Book Reviews
Comptes rendus

Last Best Hope: Quebec Secession-Lincoln's Lessons for Canada.

By BRYAN SCHWARTZ.

Calgary: Detselig Enterprises Ltd., 1998. Pp. 96. ($14.95).

Reviewed by Brenlee Carrington Trepel*

Dr. Bryan Schwartz offers an important perspective on Quebec secession in his latest book. *Last Best Hope: Quebec Secession — Lincoln's Lessons for Canada*, elucidates a fresh approach to Canadian unity by comparing and contrasting the secession crisis faced by Abraham Lincoln with that faced by Canadians.

The author[1] is a passionate federalist whose prose combines strong conviction with rigorous legal analysis. His book reflects his stated intention of creating works which are accessible to all people and not just academics. Despite the fact that the ideas propounded in *Last Best Hope* are sophisticated, they are expressed with precision and clarity.

Last Best Hope is both an examination of the situation faced by the United States during Lincoln's presidency and an examination of Canada's current political vicissitudes. He writes that Abraham Lincoln faced a major presidential crisis when the states of the deep southern United States began to secede. Lincoln refused to extend slavery into new geographical areas. He also "rejected on principle that the threat of illegal secession should determine fundamental policy."[2] Dr. Schwartz then quotes Lincoln: "I will suffer death before I will consent or advise my friend to consent to any concession or compromise which looks like buying the privilege to take possession of this government to which we have a constitutional right." Schwartz himself then asks: "Where is the bottom line for Canadian Federalists?"[3]

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[2] B. Schwartz, *Last Best Hope: Quebec Secession —Lincoln's Lessons for Canada* (Calgary: Detselig Enterprises Ltd., 1998) at 84.

[3] *Id.*

According to *Last Best Hope*, the bottom line for Canadian Federalists is " balanced and visible federalism": "The federal government must definitively declare that the era of one-sided decentralization is over. There will be no further diminution of federal authority unless counterbalanced by an equally significant accretion to federal authority or acceptance of a nation-wide program or standard. That principle must serve as the bottom line for all future federal-provincial negotiations. The federal government must then exercise imagination and leadership in defining areas in which the national side of the federal-provincial dialectic will be asserted. Unilateral secession would be legally and morally wrong. Quebec would have to negotiate its way out of the federation, and its people would bear a heavy price–in lost territory, lost economic opportunity, lost transfer payments, lost citizenship rights–for doing so. The federal government has to explain these facts in plain terms. Doing so may to some extent blunt support for separation and reduce the extent to which the rest of Canada is subjected to repeated threats of national fracture. But it is not enough to impose burdens on Quebec's exit option. It is time to give the people of Quebec — and all of Canada — a reason to believe that there is a vital national community that is worth building for ourselves and for the sake of the wide world which would be inspired by our own survival."[4]

In his essay, Dr. Schwartz elaborates on his solution to achieve national unity: "The federal government should stop its counterproductive practice of trying to appease separatist sentiment by offering to surrender various areas of jurisdiction and by withdrawing from the actual delivery of programs to Canadians. Instead, the federal government should be explaining to the people of Canada why a balanced form of federalism helps to promote freedom and good government for all Canadians. And the federal government should be delivering programs in a way that establishes a manifest and direct link between the individual citizen and the national government."[5]

He exhibits no sycophantic tendencies in the quest to articulate his beliefs. His observations concerning the political process are typical of the candour with which he expresses his views: "The decision to explain a course of action carries with it the necessity to actually think it through. Lincoln painstakingly wrote his own letters and speeches: he spent many evenings of solitude in drafting his first Emancipation Proclamation. A fair amount of thinking and communication is now delegated by senior politicians, rather than conducted personally. We have had senior politicians who could write and think for themselves — John A. Macdonald, Pierre Trudeau — but many of our current leaders are better at delivering the message than creating one. Whether the need to 'go public' triggers solitary

[4] *Ibid.* at 85.

[5] *Ibid.* at iv.

reflection or a more collective process of rumination, the end result is often a more sensible course of action."[6]

Last Best Hope is not a long book. Indeed, Dr. Schwartz has a knack for being concise and has compressed a great deal of analysis and information into a relatively small amount of space. That same readable style is a hallmark of Dr. Schwartz's writings.[7]

According to *Last Best Hope*, one of the problems inherent in holding a national unity debate today is the public's boredom with a topic which the author feels has been raised too frequently when there was no need to do so. "Tedium has become one of the most dangerous forces in Canadian politics. It numbs our sense of danger. People worry about the future or dwell in the past for a psychological reason: the hope that sheer repetition of the preview or review will eventually numb them to the fear or trauma of the event. The repeated flirtations with independence have made many Québécois regard as plausible an option that would, if carried out, inflict terrible economic hardship on its people. It has also dulled many Canadians to the risk that Quebec separation presents to their own political future."[8]

Last Best Hope states that unilateral secession on the part of Quebec would be illegal both under Canadian Constitutional law and under international law. Professor Schwartz also unequivocally opines that to secede unilaterally would be "fundamentally contrary to some basic principles of political justice."[9]

The author's position is that the Canadian constitution would be contravened by unilateral secession and that international law would also be violated. It's his belief that the only circumstances in which international law recognizes a territory's right to separate are " in cases of classic colonialism (an overseas power dominates a local population) or severe persecution (such as West Pakistan's rule over East Pakistan).The secession by Quebec would not be lawful in international law. The international community would not be obliged to recognize the 'de facto' success of a separatist government in controlling parts of Quebec, anymore than the rest of the world recognized the Confederacy."[10]

The book is aimed at catapulting Canadians out of lassitude and into serious debate about the future of this country. According to Dr. Schwartz, public authorities have both the legal and the moral right to use force to maintain the rule of law in the event of an attempted unilateral secession. "The moral and

6 *Ibid.* at 68.

7 He is author of many articles on public law, legal philosophy and legal sociology.

8 *Ibid.* at 69.

9 *Ibid.* at iii.

10 *Ibid.* at 41.

legal duty to assert the rule of law must, of course, be tempered by a profound respect for human life and limb."[11]

The style of *Last Best Hope* is individualistic. It comprises an essay featuring Dr. Schwartz's ruminations on a panoply of topics which interrelate to the secession issue and his observations are thoroughly researched and frequently entertaining. He writes that Canadians are not inclined to proclaim certitudes of any sort and supports that comment with the fact that there was once a contest to define the Canadian equivalent of the aphorism "as American as apple pie." The winning entry was "as Canadian as possible in the circumstances."[12]

The title of *Last Best Hope* comes from Abraham Lincoln's December 1862 message to the United States congress in which he called the United States the "last, best hope of earth."[13] Dr. Schwartz writes that the survival of the United States "would prove that a state could be committed to democracy, freedom and liberty–and yet still command the legal authority and citizen loyalty to resist a rebellion by would — be tyrants."[14] He postulates that Canada, with its ethnic tensions, will survive only through the successful use of federalism and not through the individual provincial governments' fighting with one another. Schwartz espouses the idea that "If Canada can succeed (in achieving national unity), it will be a successful experiment in federalism as a means of resolving ethnic tension."[15]

Dr. Schwartz's observations on federalism are not limited in relevance to the subject of Quebec. He calls the creation of the Nunavut territory part of the Canadian experiment in federalism. Whether or not one agrees with his viewpoint, he presents his case in a thought-provoking style which encourages commentary and discussion.

Perhaps one of the most admirable aspects of *Last Best Hope* is the fact that the author does not mince words. A prominent academic, he conveys his deep respect and affection for Canada as a united country. He is not afraid to state his opinion, no matter how controversial. For example, Dr. Schwartz writes: "It is possible that apartheid governments in South Africa modelled some of their race laws after some of the most segregationist and discriminatory provisions of our own Indian Act."[16] He then goes on to explain that Canada can also become a model to the world on the use of federalism as a means of resolving ethnic conflict. He believes that the country as we now know it would be irrevocably damaged if Quebec were

[11] *Ibid.* at 73.

[12] *Ibid.* at 7.

[13] *Ibid.* at 6.

[14] *Ibid.*

[15] *Ibid.* at 11.

[16] *Ibid.* at 12.

to separate: "The overriding image we would present to the world would be one of political failure. The remaining parts would have fewer human and economic resources with which to establish any sort of international presence. Quebec would almost immediately fade into economic, political and military irrelevance. The rest of Canada would, in the long run, by pieces or en masse, become more closely assimilated into the United States. Outright union might be our eventual destiny."[17]

With characteristic candour, Dr. Schwartz states his case in a moving passage: "Assimilation into the United States would not be a catastrophe. We might become a little richer. Our individual opportunities would in some ways be greater; we could live and work anywhere in a vast market, not just its minor adjunct. At the same time, we would have lost the ability to create and maintain a distinctive kind of polity; one whose governments and people are less violent, more compassionate and more embracing of cultural diversity than in the United States. Not just our loss, perhaps, but the extinction of a light that might have cast some light and warmth on the wider world."[18]

Dr. Schwartz's dream of visible federalism is summed up in this paragraph from *Last Best Hope*: "We have wasted too much time and good will on fending off our own self-destruction by trying to negotiate large-scale changes to our constitution. We should focus instead on the affirmative and practical task of building an economic and social union that is worthy of the loyalty of our own citizens and the admiration of the world."[19]

Throughout Dr. Schwartz's book, he scrutinizes the American president's literary techniques which were crucial to the political impact of his speeches. He devotes several pages of his book to the political power of the words and slogans used by Lincoln.[20] He analyzes Lincoln's attraction to the phraseology of "a house divided against itself cannot stand", and the significance of that phrase in the civil war era. He goes on to compare and contrast Canada's own divisions over controversial phrases, such as "distinct society" status for Quebec.

Schwartz has consistently favoured maintaining a dynamic role for the central government of Canada at a time when the conventional wisdom has been that Canada must be decentralized in order to be "saved". He was a strong critic of constitutional deal making which did not involve public consultation. However, Dr. Schwartz has not merely offered criticism; he has always proposed as well constructive alternatives. For example, during the Meech Lake era, he suggested a number of improvements which

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[17] *Ibid.* at 13.

[18] *Ibid.*

[19] *Ibid.* at 86.

[20] For an example of his skill as a literary critic, see "A Meditation on Bartleby" (1985) 22 Osgoode Hall L.J. 441.

subsequently became part of the "Canada clause" which formed the centrepiece of the Charlottetown Accord. The consensual process used to create the Charlottetown Accord was also consistent with Schwartz's proposals, which included the use of constitutional referenda to ascertain public support for various constitutional solutions.

Similarly, *Last Best Hope* contains many creative solutions. The "moral case" for federalism which he outlines is original. His proposal for "visible federalism" merits careful reading by framers of federal policy.

Last Best Hope was written in anticipation of the Supreme Court of Canada's decision on the Quebec secession reference.[21] The book, which was published before the case was argued, correctly predicted that unilateral secession would be found to be illegal under both domestic and international law. His opinions about the morality of federalism and of unilateral secession would be highly relevant to the debate which would follow if ever there were a "yes" vote in Quebec.

Dr. Schwartz was also prescient when he anticipated that the Supreme Court of Canada would suggest that if Quebec were to secede unlawfully under international law, the international community might eventually recognize that fact.[22] The Court, however, does not address his observation that international law often rejects "realities" such as territorial acquisitions that are unlawful in their inception.[23] Professor Schwartz writes:"The argument that the world must sooner or later give official recognition to the reality of a secession is contrary to principle as well as actual practice. International law does not reward illegal behaviour. It does not recognize the right of a foreign aggressor to keep its conquests. It similarly does not reward the efforts by secessionists to destroy the territorial integrity of a state from within. The attempted secession by a minority in a state may effectively thwart the right of the majority to self-determination, in the sense that the latter may wish to maintain a united state. Likewise, attempts by an outside state to recognize an unlawful unilateral secession would also be a serious violation of the principle of nonintervention in the internal affairs of another state."[24]

Since Professor Schwartz is an expert in both international and constitutional law, his in-depth exploration of the international law aspects of secession, both in *Last Best Hope* and in his recent article in the New York Journal of International Law, are important to the study of secession in both the global and in the Canadian context.

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[21] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

[22] *Ibid.* at 222-23.

[23] B. Schwartz & S. Waywood, "A Model Declaration on the Right of Secession", (1998) 11 N.Y. Int'l L.R. 1.

[24] *Ibid.* at 12-13.

Bryan Schwartz's past books[25] have been lauded[26] for their depth, brilliance and clarity of thought. Since the beginning of the Patriation era, he has written about virtually every significant development in Canadian constitutional controversies. *Last Best Hope* forms yet another link in what one hopes is a continuing chain of his contributions to Canadian legal literature.

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Beyond All Reason: The Radical Assault on Truth in American Law.

By DANIEL A. FARBER and SUZANNA SHERRY.

Oxford University Press, 1997, Pp. 195 ($US 25)

Reviewed by Graeme G. Mitchell*

Don't be put off by its provocative title, *Beyond All Reason: The Radical Assault on Truth in American Law* is neither an unbridled rant nor an ill-informed diatribe about the state of contemporary American academic legal writing. Rather, *Beyond All Reason* is an admirable and highly accomplished critical survey of what currently passes as scholarship in the American legal academy. Its authors, Daniel Farber and Suzanna Sherry, are prominent professors of American constitutional law teaching at the University of Minnesota Law School. Together, they offer an impeccably written, balanced, persuasively argued and exhaustively researched and documented,[1] normative critique of the academic movement currently in vogue in law schools south of the 49th parallel.

Farber and Sherry coined the obtuse term "radical multiculturalism" to identify this new ideology that has taken hold in law schools and university campuses across the United States. This term embraces separate yet sympathetic jurisprudential strands, in particular, critical race theory, radical feminism, critical legal studies, itself, a waning movement that was widely influential in

[25] *See for example: First Principles* (Kingston: Queen's Institute of Intergovernment Relations, 1986); *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1987); *Fathoming Meech Lake* (Winnipeg: Legal Research Institute, 1988); *Opting In? The New Federal Proposals on the Constitution* (Hull: Voyageur Publishing, 1992); *Still Thinking: An Assessment of the Charlottetown Accord* (Hull: Voyageur Publishing, 1992).

[26] See e.g. reviews by H.S. Fairley, (1988) 67 Can. Bar Rev. 717-723; M.L. Berlin, (1988) 67 Can. Bar Rev. 175-78.

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[1] At the conclusion of the text are found thirty seven pages of endnotes (pp. 149-186). These endnotes serve as an complete review of the large volume of legal literature spawned by radical multiculturalists.

legal academic circles throughout the 1980's and into the early years of this decade, and the emerging gaylegal studies movement. As categorized by Farber and Sherry, radical multiculturalists are not simply a rag-tag collection of radical post-modern malcontents. Included among their number are such influential critical race theorists as Derrick Bell, Kimberlé Crenshaw, Jerome Culp, Richard Delgado, Mari Matsuda and Patricia Williams, the acknowledged founder of critical race theory; feminist scholars like Catharine MacKinnon and Robin West; advocates of critical legal studies such as Duncan Kennedy and Stanley Fish, and William Eskridge Jr., a leading exponent of gaylegal studies. With such gifted proponents as these, Farber and Sherry believed it was necessary that their trenchant critique of radical multiculturalism's troubling message reach the widest audience possible. *Beyond All Reason* is the result.

This book is divided into six chapters bracketed by brief introductory and conclusionary sections. In the Introduction, Farber and Sherry contend that the radical multicultural ideology "fails by its own terms because it cannot support the kind of world that it seeks to create or maintain."[2] By their own admission, the normative critique of this ideology is "unavoidably harsh" for its flaws are "serious, profound and dangerous".[3] *Beyond All Reason* concentrates on three fundamental precepts of radical multiculturalism. First, Farber and Sherry, both of whom self-identify as Jews, attack the radical multiculturalists' complete and utter rejection of objective merit criteria as inherently anti-Semitic and anti-Asian. They contend that the rejection of merit implies that "Jews and Asian Americans are unjustly favoured in the distribution of social goods."[4] Second, they disparage convincingly the 'storytelling' movement which has gained prominence in American constitutional legal scholarship, as failing to contribute in any meaningful way to public discourse. Third, Faber and Sherry demonstrate that the radical multiculturalists's open antagonism to the 'concept of objective truth' inevitably leads to a "nonchalant mishandling of evidence" which, ultimately, "provides no defence against even the most outrageous distortions of history, such as Holocaust denial."[5]

Chapter 1 entitled "Radical Multiculturalism and Its Discontents" begins by tracing the ideology's jurisprudential pedigree. According to Farber and Sherry, radical multiculturalism had its genesis in the nihilism evident in the most extreme forms of legal realism as well as the progressive left's frustration at the false promise of radical reform held out by the critical legal studies movement. The new radicals openly condemn such Enlightenment values as knowledge, truth and merit as being "socially constructed by the powerful in

[2] At 9.

[3] At 13.

[4] At 11.

[5] At 12.

order to perpetuate their own hegemony."[6] Indeed, Richard Delgado has gone so far as to suggest that "if you are black or Mexican, you should flee Enlightenment based democracies like mad, assuming you have any choice."[7] (To date, Professor Delgado has failed to heed his own counsel choosing instead to remain comfortably ensconced in an America law school.) Patricia Williams, a critical race theorist teaching at Columbia Law School, has denounced experience and professional qualifications as nothing more than "con words, shiny mirrors that work to dazzle the eye."[8] Since radical multiculturalism blithely rejects Enlightenment inspired values as "a fraud perpetrated by white males to consolidate their own power",[9] Farber and Sherry candidly acknowledge that rational discourse and reasoned debate with, and among, its proponents is exceedingly difficult.

In Chapter 2 ("Transforming the Law"), Farber and Sherry introduce us to the 'storytelling movement' currently in vogue in academic legal circles, a phenomenon they elaborate upon far more extensively in Chapter 4 ("Distorting Public Discourse") and Chapter 5 ("The Assault on Truth and Memory"). First person narratives are the expressive vehicle of choice for many new radicals, especially critical race theorists, because "stories have a persuasive power that transcends rational argument".[10] One prominent American legal commentator dismisses critical race theorists whose scholarly preoccupation is the telling of stories as members "of a minority group. . .paid a comfortable professional salary to write childish stories about how awful it is to be a member of such a group."[11] Farber and Sherry are more charitable, although they fear storytelling may become "a substitute for (or at least a crucial supplement to) logic and empirical research, the traditional focal points of scholarship."[12]

First person narratives are, perhaps, the oldest method of legal discourse and the foundation of the common law. Individuals appear in common law courts to tell their 'stories' to a judge who then employs previously established legal principles to resolve conflicting claims. However, any similarity between the contemporary storytelling movement and the evolution of the common law is coincidental. As recounted by law professors, personal stories are presumed to be inherently true. Therefore, any challenge to the veracity of these atypical anecdotal experiences inevitably deteriorates into acrimonious interpersonal conflict. As Farber and Sherry argue in Chapter 4, the "problem with personal

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[6] At 23.

[7] At 29 quoting Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy and the State*, 41 U.C.L.A. L. R. 720, 735 (1994).

[8] At 32 quoting Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press, 1991) at 103.

[9] At 33.

[10] At 39.

[11] R. Posner, "The Skin Game", *The New Republic*, October 13, 1997, 40, 42.

[12] At 40.

stories is that, well, they're personal, so it's hard to say anything critical about the story without implicating the storyteller."[13]

Chapter 5 explores an even greater shortcoming of the storytelling movement, what Farber and Sherry describe as the radical multiculturalists' "casualness about truth".[14] To illustrate this effectively, they employ Patricia Williams's account of the false allegations of rape made by Tawana Brawley, a black teenager. Brawley claimed she had been abducted by a group of white men, gang raped, sodomized and then smeared with human excrement before escaping. These horrific allegations ultimately proved false. Yet reality does not discourage Professor Williams. She audaciously maintains that "Tawana Bradley has been the victim of some unspeakable crime. . . .No matter who did it to her - even if she did it to herself."[15] What can one say?! Farber and Sherry ask if Brawley had actually been raped and tortured, "what would we think of someone—however sympathetic to Brawley—who said she didn't care whether it had happened or not?"[16] They then patiently proceed to demonstrate that in a society governed by the Rule of Law truth does matter, for justice is far more noble and nuanced a concept than the simple tally of whose ox is gored. For me, this arrogant "non-chalance about verifiable facts"[17] is the greatest indictment of the storytelling movement.

Radical multicultural scholarship also has a sinister aspect. Take, for example, Derrick Bell's parable "The Space Traders".[18] Bell postulates a scenario in which aliens land in the United States and offer Americans untold riches if they surrender all blacks. The American public agrees willingly, except for the Jews. Horrified at this genocidal proposal, Jews organize the Anne Frank Committee to stop it. According to Bell, this Jewish initiative is not motivated by humanitarianism but by fear. For "in the absence of blacks, Jews could become the scapegoats."[19] In Chapter 3 ("Is the Critique of Merit Anti-Semitic?"), at once the most original and most sobering chapter of the book, Farber and Sherry ignore the virulent anti-Semiticism evident in the writings of radical multiculturalists like Bell, and instead explicate the anti-Jewish and anti-Asian bias inherent in the ideology's rejection of objective merit criteria.

Beyond All Reason is an enlightening book. It is also an important one. It is enlightening because Farber and Sherry introduce us to radical multiculturalism using the very words of some of the ideology's leading exponents. One of the

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[13] At 89.

[14] At 96.

[15] At 96 quoting Williams, *The Alchemy of Race and Rights*, *supra* note 8 at 169-70.

[16] At 96.

[17] At 100.

[18] Recounted at 4.

[19] *Ibid.* Bell is also an apologist for the extreme anti-Semitism preached by L. Farrakhan, see discussion at 44 quoting from Bell, "Racial Realism", 24 Conn. L. Rev. 363, 364 (1992).

book's principal virtues is that the authors have quoted widely from the extensive legal literature that the new radicals have generated and it makes for some very uncomfortable reading. It is important because in the best scholarly tradition, Farber and Sherry choose not to dismiss radical multiculturalism out of hand. Rather they attempt to analyse and critique, in a reasoned and rational way, ideas that are often unreasonable or irrational or both.

Why should Canadian lawyers, judges, academics and law students read a book devoted entirely to American legal scholarship? Apart from its significance, I can think of at least two reasons. First, intellectual trends in the United States tend eventually to migrate to the Canadian academy. Indeed, a variant of critical race theory based upon aboriginal experience is being taught in Canadian law schools and its scholarship appearing in academic journals. Farber and Sherry's erudite critique of this movement in the United States should give us pause in accepting uncritically its evolution here. Second, and more importantly, Farber and Sherry's commitment to law's ideal as a principled discourse must be fostered in the legal academy if our legal system, not to mention the Rule of Law, is to have continued viability. I commend this slim volume to anyone who cares about the future of legal education and the legal system in Canada.