly by one commentator who is critical of codes against sexual harassment in the university: "Widget Inc. and its employees will function with or without pin-up posters and other forms of employee 'speech' that have occasionally attracted harassment complaints. In higher education, in contrast, free speech is central both the purpose of the institution and to the employee's profession and performance": M. S. Greve, "First Amendment: Do 'hostile environment' charges chill academic freedom? Yes: Call It What It Is — Censorship" (1994) 80 ABA J. 40. The specific example at issue involved a professor's comparing writing to sex where "you seek a target... zero in.. move from side to side... [and] close in on the subject". The view that insulting female students is not necessary to academic discourse and therefore not required by academic freedom is found in the other half of this debate: L. Hirshman, "First Amendment: Do 'hostile environment' charges chill academic freedom? No: This Is Teaching?" (1994) 80 ABA J. 41. Obviously the policies are intended to prevent workers doing what they might otherwise do or saying what they might otherwise say. But since (I maintain) the restrictions are justified by the goal of preventing racist, sexist, homophobic and similar conduct and speech, I do not accept that the restrictions in themselves necessarily constitute a valid source of criticism. Having said that, academic freedom is a factor which must be taken into account in establishing policies in the university (whatever form they take); academic freedom does not mean freedom to say or do whatever one wishes, however — another subject for another day which does not go to my general analysis, but only to its application in a particular context.

[10] This group constitutes an ever-decreasing in number as the grounds of acknowledged relevant differences increase.

through the application of "reason" and that "society" is best organized around individual rights. The commitment to "reason" stems from the belief that it is possible to establish a body of knowledge which is neutral and objective — which is scientific and separate from the individuals who establish it and are subject to it. It is verifiable, its results measurable. "Truth" is thus knowable by those with the capacity to discover it. These principles continue to play a significant role in the legal context where they are encapsulated in the principle and method of "the rule of law."[11] In its most oft-quoted form, the rule of law emphasises the "equality" of the individual. Thus no one, including members of government and bureaucratic officials, is to be above the law (all are equal before and under the law); each individual is able to lay claim to certain substantive rights; and no one will be deprived of rights without the application of legal process. In its broadest sense, and although the law itself and its philosophical underpinnings may be open to criticism, this spirit of the rule of law (in the sense that no one is supposed to be above the law and we are not to be punished for some act unless we know how we might have avoided it)[12] is widely accepted. This classic articulation, inherited from English constitutional thought and practice, has undergone modification since Dicey's formulation.[13] Indeed, it has been said that "the rule of law may not be a single concept at all [but]... a set of ideals connected more by family resemblance than by a unifying conceptual structure".[14] It is nevertheless significant that the "classic" formulation did not include — and could not have included — a reference to equality as it has developed today under the discrimination approach nor does

[11] Too rigid a description of the legal method risks the following criticism directed at the Critical Legal Theorists' condemnation of formalism: "'Formalism' is the CLS [Critical Legal Studies] caricature of the notion that law is a deductive and autonomous science that is self-contained in the sense that particular decisions follow from the application of legal principles, precedents, and rules of procedure without regard to values, social goals, or political or economic context": L. B. Schwartz, "With Gun and Camera Through Darkest CLS-Land" (1984) 36 Stanford L. Rev. 413, 431. It remains true to say, however valid this comment might be, that the deductive nature of law is for a significant faction the ideal and that "values, social goals, or political or economic context" are viewed as somehow necessary evils which depart from the ideal; furthermore, judicial decisions continue to recognise the impact of values and context more often in the breach than in the observance.

[12] Absolute and strict liability offences are somewhat of a departure from this principle, although in the criminal, but not necessarily the regulatory, sphere they have been found to be inconsistent with the principles of fundamental justice which are considered to characterise our legal system, both prior to and under the *Canadian Charter of Rights and Freedoms*: *R.* v. *City of Sault Ste. Marie*, [1978] S.C.R. 1299; *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486; *R.* v. *Hess*, [1990] 2 S.C.R. 906.

[13] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1967) 188ff. This view has been described by one commentator as an "unfortunate outburst of Anglo-Saxon parochialism": J. N. Shklar, "Political Theory and The Rule of Law" in A. C. Hutchinson and P. Monahan, eds. *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 1, 5.

[14] L. B. Solum, "Equity and the Rule of Law" in Ian Shapiro, ed., *The Rule of Law* (New York: New York University Press, 1994) 120, 121.

it reflect anything other than a "formal" view of equality, equality under the law. The "classic" formulation ("that the law is supreme over officials of the government as well as private individuals")[15] fails to recognize that equality under the law is insufficient without consideration of how class and other factors impede meaningful access. Nor was "equality" included as one of the rights deriving from the common law; according to Dicey, these were liberty, expression and association,[16] rights which Canadian courts sought, albeit not particularly successfully, to enforce through an "implied bill of rights" doctrine.[17] The parameters of both these civil liberties and equality, as well as other rights and freedoms, now evolve under the Charter's protective gaze. Yet it remains that the civil liberty tradition in Canada flowers from the common law, while our equality jurisprudence stems from legislative prohibitions against discrimination quite different from individual formal equality. It is in aid of achieving substantive "equality" rather than the older equality before and under the law that we have instituted speech and conduct policies in the workplace.

The Manitoba Language Rights Reference, as well as more general statements about the rule of law, indicate that we place great emphasis not only

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[15] *Reference re Language Rights Under Section 23 of the Manitoba Act, 1870*, [1985] 1 S.C.R. 721. The Court identifies a second element: "the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order": *ibid.* at 748, 749. Finding almost all Manitoba laws unconstitutional because they were enacted only in English, the Supreme Court of Canada avoided a lawless Manitoba by granting a temporary suspension of the declaration of invalidity under section 52 of the *Constitution Act, 1982* (not only the legislation would be invalid, but so would anything flowing from its operation, from votes for women to the composition of the sitting legislature to highway traffic legislation and all provincial government institutions would be acting without legal authority); delay or suspension provided Manitoba with an opportunity to reenact legislation in English and French. The Court rationalized the temporary continuation of "illegal laws" on the basis that the rule of law required a system of positive laws, that is, actual legislation for its realization.

[16] Dicey, *supra* footnote 13, 195.

[17] Some of those judges seeking to rely on the "implied bill of rights" were driven to find an ability to enforce it in the concept of federalism: the powers to protect the constitution (which require free discussion, including a free press) vest in Parliament; the power to abrogate these rights lies only in Parliament: Duff C.J.C. in *Reference re Alberta Statutes*, [1938] S.C.R. 100 at 133. But this does leave Parliament with the capacity to restrict them. For other judges, these rights had their origin outside positive law: "freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human being and the primary conditions of their community life within a legal order": Rand J. in *Saumer* v. *City of Quebec*, [1953] 2 S.C.R. 299 at 329 . Thus "Parliament itself could not abrogate this right of discussion and debate" and its only ground for limiting it must be found in the criminal law and the power to make laws for the peace, order and good government of Canada: Abbott J. in *Switzman* v. *Elbling*, [1957] S.C.R. 285 at 328. Despite the perhaps "lukewarm" support of these civil liberties, however, in comparison, equality as a substantive and not merely formal legal right is a relative newcomer to our understanding of the rule of law. It is only with the implementation of the *Canadian Charter of Rights and Freedoms* that both the civil liberties and equality achieve freestanding status to which both federal and provincial governments must conform, subject to their invocation of the "notwithstanding" provision in section 33 of the Charter.

on something we might call "the spirit" of the rule of law, but also on the application of the rule of law as reflected in the following principles of natural justice. Today it is not uncommon to confound the principle (usually Diceyan in form) with the means of enforcement and call the mix "the rule of law."[18]

The spirit of the Rule of Law has thus been operationalized (that is, legal "truth", or the closest thing we can get to truth, is determined) through the enforcement of the reciprocal rights and obligations which characterize "citizenship", primarily by adherence to detailed codes of procedure applied in an adversarial pitting of interests. While the focus in the past has been on the application of the legal model on the rights of the individual in relation to the state, any contemporary understanding both of the principle and of the method of operationalization must include reference to claims made by one individual against another, the kind of claims made under workplace speech and conduct policies which find their analogy in human rights legislation in the public sphere. Indeed, the grand principle or the spirit of the Rule of Law has become part of our way of being, underlying a view of the substantive ordering of society.[19]

But while in general terms, the rule of law is widely acceptable as a desirable part of the western philosophical tradition,[20] the application of the spirit is often doubted, and we tend to believe, grand assertions otherwise notwithstanding, that some people are in fact "above" the law and that not everybody is treated equally by the law (in the sense that the law is not applied in the same way to everyone for unacceptable reasons). In short, the promise of the legal model does not always fulfil its own limited claim. This is because it fails to explore the substantive inequality underlying the formal equality. For example, we believe, not without reason, that there is "one law for the rich and one for the poor", one for white people and one for native people (a cavalier law for native victims and a harsher one for native perpetrators), one for those with "friends in the right places" and one for "the friendless", one for victims of robbery and one (or several) for victims of rape. Despite the very large issues attending the application of law and legal process, I am concerned here with acceptance of the principle, and the method of its application, not with the equity

[18] Solum defines "rule of law" to include not only the "rule of law, not of men [sic]" elements, but also "requirements of generality, publicity, and regularity", seven requirements all told: *supra* footnote 14, 121-122.

[19] In some ways this is merely a new variant on an old theme: Aristotle's "rule of reason" as a way of life contrasted with Montesquieu's "institutional restraints": Shklar, *supra* footnote 13. Compare the "thick" version of the rule of law which requires that "positive law embody a particular vision of social justice, structured around the moral rights and duties which citizens have against each other and the state as a whole" and the "thin" version of the rule of law which "amounts to a constitutional principle of legality": A. C. Hutchinson and P. Monahan, "Democracy and the Rule of Law" in Hutchinson and Monahan, eds., *supra* footnote 13 at 101-102.

[20] By which I mean only that few critics would be prepared to support an arbitrary or totalitarian system, although there are always those who are prepared to lose babies as well as bathwater.

of its application or trust in its fair or judicious application. We have tended to ensure that the spirit is realized through the use of a particular kind of process, which I have called "the legal model". These two — the spirit and the process — tend to be seen as one and the same thing; or perhaps amounting to the same thing, there is sometimes a presumption that only a detailed procedural code can meet the demands of the spirit. Process is crucial, but in assuming that a particular process must accompany the spirit, we have often glossed over the objective to which the process is put. It is in relation to objective that we need to reexamine where we apply the legal model.

The first significant attack on the "neutrality" of law and the notion of law as a deductive exercise came in the 1920's and 1930's with the powerful assault by the Realists.[21] But theirs was a limited approach ultimately, reformist and played doctrine by doctrine. A contemporary criticism is that the law has become too demanding and too refined, especially in regulatory matters (extremely detailed building codes, for example); it is considered inflexible. Unable to contemplate every extraordinary situation, yet trying to do so, it has often meant that it cannot be adapted to the situation which does not quite "fit".[22] Although most of the recent criticism about the over-detail of law and application of these technical rules — legal formalism — has come from the United States where individual liberty has an even stronger foothold than it does in Canada (without the mellowing impact of mutual obligation), it does have a resonance in Canada.[23] The reliance on detail, say the critics, precludes resort to "common sense".[24] If anything, it might be the realization of the Realists' criticism of judicial decision-making and the turn to "law in action", partly realized by

[21] K. N. Llewellyn, *The Bramble Bush: On Our Law and its Study* (Dobbs Ferry: Oceana Publications, 1973) and J. Frank, *Law and the Modern Mind* (New York: Tudor Publishing Co., 1936) and *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1949). The related but different concern that the "rules" did not always result in a just outcome was, of course, identified far earlier and answered with the development of equitable doctrines.

[22] As one commentator observes, "[w]hen we curtail discretion by insisting on rule-bound behaviour, we sacrifice opportunities for truly virtuoso performances and fine-tuned treatment..., but we also avoid suffering the idiocies, corruption, and abuse that will occur when knaves and fools have leeway": S. Macedo, "The Rule of Law, Justice, and the Politics of Moderation" in Shapiro, ed., *supra* footnote 14, 148, 155. Macedo argues that acceptance of "unfairness" is part of the rule of law, the cost of "predictability, efficiency, stability, and other values promoted by a regime of general rules": *ibid.* at 167. This is a trade-off not everyone is as willing to make.

[23] For a broad brush (and "popular") review of this in some ways "cultural" tendency in law, see J. Ralston Saul, *Voltaire's Bastards: The Dictatorship of Reason in the West* (Toronto: Penguin Books, 1993) 322-324.

[24] P. K. Howard, *The Death of Common Sense* (New York: Warner Books, 1994). "In the decades since World War II, [the United States has] constructed a system of regulatory law that basically outlaws common sense. Modern law, in an effort to be 'self-executing,' has shut out our humanity": 11. On the partial nature of "common sense", see *infra*, text at footnote 36.

administrative decision-making.[25] Put another way, this is a rejection of doctrine and an embrace of pragmatism. For the new "common sense advocates", law today is Realism overdone.

The Critical Legal Theorists plunged after the entire structure of law, maintaining that law is merely the authoritative arm of capitalism and that legal rules reinforce the hegemony of the ruling class.[26] Similarly, feminists challenge the fundamental assumptions of law, initially on the basis that it was patriarchal, more recently that it reproduces all manner of power. One of the most insightful and incisive challenges to law and its colonizing of other ways of defining the world and of "knowing" remains Carol Smart's *Feminism and the Power of Law* and her challenge that "it is important to think of non-legal strategies and to discourage a resort to law as if it holds the key to unlock women's oppression" has yet to be met.[27] Other commentators have challenged the presumption of "natural equality" from which are drawn the assumptions about equal bargaining power and self-interested activity upon which the legal model is based.[28] Yet this assumption of equality remains one of the central elements, if not the lynchpin, of the legal model. The legal model is based on this view of assumed — and false view of — equality of individuals; then it is used to advance substantive or real equality through internal workplace policies.[29]

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[25] The Realists were seeking greater certainty in decision-making and believed that revealing what really influenced decisions would aid in achieving that goal. J. Frank has suggested that a better name would be "rule skeptics" because they were sceptical of the "paper rules" and sought the "real rules": J. Frank, *Law and the Modern Mind* (Garden City: Anchor Books, 1963) (Preface to Sixth Printing), x. Frank classified himself as a "fact skeptic", that is, sceptical about what a trial judge or jury will consider to be the relevant facts: *ibid.*, xiii. The foremost Realist, Karl Llewyllen, would call these administrative (bureaucratic) rules, "rules for conduct" rather than the stuff of law, rules about dispute resolution: Llewyllen, *supra* footnote 21 at 13. The rules applied by judges he calls "so-called rules of law": *ibid.*

[26] Schwartz, *supra* footnote 11, 423: "Central to the CLS outlook are the propositions that law and politics are one and that there is no such thing as 'neutral' justice".

[27] *C. Smart, Feminism and the Power of Law* (London: Routledge, 1989) 5. For one of the classic feminist challenges to the capacity of legal *method* to acknowledge feminist concerns, see M. J. Mossman, "Feminism and Legal Method: The Difference It Makes" (1986) Australian J Law and Society and reprinted in M. A. Fineman and N. S. Thomadsen, eds., *At The Boundaries of Law: Feminism and Legal Theory* (New York: Routledge, 1991) 283. While one must be sceptical of the law's capacity to develop a legal method which is not "impervious" to a feminist challenge, I am asking the question of whether if legal method can be adapted or changed to address feminist (and racist and class) concerns, should be transpose a method which is fundamentally developed for the legal system and impose on mechanisms of cultural change.

[28] See, for example, C. Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) who writes of the "repression of the sexual contract" in the story of the social contract underlying western political (and legal) thought.

[29] This is not to say that the same is not true in the public legal system, but there equality analysis is part of a comprehensive legal scheme. In the workplace, it is more easily identified as a distinctive way to deal with workplace problems.

Contemporary criticism about the detail of law, essentially a criticism of the bureaucracy, is directed at law "run amok", while the second type, the stuff of critical legal studies and feminism, is more fundamental, critical of current law's foundations in a particular political hegemony.[30] These criticisms, although very different (one would be satisfied by a reduction in laws or regulations, while the other requires a philosophical sea change in the formation of the principles governing the legal life of society[31]), share one concern: that law should be more flexible, permit discretion[32] or be less exclusionary. They also share a sense of the inadequacy of law; Howard's "life's complexities" (in tension with "legal certainty")[33] is, on its face, a different version of feminists' "contextualization" (in opposition to the abstraction of law).[34] One criticism is about the error of too rigid classification and the other is about the universalizing of a particular experience. The latter critics identify the failure of the legal model in the "limits of liberalism".[35]

For the legal model is the legal manifestation of liberalism and at its core, the liberal triumph of individual rights. For the conservatives, the rigidity of law is the denial of liberalism's laissez-faire principles. Their appeal to "common-sense" masks the ideological nature of their position. Himani Bannerji exposes the insidious nature of "common sense" when used in another context: when it is "the submerged part of the iceberg which is visible to us as ideology";

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[30] The use of law has also been criticized because of the difficulty of "reconcil[ing a] view of law as a neutral concept with the fundamental premise upon which the equity enterprise is, in part, founded: namely law's structural complicity in the production and reproduction of restrictive and repressive condition": J. Kilcoyne, "The 'Politics of Policies': Responding to Sexual Harassment on Campus" (1994) 3 CLELJ 33, 34.

[31] This description is not intended to ignore the ideological nature of all these criticisms. The "Howard criticism" is a conservative response to the containment of laissez-faire liberalism, the free market-place. Because it is closer to the status quo, its ideological stance tends to be less obvious., however, than does that of feminism or the Critical Legal Theorists.

[32] That "law" is too rigid and does not respond to particular cases is hardly a new problem, but one which led to the development of counteracting "equity" to fill the gaps when law did not fit or to provide a remedy when a case cried out for one, but the law did not provide one; equity, of course, eventually (and probably inevitably) developed its own set of "rules". It may be argued that "adherence to the spirit of the law requires a departure from its letter": Solum, *supra* footnote 14 at 145; also see Macedo, *supra* footnote 22 at 150. Although there are a number of different understandings of equity, that which most aligns with "law" does not adequately address itself to the systemic problems which feminists and others find in the legal model. (On different understandings of equity, see Macedo, *ibid.* at 149-50 and Solum, *ibid.* at 123ff).

[33] Howard argues that "[t]he tension between legal certainty and life's complexities was a primary concern of those who built [the American] legal system": Howard, *supra* footnote 25 at 22.

[34] S. Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991) 14; L. E. White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G." (1990) 38 Buffalo L. Rev. 1.

[35] K. E. Mahoney, "The Limits of Liberalism" in R. F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 57.

common sense racism is the undeclared racism which is so inbred as to be unarticulated in the form of "diffused normalized sets of assumptions, knowledge, and so-called cultural practices" which "produce silences or absences, creating gaps and fissures through which non-white women, for example, disappear from the social surface."[36] For some feminists, the fault lies with liberalism's treatment of individuals "as separate competitive units", each of whom is assumed to have "a [realizable] capacity for free choice and self-development."[37]

Even feminists who view liberalism as more complex, nevertheless disagree on its potential for allowing real change. Although Sherene Razack distinguishes one form of liberalism from another,[38] she concludes that "[u]nderlying liberalism . . . is a concept of a self who has an independent existence unconnected to other selves or defined by the ends it chooses" (which she terms a "decontextualized self").[39] Offering a friendlier assessment, Mona Harrington identifies in "social liberalism" a recognition of the desirability of "the individual-in-relation".[40] This view posits the potential for a more complex and nuanced way of realizing the spirit of the rule of law than that which presents it by definition as isolationist and adversarial, as well as a complementary development of individual and "community." Without a sufficiently honed sense of self, the individual risks immersion in the newly minted "identities" by which excluded communities have found empowerment and which increasingly ground the isolationism which the legal model encourages. It might be said now, with the growth of the identity of the individual with his or her "community", that one community is isolated from others, rather than an individual from other individuals.

In this respect, it appears that liberalism, and the legal model, can tolerate making "gender differences the basis for differential rights to self- realization", contrary to Mahoney's concerns.[41] Workplace speech and conduct policies are based on differential rights on the basis of gender, race, disability, sexual orientation and possibly other grounds, as well, because they acknowledge that differences might require different treatment for an equal result. Because each "group" or community puts forward its own experiences and expectations about

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[36] H. Bannerji, "Notes Toward an Anti-Racist Feminism" (1987) 16 Resources for Feminist Research 10 (cited in T. B. Dawson, ed., *Women, Law and Social Change: Core Readings & Current Issues* (2d. ed.) (North York, Ont: Captus Press, 176, 177-78). Resort to the "authority" of common sense cannot ignore the question: whose common sense?

[37] *Supra* footnote 35, 60 (references omitted).

[38] She names classical liberalism based on meritocracy and a liberalism which takes into account the "mitigat[ion]" of "inequalities created at birth . . . by social policies that have as their aim a redistribution of society's benefits": *supra* footnote 34 at 14.

[39] *Ibid.*

[40] M.Harrington, "What Exactly Is Wrong with the Liberal State as an Agent of Change?" in V. S. Peterson, ed., *Gendered States: Feminist (Re)Visions of International Relations Theory* (London: Lynne Rienner Publishers, 1992)) 65-74.

[41] Mahoney argues that the self-interested liberal approach means that no class of persons is more entitled to self-realization than any other and thus "[t]here are, for example, no grounds for making gender differences the basis for differential right to self-realization": *supra* footnote 35 (references omitted).

appropriate conduct or speech, policies regulating speech and conduct are criticized as being reflective of particular claims, contrary to the purported universality of liberalism's purported neutrality.[42] Marion Iris Young explains how the claims of excluded groups reveal the particular nature of the so-called "norm" which Fekete and DeCoste consider universal.[43] By positing their experiences in relation to the "norms", it becomes obvious that the so-called "norm" is in fact only one experience among many.

The core legal concept which may be seen as the western tradition's major contribution to the development of legal theory is that of "rights": the idea that there are certain "civil" goods to which each member of the polity is entitled and to which he or she can lay claim through the legal system. In western society, these include legal, cultural (language) and "social" or political rights, but rarely (and not well-established in Canada) economic rights. Speech and conduct policies are a manifestation of equality rights — and are opposed as an infringement of expression rights. Internal policies based on the legal model thus posit the right to be free of harassment or sexism, racism or homophobia, as an enforceable right, not before the courts, but before the employer. These policies are, it might be argued, the epitome of rights claims: the right to be treated with respect.

The assertion of rights, inherent in the legal model, has itself become a question of controversy: what is a right? what should constitute a right? Is the notion of "rights" too limiting, too geographically biased? This is a question addressed by philosophers and political theorists, not only by legal theorists and judges. Our dealings with each other are grounded not only in "rights", but also in a moral ethos which law only weakly emulates and protects.[44] Generally

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[42] Fekete, *supra* footnote 9 and DeCoste, *supra* footnote 9.

[43] I.M. Young, "Social Movements and the Politics of Difference" in J. Arthur and A. Shapiro, eds., *Campus Wars: Politics of Difference* (Boulder: Westview, 1995) 199.

[44] J. B. Elshtain, *Democracy on Trial* (Concord, Ont.: Anansi, 1993): "Should we try to understand why we stay up all night with a sick child or take our neighbour a pot of soup when she comes home from the hospital, or spend hours helping to provision the victims of a natural disaster... in and through 'rights talk,' we would seriously distort these socially responsible and compassionate activities... Yet each time we feel called upon to justify something politically, the tendency is to make our concerns far more individualistic and asocial than they, in fact, are, by reverting to the language of rights as a 'first language' of liberal democracy": 16-17. Smart captures the quandary that "the rhetoric of rights has become exhausted and may even be detrimental," even though "rights constitute a political language through which certain interests can be advanced": Smart, *supra* footnote 27, 139, 143. The controversy over the human rights "paradigm" with efforts to supplant it (with what?) comes as previously excluded groups have obtained its benefit (but it also comes from those who believe it to be a western model and thus merely a newer form of colonization). I realize that my own musings here might be subject to at least the first concern. On the complexity of rights discourse and feminist reliance on rights, see E. F. Kingdom, *What's Wrong with Rights? Problems for Feminist Politics of Law* (Edinburgh: Edinburgh University Press, 1991): she concludes that although there may be something wrong with rights, a rights approach is not wrong all the time or in relation to all issues which feminists must address. For recent thoughts on some rights controversies, see the 1993 Oxford Amnesty Lectures collected in S. Shute and S. Harley, eds., *On Human Rights* (New York: HarperCollins, 1993).

speaking, the legal model requires us to treat rights in a vacuum, outside a more complex web of interrelationships. The legal model forces one legally into being a plaintiff or a respondent, politically into being a victim or an oppressor. This criticism of our political direction — that our identity is reduced to a particular characteristic — is particularly suited to the conduct and speech policies: "The public world is a world of many `I's' who form a `we' only with others exactly like themselves. No recognition of commonality is forthcoming. We are stuck in what the philosopher calls a world of `incommensurability,' a world in which we quite literally cannot understand one another."[45]

These policies are really about "living together" in the workplace; although it underestimates their purpose to treat them as rules of "etiquette", they are about living "civilly" in a multicultural and gender-mixed environment[46] and in that they are diametrically opposed to "abstraction and isolation." Speech and conduct policies are exactly about Harrington's liberal "individual-in-relation" and the freeing of individuals from systemic discrimination to allow them self-realization. The policies are not premised on the assumption that people are "free and equal to each other" (quite the contrary), although they are premised on the assumption that people *should* be free and equal to each other and are meant to advance that goal. They assume that the "capacity for free choice and self-development" is subject to systemic or structural barriers which prevent the realization of the capacity.[47]

IV. *The Policies, Liberalism and the Legal Model*

Despite criticism of the legal model or of the liberal values underlying it, the legal model has been broadly adopted as a mechanism for enforcing rights internally in the workplace. The adoption of the model otherwise condemned reflects the luxury of criticism on the one hand, and the need for some tools on the other: the evil you know is better than the evil you don't know. In discussing the debate between Critical Legal Theorists and minority legal scholars in the United States, for instance, Henry Louis Gates explains that "the minority legal

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[45] Elshtain, *ibid.* at 66. "Minority" and "majority" (defined by status or power) or similar terms are relational concepts. "Women" (to the extent that that category continues to be acknowledged) are a minority relative to men; in the western world, "women of colour" are a minority relative to white women, but this is a simplistic statement which ignores that women of colour are not always each other's allies, that "white" is a colour and that, for example, poor black women and poor white women *might sometimes* have more to say to each other than they do to middle-class black women and middle-class white women, respectively. In encouraging greater refinement of identity without concomitant "commensurability," feminism risks feeding into the isolationist, adversarial, static identity tendencies of the legal model even if this becomes community rather than individual isolation.

[46] I am suggesting here that we might equally make a mistake in treating them as anti-discrimination laws writ small.

[47] The policies are sometimes perceived as an entrenchment of victim status: Elshtain, *supra* footnote 44, 42-44, 50-52; or as producing "new forms of paternalism and cultural imperialism": P. C. Emberley, *Zero Tolerance: Hot Button Politics in Canada's Universities* (Toronto: Penguin Books, 1996) 233.

scholars pointed out that those rudiments of legal liberalism — the doctrine of rights, for example, formality of rules and procedures, zones of privacy — that CLS wanted to trash as so much legal subterfuge were pretty much all they had going for them".[48] In other words, we cleave to the legal model — to legal liberalism — for its protection, even while we bemoan its ideological bias.

There is a strong argument that the objective of the policies are well within the "spirit" of the contemporary "rule of law" (which I argue properly defined contains a healthy dollop of commitment to equality), but this does not mean that it is appropriate to use, in the main, the legal model to implement the objective. The goal of the policies conforms to the characteristics of "distributive justice" more than to those of "corrective justice," the form of "justice" normally associated with the paradigmatic form of the legal model.[49] In a "corrective transaction," it is assumed that the parties are each executing their own purposes and that each is initially equal to the other and further, that "the internal characteristics of the interacting parties [are] construed as irrelevant."[50] The use of the legal model in workplace policies means that distributive objectives are in large measure being sought through corrective justice means.

Thus the goal and the means are often at odds. Detailed policies premised on the legal model actually encourage the atomism of "communities" which those of us advocating the policies said we abhorred. Mahoney's criticism of liberalism that "all judgements and actions are based on an individual's own subjective viewpoint" is one which is made of the conduct and speech policies by opponents who argue that they are vulnerable to abuse and in their efforts to contextualize and to incorporate the victim's standpoint, fail to set out common standards of behaviour. The policies require a combination subjective-objective standard[51] (in this respect, inappropriate conduct or speech differs from theft,

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[48] H. L. Gates, Jr. *Loose Canons: Notes on the Culture Wars* (New York: Oxford University Press, 1992) xv.

[49] E. J. Weinrib, "The Intelligibility of The Rule of Law" in Hutchinson and Monahan, eds., *supra* footnote 13, 59, 73-75.

[50] *Ibid.* at 79.

[51] This ought not to be a *personal* standard; rather it is the development of an understanding based on systemic patterns. A simple example is the following: it is different to call women "girl" than it is to call (some) men "boy"; but it is also different to call a black man "boy" than it is to call a white man "boy". The reason lies not in the fact that I am personally offended by being called "a girl" or hearing the term used in connection with women in a serious context, although I may well be, but because of the history of the term and the differential application: as between men and women, when we use "boys", we mean it to "diminish" or infantilise because of the context — "boys' night out", "big boys' toys" — or because we want to say that the men are not acting seriously; but "girls" is used indiscriminately and its diminishing impact is subliminal (I continue to hear male colleagues refer to female support staff as "girls" both directly to them and when speaking about them — and yes, the women refer to themselves that way). There are many other expressions and conduct which function on the same principle and about which there may need to be more education. There is, however, a widespread confusion on all sides about this point; although it is often difficult to distinguish "personal offence" ("I" am offended) and "political offence" (the status of women is offended), it can be done and some effort needs to be made to do it.

for example, where the disagreement will usually be on whether it occurred, not on what it is); the general tendency to determine whether a comment or conduct is "offensive" (a word employed in many policies) on the basis of whether the recipient is offended by it, regardless of the recipient's own level of sensitivity, runs counter to the widespread view that we need to know enough about the standards we are required to meet to permit us to try to meet them. Yet the policies are dealing with some deeply-rooted conduct or speech, the implications of which even yet lie bubbling beneath the surface. Often a third person who overhears the comment and is offended by it may invoke the policy, even if the original "target" of the comment does not wish to pursue it; indeed, there does not need to be a distinct "target" when a claim of "poisoned workplace" is made. The policies are intended to refashion communal relations and thus infringements are "everybody's business." The employer also has an incentive to proceed regardless of whether there are actual and formal complaints to avoid later allegations of failing to provide a "safe" workplace.

Using the legal model posits the claim to appropriate treatment as a right and forces disputes into that straightjacket. But the policies' real goal is a more nuanced and ambiguous negotiation of newcomers to the workplace, a process which has become more complex (more "sophisticated") and more disruptive of established norms because of the shifting of the reference point of what is non-discriminatory speech or conduct. The conduct and speech policies encourage the shifting of the reference points and that it is why they can be so troubling to some people who are surprised to find themselves troubled. Liberalism's success lies in its elasticity,[52] but the legal model is rather less flexible. The lack of flexibility has been reflected in efforts to develop "new" methods of dispute resolution, those less dependent on rights analysis and win-lose rules, most notably "mediation." While the reasons for departing from the adversarial litigation model vary, one justification is that some legal questions are less suitable for resolution by this method than are others. This is often another way of saying that these matters are not really "legal" matters, or, that they are other kinds of matters wearing a loose legal cloak. The fashion in this changes, of course. In family law, mediation was seen as the panacea for women who were thought to be disadvantaged by the adversarial process; family matters were thought often to be less legal than "emotional", inevitable at the end of an intimate relationship; there were concerns that the adversarial process merely intensified hostilities in cases where the couple had to have a continuing relationship because of the children. It did not take long before the weaknesses of mediation (the usual "substitute" for litigation) became evident: is it appropriate in cases of an abused woman? (and how can we be sure a woman has not been abused?); more generally, how does the usual imbalance of power get reflected in the mediation sessions? and, more fundamentally, by sliding

[52] Indeed, liberalism is seductive; it is malleable and can be pushed to recognize and incorporate significant shifts in societal values. This is at once part of its appeal and for those advocating significant social change, its risk — elastics retract, after all, when they are pulled too far.

these matters off to mediation, are we saying that they are not important enough for the public system?

The reference to mediation in family matters is not mere mental roaming for there are lessons to be learned from this experience in family law about the implementation and enforcement of workplace conduct and speech policies which are by definition internal. The granting of legal recognition to a problem is a way of saying that the problem matters, that it deserves public scrutiny. The change in perception of "domestic" violence is an important example of how an abuse which was considered for the most part outside the interests of law is now considered "the law's business." Using legal clothing is a short-cut way of saying "this matters", "this is serious." Nevertheless, all it is is clothing and while some clothing is required, particular clothing may not be; we should remember that there are already public mechanisms for responding to the more egregious instances of abuse (human rights legislation, workplace health and safety regimes, the criminal code and possibly tort law);[53] to the extent these forms of action are vulnerable to criticism they are the same criticisms to which the legal system generally is amenable: fear of retribution, complexity, time and cost are some of the problems. I do not dismiss these problems, but I cannot pursue them here. I accept one commentator's caution, however, that "the existence of regulatory agencies outside the workplace, in particular human rights commissions, should not absolve the employer of all responsibility for dealing with... harassment. Employers should not be able to marginalise... harassment by treating it as a human rights issue instead of a workplace issue."[54] Furthermore, these problems are generally not resolved through the use of the internal policies: for example, concern about retribution always exists and is likely to be more serious when the process is internal to the workplace. The biggest difficulty with less formal or detailed policies may be thought to be whether the lack of detailed procedures prohibits employers from taking disciplinary action against perpetrators; yet it is not necessary for an employer to have an elaborate policy to take action against an employee who steals, who hits another employee or otherwise contravenes the rules of the workplace.[55] Improper conduct or speech which justifies disciplinary action should be seen, as is theft or assault, as a contravention of the terms and conditions of employment.[56]

Yet the nature of harassment and other forms of discrimination is in certain important ways different from theft.[57] The issues involved in harassment or

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[53] But not an action based solely on the tort of discrimination: *Seneca College* v. *Bhadauria*, [1981] 2 S.C.R. 181. Generally, see Cornish and Lopez, *supra* footnote 4.

[54] Schucher, *supra* footnote 5 at 188.

[55] There already exist more or less effective and accessible processes available to employees to challenge an employer's action, whether through a grievance procedure or through a civil suit.

[56] See *supra* footnote 6.

[57] Aggarwal would not agree that the standard grievance procedure is suitable for dealing with "the complicated and emotionally charged problem of sexual harassment": "Dispute Resolution Processes", *supra* footnote 5 at 73.

other forms of sexism, racism or homophobia are more sensitive and may be (but definitely are not always) less clear-cut. And the fact is that employers are not thought (by the likely targets) to be as interested in harassment as they are in theft; on the contrary, they are often thought to be complicit in it. (On the other hand, the class of self-defined potential respondents often think employers are overly eager to appease certain groups by establishing policies.[58]) For this reason, it is generally thought necessary to have "independent" advisors to satisfy complainants that the employer is not "brushing off" the complaint or worse (perhaps) using it against the complainant. Even so, I am not sure that these sorts of provisions need to be part of a detailed procedural code. It may even be that an "advisor" is more likely seen as "impartial" or even approachable at all (and thus to be consulted) if the process is informal and not part of an enforcement process.[59]

Conclusion

Constitutionally, the rule of law was a bulwark against arbitrary action by government; in its popular restatement, more likely called "democracy" or even just "fairness", it is understood to mean that no one be singled out for unfair treatment, that others — because of their position — do not escape sanction for inappropriate conduct and that we have an opportunity to "have a say" in how we are governed. The legal model is merely a way of ensuring that the rule of law is observed in the legal system itself, particularly when an individual has been charged by the state with a crime. In the civil context, the legal model perhaps less obviously tries to ensure that individuals are "equal" in the courtroom. It has long been recognized that oppression can come at the hands of private actors, not only at the hands of the state — and that the state can be useful in diminishing that oppression, hence feminists' uneasy alliance with government.

The legal model is premised on an assertion of rights: the right not to be punched in the face, the right to have a neighbour pay a share of the cost of erecting a fence, the right to compel someone to pay for damages resulting from their actions (or failure to act when a duty to act has been established); but the legal model is also a way of making sure the adjudicator, the court or the human rights the board of inquiry, for example, acts without fear or favour, without bias towards or against one party or the other. It is therefore tempting both for workplace complainants and respondents to wrap the blanket of the legal model around them: for the complainant,

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[58] In fact, this class includes most of us. It is the "'dead' white male"who tends to think of himself as a likely respondent, justified or not, but because of the complex interrelation of sex, race, sexual orientation and other "identities" which are addressed by the policies respondents are not that easily categorized.

[59] It is in the nature of the exercise that some employees will never accept that an advisor is "impartial" because, on the one hand, the advisor's task, after all, is to advance equality and the inclusion of members of excluded groups, while, on the other, the advisor works for the employer. In short, the advisor addresses "how", not "whether," changes are to be made, but should be equal to the task of determining whether in any given case, there is cause for concern: in the exercise of this latter responsibility the advisor must be seen to be impartial.

there is recourse to a clearly set out complaint mechanism which by its very existence is a message that she or he has a right to complain, while for the respondent there is the "security" of clear procedures and fairness entitlements. When real life lives up to the paper promise, it is hard to gainsay the benefit of either. For the complainant who has sought in vain serious treatment for racist, sexist or homophobic harassment or for the respondent who has been caught in a Kafkaesque world, not knowing who made the allegations or perhaps even what they are, the legal model, with its promise of action, on the one hand, or of disclosure, on the other, must seem like an oasis. It is true that the policies with detailed procedural codes are a message about the seriousness with which harassment will be treated and about the seriousness of allegations of harassment, sexism or racism, regardless of consequences. We all, whether we live in overwrought fear of allegations against us or in a misguided complacency that we can never be the sinner, but only the sinned against, may seek the comfort of codes.[60]

Yet the legal model reinforces, rather than complements, the more widespread concern about our political direction, because it demands categorization, simplification and self-identification "here and now for this purpose." It denies the complexity of who we are, a price we have been forced to pay to invoke the public legal system. In particular, "the categorical structure of equality rights requires those injured through relations of inequality to caricaturize both themselves and their experiences of inequality in order to succeed with a legal claim."[61] The policies are best appreciated as a means to change, an instrument whose objective is a shift in civic relations. The educational or cultural change function, which I argue is the real purpose of the policies, is probably least well served by the use of a policy based on the legal model because the legal model forces everyone into the oppositional, categorical mode. This shift is always in transition, as new claims emerge and new forms of "inappropriate" conduct or speech are acknowledged; it thus requires a high toleration for doubt.[62] A failure of memory (individual or collective) and a self-righteous certainty are a dangerous combination, yet it is a combination which surrounds us: we live in an historical epoch, not because we have come to the end of history,[63] but

[60] Because of their history in (originally) the women's movement (rather than among employers), I have not raised the possibility that the policies are really just a way of ensuring workplace peace by channelling disputes on these issues. The promise of disruption because of sexism, racism or homophobia is *usually* not so great in most places that this explanation makes sense.

[61] N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179, 181 (emphasis in original).

[62] I urge the reader who questions this assertion to think back twenty years and remember what speech and conduct were acceptable then which are not now.

[63] F. Fukuyama, *The End of History and the Last Man* (New York: Avon, 1992). Fukuyama means that liberal democracy as a principle is sufficient "perfect" to constitute the end of ideological development. Yet Fukuyama's reliance on Hegel's concept of recognition is what underlies the policies — the mergence of the invisible as visible, difference out of homogeneity. The question is whether the recognition is permitted to exist as isolated static identity or as interactive shifting identities; I would argue that the latter is preferable, but that the former is encouraged by the legal model.

because we too readily dismiss it. It has been argued, indeed, that "doubt is central to a citizen-based society; that is, to democracy".[64] We turn to reason because it "knows no doubt. It is strong because it finds the answers".[65] Law is supposedly the embodiment of reason, but whatever its merits there, it serves less well as an agent of change.

To abandon the legal model runs the risk that those seeking full "citizenship" must rely on the good intentions and good faith of employers, the openness of the so-called "dominant" members of the workplace and the difficulties they may face in asserting themselves. Changing culture is hard work for everyone, albeit for different reasons. It may be risky work for those who assert their claim to be treated in a non-racist, non-homophobic, non-sexist manner. Yet the pace of effective cultural change, one must reluctantly concede, is that of the steady regularity of the long-distance runner, not the lightening bolt pace of the sprinter. And much must occur during that steady pace.

Policies of change must permit us to acquire knowledge about "the Other", as well as about "the Self", in order to "forge . . . a civic culture that respects both differences and commonalities."[66] This process of understanding is in some important ways undermined by recourse to the legal model. The legal model in the public sphere is available when the civic process fails. This does not mean that we abandon all the protections gained from the institution of speech and conduct policies; but it does mean we should look to other methods to achieve the same goals. For example, if the goal is to change the culture, strong statements of commitment from the people who count, on-going education, responding through the existing mechanisms to instances of harassment, taking disciplinary action and supporting complainants when appropriate, all actions which can be taken by the employer and are probably already required by human rights legislation, are what are needed. This approach requires on-going evaluation and learning; it is dynamic in its own sphere with the "back-up" of the public legal system. It is time to reconsider whether detailed procedural codes, imitative of the legal model, best advance the spirit of change which a contemporary rule of law should support.

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[64] J. R. Saul, *The Unconscious Civilization* (Concord, Ont: Anansi, 1995) 5.

[65] *Ibid.* at 100.

[66] Gates, Jr., *supra* footnote 48.