

# SPOUSAL INCOMPETENCY AND THE *CHARTER*<sup>®</sup>

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This article considers the effect of the *Canadian Charter of Rights and Freedoms* on the rule of spousal incompetency in criminal proceedings. The rule is arguably under-inclusive, in that it is not available to protect opposite-sex couples who are not legally married or same-sex couples; on the other hand, the rule is arguably offensive to the modern conception of marriage. The *Charter* arguments for each of these positions are considered, and it is submitted that the *Charter* requires the rule of spousal incompetency, whatever it is, to apply equally to legally married couples, to cohabitants, and to same-sex couples. A rule of spousal incompetency that arguably reconciles the modern conception of marriage with the interest protected by the rule of spousal incompetency is then considered. This rule would make the spouse a competent but not compellable witness for the prosecution. Various considerations of law and policy militate against giving the spouse this decision; the real choice is between maintaining the existing rule of incompetency and making the spouse competent and compellable for the Crown. It is submitted that the arguments on either side of this choice are so evenly balanced that any change should be made by Parliament rather than by the courts.

Cet article examine l'effet de la *Charte canadienne des droits et libertés* sur la règle rendant le conjoint inhabile à témoigner dans les procédures criminelles. D'un côté, on peut soutenir que la règle est trop étroite, puisqu'elle ne s'étend pas à la protection des couples non-mariés ou des couples du même sexe; de l'autre côté, elle est peut-être incompatible avec une vision moderne du mariage. Des propos relevant de la *Charte* en faveur de chacun de ses points de vue sont examinés. L'article suggère que la règle de l'habilité du conjoint, quel que soit son contenu précis, doit s'appliquer également aux couples mariés, aux cohabitants et aux couples du même sexe pour être conforme aux exigences de la *Charte*. L'article examine alors une règle de l'habilité du conjoint qui pourrait rendre compatible la vision moderne du mariage avec l'intérêt que la règle cherche à protéger. Cette règle ferait en sorte que le conjoint soit un témoin compétent mais pas contraignable pour l'accusation. Il y a plusieurs raisons légales et politiques pourquoi l'époux doit être privé du pouvoir de prendre cette décision; le problème véritable est donc de choisir entre le maintien de la règle existante de l'inhabilité et l'introduction de la compétence de l'époux, mais non pas de sa contraignabilité, par le Couronne. Les arguments qui ontiennent les deux côtés étant égaux, cet article suggère qu'un changement quelconque doit être fait par le Parlement en préférence aux cours.

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## I. INTRODUCTION

At common law, the accused person and his or her spouse<sup>1</sup> were incompetent to testify. This rule had two common law justifications. First, interested parties were generally prohibited from testifying, and since the husband and the wife were deemed to have the same interest, neither could testify. Second, since at common law “the husband and

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<sup>1</sup> I will use the word “spouse,” rather than the more cumbersome expression “wife or husband” used to refer to a *legally married* person in the *Canada Evidence Act*, R.S.C. 1985, c. C-5 [hereinafter *Canada Evidence Act*]. But since most persons accused of criminal offences are male, I will generally refer to the accused as “he” and the non-accused spouse as “she.” Terminology of this sort is also adopted by A.W. Mewett & M. Manning, *Mewett & Manning on Criminal Law* 3d ed. (Toronto: Butterworths, 1994) at v (referring to the accused as “he”) and by R.O. Lempert, “A Right to Every Woman’s Evidence” (1981) 66 Iowa L. Rev. 725 at 728 (referring to the accused’s spouse as “she”).

wife are one person in law,”<sup>2</sup> the husband’s incompetency virtually entailed the wife’s.<sup>3</sup> The principal common law exception to this rule of incompetency was that a spouse could testify for the Crown where the offence involved her “person, liberty, or health.”<sup>4</sup> In this situation, the first common law rationale did not apply (though, arguably, the second did).

These common law rationales for the rule of spousal incompetency are no longer considered valid.<sup>5</sup> As to the first rationale, the rule prohibiting interested parties from testifying has been abrogated,<sup>6</sup> the accused and his spouse are now competent witnesses for the defence,<sup>7</sup> the spouse has been made competent for the Crown in certain situations,<sup>8</sup> and a divorced<sup>9</sup> or irreconcilably separated<sup>10</sup> spouse is competent for the Crown. The second rationale is plainly inconsistent with the modern conception of marriage as a partnership between juridical equals<sup>11</sup> and with the abrogation of married women’s common law disabilities in areas such as contract and property.<sup>12</sup> But, subject to certain exceptions, the common law rule that a spouse is not a

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<sup>2</sup> W. Blackstone, *Commentaries on the Laws of England* vol. 1 (Oxford: Clarendon Press, 1765) at 430.

<sup>3</sup> *Ibid.* at 431: “in trials of any sort, they [husband and wife] are not allowed to be evidence for, or against, each other: partly because it is impossible that their testimony should be indifferent; but principally because of the union of person ... .”

<sup>4</sup> J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 613. The exception is often traced to *Lord Audley’s Case* (1631), Hut. 115, 123 E.R. 1140 (H.L.).

<sup>5</sup> The United States Supreme Court has described them as “two now long-abandoned doctrines”: *Trammel v. United States* 445 U.S. 40 at 44 (1980) [hereinafter *Trammel*].

<sup>6</sup> *Canada Evidence Act*, *supra* note 1, ss. 3, 4(1).

<sup>7</sup> *Ibid.*, s. 4(1).

<sup>8</sup> *Ibid.*, ss. 4(2), 4(4). Section 4(5) preserves the common law exceptions to the rule of spousal incompetency.

<sup>9</sup> *R. v. Bailey* (1983), 4 C.C.C. (3d) 21 (Ont.C.A.) [hereinafter *Bailey*].

<sup>10</sup> *R. v. Salituro*, [1991] 3 S.C.R. 654 [hereinafter *Salituro*].

<sup>11</sup> *Ibid.* at 672; see also *Family Law Act*, R.S.O. 1990, c. F-3, preamble [hereinafter *Family Law Act*]; and J.H. Wigmore, *Evidence in Trials at Common Law* rev. ed., vol. 8 (Boston: Little Brown, 1961), § 2228: “In an age which has so far rationalized, depolarized and dechivalrized the marital relation and the spirit of femininity as to be willing to enact complete legal and political equality of man and woman, this marital privilege is the merest anachronism in legal theory ... .”

<sup>12</sup> See, for example, *Family Law Act*, *supra* note 11, s. 64.

competent witness for the prosecution remains in force.<sup>13</sup> In this article, I want to explore the possibility of an attack under the *Canadian Charter of Rights and Freedoms*<sup>14</sup> on this rule of spousal incompetency.<sup>15</sup>

There are two very different ways in which the common law rule of spousal incompetency might be inconsistent with the *Charter*. On the one hand, the rule is arguably under-inclusive. It has been repeatedly held that the rule applies only to legally married spouses;<sup>16</sup> yet, in other areas of the law, many of the benefits, obligations, and protections traditionally accorded only to legally married couples have been extended, either by statute or through *Charter* litigation, to unmarried cohabitants.<sup>17</sup> A couple who are “spouses” under Part II of Ontario’s *Family Law Act*, and are thus entitled to and liable for each other’s support, or who are entitled to various employment related benefits or insurance law protections, are not protected from having to testify against each other under the current formulation of the rule of spousal

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<sup>13</sup> *R. v. Hawkins*, [1996] 3 S.C.R. 1043 [hereinafter *Hawkins*]. The accused, after his preliminary hearing but before his trial, married a witness who had testified for the Crown at the preliminary hearing. The Crown invited the Court to create an exception to the rule of spousal incompetency for spouses who marry for the purpose of avoiding having to testify. Eight members of the Court declined the invitation: *ibid.* at 1072-75, Lamer C.J. and Iacobucci J. (Gonthier and Cory JJ. concurring); at 1094, L’Heureux-Dubé J. concurring; at 1113-14, Major J. (Sopinka and McLachlin JJ. concurring) dissenting on other grounds. A majority of the Court went on to hold that the witness’s evidence from the preliminary hearing was admissible under the “principled approach” to hearsay: at 1077-94, Lamer C.J. and Iacobucci J. (Gonthier and Cory JJ. concurring); and at 1094, L’Heureux-Dubé J. concurring.

<sup>14</sup> Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

<sup>15</sup> In addition to the rule of spousal incompetency, legally married couples are protected by the privilege in s. 4(3) of the *Canada Evidence Act* *supra* note 1, which provides: “No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.” The section envisages an otherwise competent spouse refusing to answer questions about communications from the accused: *R. v. Zylstra* (1995), 99 C.C.C. (3d) 477 (Ont. C.A.), *rev’g* on other grounds (1994), 88 C.C.C. (3d) 347 (Ont. Ct. (Gen. Div.)). *Contra*: *R. v. St. Jean*, [1976] C.A. 513 (Que.) (holding that despite s. 4(3), compellable spouse was required to answer questions about conversation with accused). But the privilege belongs to the witness spouse, not to the accused person: *Zylstra* at 480. The arguments for and against the rule of spousal incompetency, and for expanding or contracting the scope of the rule, would apply with equal force to this privilege. For the most part, I will not be separately concerned with it.

<sup>16</sup> *R. v. Duvivier* (1990), 75 O.R. (2d) 203 (Gen.Div.) [hereinafter *Duvivier*], appeal dismissed without prejudice to the merits (1991), 3 O.R. (3d) 49 (C.A.) [hereinafter *Duvivier C.A.*]; and *R. v. Thompson* (1994), 155 A.R. 9 (C.A.) [hereinafter *Thompson*].

<sup>17</sup> I will use the word “cohabitants” to refer to persons who are not legally married but are in opposite-sex conjugal relationships. The expression “common law relationship,” though widely used, can be misleading, since it is often used to refer to relationships that would not have been recognized at common law as equivalent to legal marriages.

incompetency. This inequality between legally married spouses and cohabitants might found a *Charter* argument for expanding the rule. Similarly, the partners in a same-sex relationship are not currently entitled to the protection of the rule of spousal incompetency; although there has been some movement toward recognizing same-sex relationships as legally comparable to traditional marriages, this movement is by no means complete. Again, this disparity between opposite-sex and same-sex relationships might found a *Charter* argument for expanding the rule.

On the other hand, the rule of spousal incompetence is arguably offensive to the modern conception of marriage. A rule which says that a spouse *cannot* testify against an accused, purely by virtue of her status, smacks of ancient doctrines, like *coverture*,<sup>18</sup> that denied that married women could be, independent of their husbands, full participants in public life. This difference in status between married and unmarried persons, particularly since most witnesses affected by the rule are women, might found a *Charter* argument for contracting or even abolishing the rule.

In this article, I outline the *Charter* arguments for each of these positions. I argue that whatever rule of spousal incompetency is adopted should apply equally to legally married couples, to cohabitants, and to same-sex couples. I then consider a rule of spousal incompetency that arguably reconciles the various interests at play in these arguments. The rule, analogous to a privilege in force in many American jurisdictions,<sup>19</sup> is that the spouse is a competent witness for the prosecution, but can decline to testify. I argue that various considerations of law and policy militate against giving the spouse this decision; the real choice is between maintaining the existing rule of incompetency and making the spouse competent and compellable for the Crown. Finally, I suggest

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<sup>18</sup> Blackstone, *supra* note 2, vol. 1 at 430, described *coverture* as follows: "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *femme-covert*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*"

<sup>19</sup> The rule in the federal jurisdiction is that a spouse is a competent witness for the prosecution, but can assert a privilege to decline to testify. In addition, confidential communications between spouses are protected by a privilege much like the one found in s. 4(3) of the *Canada Evidence Act*, *supra* note 1. The state rules vary considerably, but many have followed the federal approach. For a useful overview of the privileges in the United States, see B.I. McDaniel, "Annotation: Marital Privileges under Rule 501 of Federal Rules of Evidence" (1981) 46 A.L.R. 4th 735. In *Hawkins*, *supra* note 13 at 1095, La Forest J. seems to have taken the view that this rule might exist in Canada as well.

that, although a rule making the spouse competent and compellable may well be more consistent with the *Charter* than the existing rule, the arguments for and against this change are so evenly balanced that any change should be made by Parliament rather than by the courts.

## II. THE EXISTING DOCTRINE

The current position with respect to spousal incompetency is fairly clear. If the accused and his spouse are legally married<sup>20</sup> and not irreconcilably separated, the spouse is an incompetent witness for the Crown but competent for the defence.<sup>21</sup> The rule of incompetency applies during the marriage, regardless of when the offence is alleged to have been committed, but does not apply when the accused and the spouse are divorced or irreconcilably separated.<sup>22</sup>

The current rationale for the rule of spousal incompetency can only be that permitting (or compelling) the spouse to testify against the accused would tend to disrupt an established relationship, to destroy the marital harmony that exists between the accused and his spouse.<sup>23</sup> This rationale has left some commentators completely unpersuaded. Wigmore was particularly critical of associating this policy rationale with

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<sup>20</sup> There is some support in the case law for the proposition that something less than a legally recognized wedding ceremony can create a lawful marriage for this purpose. In *R. v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 21 (N.W.T.S.C. *en banc*) and in *R. v. Williams* (1921), 30 B.C.R. 303 (S.C.), marriages performed according to Aboriginal customs were recognized as valid, rendering the spouse incompetent (in *Williams* the spouse was incompetent for the Crown, and in *Nan-E-Quis-A-Ka* she was incompetent for either party, because the common law rule was still in force). See also *Coffin v. The Queen* [1955] B.R. 620 (Que. Q.B.), where Rinfret J. held on the facts that the accused and his partner had not made any agreement that would make them legally married at common law, leaving open the possibility that if there had been such an agreement, the spouse would be incompetent for the Crown. A “common law marriage,” where a man and a woman can become legally married without going through a recognized wedding ceremony, must be distinguished from what is now termed a “common law relationship,” where a man and a woman live together without having gone through any ceremony or having made any agreement sufficient to create a common law marriage. A spouse who is “common law” in the latter sense is, according to the pre-*Charter* cases, competent for the Crown: see *Ex parte Cote* (1971), 22 D.L.R. (3d) 353 (Sask. C.A.); and *R. v. Jackson* (1981), 23 C.R. (3d) 4 (N.S. S.C.A.D.).

<sup>21</sup> There is some question as to whether a spouse who is competent for the defence can be compelled to testify against her will. In *R. v. Bechard* (1975), 24 C.C.C. (2d) 177 (Ont. Prov. Ct.) it was held, though without any real discussion, that a husband was competent for and compellable by his wife at her trial. This rule would be consistent with the prevailing view that a spouse who is competent for the prosecution by virtue of a common law exception is also compellable: see text accompanying *infra* notes 176-78.

<sup>22</sup> *Supra* notes 9 and 10.

<sup>23</sup> *Salituro*, *supra* note 10 at 672; see also *Bailey*, *supra* note 9 at 23.

the rule; he argued that it was unconnected to the historical origins of the rule of spousal incompetency,<sup>24</sup> and that it was implausible on its face: “first, the peace of families does not essentially depend on this immunity from compulsory testimony, and, next, that so far as it might be affected, that result is not to be allowed to stand in the way of doing justice to others.”<sup>25</sup>

The only plausible justification for the rule that Wigmore could find was “that there is a *natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other’s condemnation, and to compelling the culprit to the humiliation of being condemned by his intimate life partner.”<sup>26</sup> In Wigmore’s view, this repugnance was a mere “sentiment” that ought not to stand in the way of the “high and solemn duty of doing justice and of establishing the truth.”<sup>27</sup>

Yet one can easily envisage that both the accused and his spouse would feel considerable resentment and distrust arising from the mere fact of the spouse’s testifying for the Crown and from cross-examination of the spouse by counsel or indeed by the accused himself, quite apart from the resentment that would arise if the accused were actually convicted as a result of his spouse’s testimony. There is more than mere sentiment at work in the marital harmony justification. If the marital relationship deserves protection—and most people would agree that it does—then at times other social goals, including even truth-finding, may have to give way before it. Special evidentiary rules surrounding marriage are one possible form of protection.<sup>28</sup> I will assume, for the purposes of this article, that the marital harmony rationale is a valid, though not necessarily decisive, reason for making spouses incompetent witnesses for the Crown.

It has been held that the marital harmony rationale does not survive divorce or irreconcilable separation; by the same token it is plausible to argue that the rationale should extend to other relationships

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<sup>24</sup> Wigmore, *supra* note 11, §2228.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* [emphasis in original].

<sup>27</sup> *Ibid.*

<sup>28</sup> For defences of the American privilege enabling the spouse to avoid testifying against the accused, which would apply equally to the Canadian rule of spousal incompetency, see M. Reutlinger, “Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege” (1973) 61 Calif. L. Rev. 1353; and C.L. Black, “The Marital and Physician Privileges — A Reprint of a Letter to a Congressman” [1975] Duke L.J. 45.

which are recognized as comparable to legal marriages.<sup>29</sup> But this extension has been rejected in two recent cases. In *Duvivier*<sup>30</sup>, the proposed witness Johnson and the accused Duvivier lived together from 1983 to 1990 except for four periods when Duvivier was in jail. A child was born to Johnson and Duvivier in 1984. Johnson was legally married to another man; but she had separated from him in 1982 and had divorced in 1987. Johnson argued that, under section 15 of the *Charter*, she was entitled to be treated as Duvivier's legal spouse and therefore was incompetent (or, in the alternative, uncompellable) against him; she sought to quash a subpoena compelling her to testify for the Crown at Duvivier's preliminary inquiry. Farley J. rejected Johnson's section 15 claim. He held that in the criminal context, it was not appropriate to place her in the group of persons involved in a quasi-marital relationship, however appropriate this may be in other contexts.<sup>31</sup> The group of which she is a member was "all those persons who are non-spouses and are therefore compellable to testify."<sup>32</sup> This group was not a discrete and insular minority,<sup>33</sup> and in particular had no characteristics in common that would give them section 15 protection. Farley J. noted that this group includes daughters and mothers, sons and fathers, mothers-in-law and sons-in-law, "no matter whether they live together in the same household or not."<sup>34</sup> Therefore, Johnson was compellable against Duvivier.

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<sup>29</sup> "If the principle in [*Salituro*] is the eminently sensible one that, given an irreconcilable breakdown of a marriage, there is no matrimonial interest left to preserve and thus no reason why a spouse of such a marriage should not be competent ... it should follow that matrimonial interests depend not on the formalities of the union but on the actual circumstances of the union": A.W. Mewett, "Editorial: Spouses" (1992) 34 *Crim. L.Q.* 129 at 130.

<sup>30</sup> *Supra* note 16.

<sup>31</sup> Farley J. alluded to *Lerouxv. Co-Operators General Insurance Co*(1990), 71 O.R. (2d) 641 at 655 (H.C.J.), where Arbour J. held that s. 15(1) required interpreting the word "spouse" in the uninsured motorist provisions of the *Insurance Act*, R.S.O. 1980, c. 218 [hereinafter *Insurance Act*], to mean "persons who live in a relationship of some permanence and commitment, akin to a conjugal relationship." This judgment was reversed on appeal after *Duvivier*, *supra* note 16, was decided: (1991), 4 O.R. (3d) 609 (C.A.). But now see *Miron v. Trudel*, [1995] 2 S.C.R. 418 [hereinafter *Miron*], rev'g (1991), 4 O.R. (3d) 623 (C.A.).

<sup>32</sup> *Duvivier*, *supra* note 16 at 211.

<sup>33</sup> This phrase comes from *United Statesv. Carolene Products* 304 U.S. 144 at 152-153 n. 4 (1938), and entered Canadian law through McIntyre J.'s judgment in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 183. See also Wilson J.'s judgment in *R. v. Turpin*, [1989] 1 S.C.R. 1296.

<sup>34</sup> *Duvivier*, *supra* note 16 at 210.

Farley J.'s reasoning is not compelling. By asking "[t]o what group does Johnson truly belong?"<sup>35</sup> and by answering "all those persons who are non-spouses and are therefore compellable to testify,"<sup>36</sup> Farley J. simply begs the question. He uses Johnson's lack of status under the law as it stands to reject her challenge to that very lack. The real question is whether cohabitants in Johnson and Duvivier's position are entitled, in a criminal case, to the same protection that a legally married couple would have; in other words, whether, in light of the rationale for spousal incompetency, Johnson and Duvivier's marital harmony should be protected from the stress of Johnson's being compelled to testify against Duvivier.

Nonetheless, Farley J.'s observation that other family members are compellable raises a valid policy concern: what is the limit of the marital harmony rationale? If marital harmony should be protected, why not filial or fraternal harmony? I return to these questions below.<sup>37</sup>

The scope of the rule was challenged again in *Thompson*.<sup>38</sup> The accused and the proposed Crown witness MacDonald had lived together "on and off for five years," had one child and another on the way, and, according to their evidence, intended to get married in August 1993 (some six months after Thompson's trial).<sup>39</sup> A majority of the court was not persuaded, on the facts, that Thompson and MacDonald had a "common law" marriage,<sup>40</sup> but the court went on to consider Thompson's argument that the restriction of the rule of spousal incompetency to legally married spouses offended section 15. The court was not satisfied that "persons living in common law relationships are members of a discrete and insular minority," nor that such persons were subject to discrimination.<sup>41</sup>

The court was greatly influenced in these holdings by the fact that cohabitants can choose to become legally married. Persons who could choose to change their status could only rarely be members of a discrete and insular minority, and while there were differences in treatment between legally married couples and cohabitants, these differences were not discriminatory because of the element of choice:

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.* at 211.

<sup>37</sup> See Part III.

<sup>38</sup> *Supra* note 16.

<sup>39</sup> *Ibid.* at 11.

<sup>40</sup> *Ibid.*, Kerans J.A., (Hetherington J.A. concurring).

<sup>41</sup> *Ibid.* at 10, Harradence J.A. (Kerans and Hetherington JJ.A. concurring).

People choose to get married; they also choose *not* to get married. Due to societal norms, the question arises naturally in most enduring relationships. It is difficult to describe a treatment as discriminatory when it arises as a consequence of the very choice of those who assert the discrimination.<sup>42</sup>

Thus, the section 15 claim failed both on the threshold question of whether marital status was an analogous ground and on the question of whether there was discrimination.

Harradence J.A.'s judgment does not explicitly pose the central question of whether harmony in cohabitants' relationships is as important and as deserving of protection as legally married harmony; but it is clear what his answer to this question would be.<sup>43</sup> If you want the protections of legal marriage, you can choose to marry.

### III. THREE APPROACHES TO MARRIAGE

The rationale for the rule of spousal incompetency has often been questioned, both by judges and by academic commentators,<sup>44</sup> on the ground that its logic is not confined to spouses. It may well be that requiring a spouse to testify against an accused will disrupt their relationship; but the same could be said when a child testifies against a parent,<sup>45</sup> a brother against a sister, or one old friend against another.

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<sup>42</sup> *Thompson, supra* note 16 at 16 [emphasis added].

<sup>43</sup> In the United States, attempts to expand the spousal privileges to include cohabitants have been unsuccessful. In two cases, the courts declined to extend the spousal privileges despite a recent extension of the property rights of cohabitants: see *People v. Delph*, 156 Cal. Rptr. 422 (Ct. App. 1979) and *In Re Ms. X*, 562 F. Supp. 486 (N.D. Cal. 1983). An argument based on the Fourteenth Amendment's equal protection clause was no more successful: see *State v. Watkins*, 614 P.2d 835 (Ariz. 1980) (holding that even if cohabitation was similar to legal marriage, Arizona's statute limiting spousal privileges to legally married couples was "rationally related to the state's interest in preventing the extension of the privilege to less permanent relationships" and to "the state's interest in the orderly administration of its laws").

<sup>44</sup> See *Duvivier, supra* note 16 at 210; Wigmore, *supra* note 11, §2227; and Note, "Developments in the Law: Privileged Communications" (1985) 98 Harv. L. Rev. 1450 at 1582 [hereinafter "Privileged Communications"].

<sup>45</sup> In Massachusetts, a minor child may not testify against his or her parents in criminal proceedings, unless the victim of the offence is a member of the household. Mass. Laws. Ann., § 233-20(4) (1986). This statute, which came into force in 1986, overrode the Supreme Judicial Court's refusal to recognize such a privilege in *Three Juveniles. Commonwealth*, 455 N.E. 2d 1203 (Mass. 1983). Two other States have a statutory parent-child privilege whereby parents cannot be required to reveal confidential communications from their children: Idaho Code §9-203(7) (1972); and Minn.Stat. §595.02(1)(j) (1996). In New York, a form of this privilege was created in *Re Application of A* 403 N.Y.S. 2d 375 (4th Dept. 1978). Although the court said that it was not

These relationships, too, are socially valuable, so what is it about marital harmony that entitles it to this special protection?<sup>46</sup>

I will consider how this question would be answered by proponents of three different approaches to marriage. The first is a functional approach; on this view, the Court would look to the functional characteristics of the relationship at issue to determine whether it was entitled to the protection of the rule of spousal incompetency. The second is a liberal, agency-oriented approach; this view seeks to understand marriage in terms of its value for individuals who have the capacity to form and pursue a conception of the good. The third is a post-modern or anti-essentialist approach, which suggests that marriage has no defining characteristics; “marriage” is just one more site for struggle between contested social meanings.

### A. *The Functional Approach*

The functional approach distinguishes quasi-marital relationships from other relationships by asking what functions marriage serves and what other relationships serve those same functions. The functional approach to determining “family status” appears to have been endorsed by L’Heureux-Dubé J. in her dissenting opinion in *Canada (A.G.) v. Mossop*.<sup>47</sup> Because she was applying a deferential standard of review in upholding the decision of a tribunal, rather than determining

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creating a privilege, it held that the right to privacy under the United States Constitution protected confidential communications from minor children to parents. For additional discussion, see “Privileged Communications,” *supra* note 44 at 1575-77.

<sup>46</sup>One commentator has proposed a general privilege which would protect “an individual’s right to participate in intimate relationships without governmental interference”: “Privileged Communications,” *supra* note 44 at 1589. The privilege would belong to the witness, not to the party to the action, and would extend to “the parent-child and other familial relationships, as well as ... [to] unmarried cohabitants, homosexual lovers, and ‘intimate’ friends”: at 1590. Full consideration of this proposal is beyond the scope of the present article; the reasons which I offer below for protecting marital relationships do not necessarily exclude protection for other relationships.

<sup>47</sup> [1993] 1 S.C.R. 554 [hereinafter *Mossop*]. *Mossop* was a review of a decision by the Canadian Human Rights Tribunal to recognize a same-sex relationship as a “family status” under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. L’Heureux-Dubé J. held that the standard of review to be applied was one of reasonableness, and that the decision was not patently unreasonable. She was thus not required to address the question of whether the decision was correct, and indeed she refrained from explicitly endorsing it: *ibid.* at 636. But her account of the functional approach is sufficiently elaborate and sympathetic that one suspects she agreed with it. Cory and McLachlin JJ. (dissenting), at 648-49, agreed with the majority that the standard of review should be correctness, but relied on L’Heureux-Dubé J.’s reasons in holding that the decision was correct. Their endorsement of the functional approach was thus more explicit than L’Heureux-Dubé J.’s.

the question for herself, it is difficult to isolate the precise factors that L'Heureux-Dubé J. would use in applying the functional approach, but they might include the following:

the existence of a relationship of some standing in terms of time and with the expectation of continuance, self-identification as a family, holding out to the public of the unit as a family, an emotional positive involvement, sexual union, raising and nurturing of children, caregiving to children or adults, shared housework, internal division of life-maintenance tasks, co-residence, joint ownership or joint use of property or goods, joint bank accounts, and naming of the other party as beneficiary of a life insurance policy.<sup>48</sup>

A more concise list of factors might include “economic cooperation, participation in domestic responsibilities, and affection between the parties.”<sup>49</sup>

If the functional approach is attached to the focus on enumerated and analogous grounds under section 15(1), then any extension of the rule of spousal incompetency is likely to stop at quasi-marital relationships. Cohabitation and same-sex relationships are functionally similar to legal marriage. There may be other sorts of relationships that are functionally similar to legal marriage, for example a relationship between siblings who are not sexually intimate but who live together, are economically interdependent, and raise children; but it seems unlikely that the siblings could point to any analogous ground of discrimination. In particular, the relationship between siblings has not been subject to historical disadvantage or stereotyping in the same way as the relationships between cohabitants or same-sex partners.<sup>50</sup> The absence of these factors, though not fatal to a section 15 claim, suggests that the courts would be slow to recognize these other relationships as possible candidates for the benefits of testimonial incompetency.

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<sup>48</sup> *Ibid.* at 637. L'Heureux-Dubé J. was here relying on the evidence presented by Dr. Margrit Eichler to the Tribunal.

<sup>49</sup> Note, “Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of the Family” (1991) 104 Harv. L. Rev. 1640 at 1646 [hereinafter “Looking for a Family Resemblance”]. For a functional approach to marriage, emphasizing not any particular benefits or burdens but the ability to “make a binding commitment to each other to act as a unit for many purposes”, see W.M. Hohengarten, “Same-Sex Marriage and the Right of Privacy” (1994) 103 Yale L.J. 1495 at 1498-1505.

<sup>50</sup> B. Berg, “Fumbling Towards Equality: Promise and Peril in *Egan*” (1995) 5 N.J.C.L. 263 at 274.

### B. *The Liberal Approach*

The functional approach has been criticized in two distinct ways. The first critique, advanced forcefully by Alice Woolley in the context of an argument for recognizing same-sex marriage,<sup>51</sup> argues that the functional approach does not adequately ground an understanding of marriage as a partnership between equals. Because the functional approach turns on the functions that marriage currently serves, it provides no secure right to women or to same-sex couples. This approach could, under different historical circumstances, serve to justify an argument that procreation decisively distinguishes heterosexual relationships from same-sex relationships,<sup>52</sup> or to justify a sexist regime based on the protection of women.<sup>53</sup>

This critique leads Woolley to argue for a conception of marriage rooted in a liberal idea of the person, which Woolley takes to be ahistorical and therefore non-contingent. This idea, found in both Kant and Hegel though in different forms, treats the person as having an abstract capacity to form and pursue a conception of the good.<sup>54</sup> For Kant, this idea leads to the familiar notion that legal and moral relations between people are subject to the principle that no one is to be treated only as a means. Kant then understands marriage as a form of preservation from sexual exploitation: in a sexual relationship there is always the possibility that one party will treat the other merely as a means to sexual gratification and not as an end in herself; marriage creates the possibility of sexual relations without exploitation.<sup>55</sup> Kant

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<sup>51</sup> A. Woolley, "Excluded by Definition: Same-Sex Couples and the Right to Marry" (1995) 45 U.T.L.J. 471.

<sup>52</sup> An argument of this sort is the basis of La Forest J.'s holding that distinguishing between heterosexual and same-sex couples is not "discrimination" under s. 15(1) of the *Charter: Egan v. Canada*, [1995] 2 S.C.R. 513 at 624-28 [hereinafter *Egan*].

<sup>53</sup> Woolley, *supra* note 51 at 481. As if to illustrate Woolley's point, Blackstone, *supra* note 2 at 433, concluded his chapter on marriage as follows: "even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England."

<sup>54</sup> Woolley, *supra* note 51 at 500-04. Rawls invokes a very similar notion of the person for political purposes. See J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1994) at 29-35.

<sup>55</sup> I. Kant, *The Metaphysics of Morals* trans. M. Gregor (Cambridge: Cambridge University Press, 1991) at 96-97; and Woolley, *supra* note 51 at 504-05. For another exposition of Kant's view on sex and marriage, see B. Herman, "Could It Be Worth Thinking About Kant on Sex and Marriage?" in L.M. Antony & C. Witt, eds., *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (Boulder, Colo.: Westview Press, 1993) 49 at 54-62. Where Woolley enthusiastically

himself, of course, regarded sexual acts between members of the same biological gender as “unmentionable vices” that must be “repudiated completely;”<sup>56</sup> but Woolley argues that recognition of same-sex marriage is not only consistent with but required by his understanding of marriage. Since Kant’s theory turns on the role of marriage in controlling the exploitation of sex, and since there is no reason to think that gay and lesbian sexual relationships are inherently more exploitative than heterosexual relationships, a contemporary Kant would have to recognize same-sex marriage.<sup>57</sup>

Woolley then turns to Hegel’s analysis of marriage, which begins similarly but ends up differently from Kant’s. Hegel’s starting point<sup>58</sup> is a very abstract notion of a person as a will that can have no objective other than to realize itself in itself.<sup>59</sup> Woolley argues that this notion leads Hegel to understand marriage as “aimed at ... the individual’s self-realization and attaining of self-consciousness through unity with another.”<sup>60</sup> Hegel saw marriage as the union of “free universality” with “concrete individuality;” but he understood these terms as essentially gendered, with the man representing the former and the woman the latter.<sup>61</sup> Woolley notes that there is no reason to identify these

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invokes Kant as offering a firm foundation for same-sex marriage, Herman’s use of Kant is almost apologetic; she argues at 50 that Kant, despite “his misogyny, his disdain for the body, and his unhappy status as the modern moral philosopher feminists find most objectionable,” may have something useful to say about sex and marriage. For a non-instrumental argument against same-sex marriage, see R.P. George & G.V. Bradley, “Marriage and the Liberal Imagination” (1996) 84 *Geo. L.J.* 301 (arguing that any sex acts other than “reproductive-type acts” between married persons are inherently exploitative because they use persons only as means to pleasure).

<sup>56</sup> Kant, *supra* note 55 at 96.

<sup>57</sup> Woolley, *supra* note 51 at 509. See also Herman, *supra* note 55 at 66 n. 22:

Since on Kant’s account the moral difficulty is with sexuality *per se* and not male-female sex (he would see gender domination as a contingent function of strength made possible by the objectification inherent in sexual relations), same-sex relationships would also be possible only with marriage. And since Kant does not hold that the State has an interest in sexual activity because or only when it is procreative ..., there is also no conceptual barrier to same-sex marriage and a strong argument for it.

<sup>58</sup> In a fully specified Hegelian argument, one starting point is as good as another because of the dialectical relationship between different stages of an argument: see C. Taylor, *Hegel* (Cambridge: Cambridge University Press, 1975) at 139-40. My purpose here is not to explicate the dialectic but to sketch Woolley’s understanding of Hegel, and in particular to draw attention to the importance of the idea of personhood in Woolley’s analysis.

<sup>59</sup> G.W.F. Hegel, *Philosophy of Right* trans. T.M. Knox (Oxford: Oxford University Press, 1952), paras. 5-28.

<sup>60</sup> Woolley, *supra* note 51 at 505.

<sup>61</sup> Hegel, *supra* note 59, para. 166.

characteristics with biological genders, and presents a non-gendered version of Hegel's argument:

The ability to find unity in another person has intuitive appeal but not ... because there are two basic types or characteristics of persons. Rather, it is the fact that one person with her own desires, inclinations, and rationality recognizes another person with his own and different set of desires, inclinations, and rationality and, through uniting her will with his, attains self-consciousness.<sup>62</sup>

This version of Hegel is non-gendered in two ways: first, personality type is not identified with biological gender, and second, the two persons who seek unity in this Hegelian manner need not be of opposite gender. Thus, Woolley argues, same-sex marriage is consistent with Hegel's theory of marriage.

Woolley endorses neither Kant's nor Hegel's theory of marriage; instead, she draws from them the following lesson: "the solution to the problem of who, in law, should be included within the concept of family lies in an abstract and universal understanding of the individual and of that individual's capacity to pursue a conception of the good."<sup>63</sup> Different analysts will, of course, draw different conclusions about the family from this conception, but it is hard to see how any analysis could exclude same-sex couples from the concept of "family."

Woolley's liberal, agency-oriented analysis of marriage has two important implications for spousal competency.<sup>64</sup> First, it provides a reason for distinguishing marital and quasi-marital relationships from others. If marriage is rooted in a very abstract notion of what it is to be a person and is valued "[e]ither because it is necessary to ensure that [one] is not made a means to the sexual gratification of another, or because it is the site of her self-realization,"<sup>65</sup> it is entitled to more significant forms of protection than other relationships. The protection offered by the rule of spousal incompetency is particularly appropriate for the Hegelian conception of marriage, in that it prevents those who have chosen to seek self-realization in each other from being turned against each other. Second, it reinforces the point that there is no reason to distinguish between legal marriage, cohabitation, and same-sex

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<sup>62</sup> Woolley, *supra* note 51 at 519.

<sup>63</sup> *Ibid.* at 523.

<sup>64</sup> Woolley does not directly address the question of whether her approach to marriage requires the state to provide certain benefits to married couples: *ibid.* at 474.

<sup>65</sup> *Ibid.* at 522.

relationships: these are all vehicles through which persons may seek self-realization.<sup>66</sup>

### C. *The Post-Modern Approach*

The second major critique of the functional approach seeks not to ground but to uproot the concept of marriage. The post-modern or anti-essentialist approach to marriage suggests that marriage has no essential characteristics, and that it would therefore be a mistake to take heterosexual wedlock as the paradigm of functionality. The functionalist mistake, on this view, is both strategic and conceptual. The strategic mistake is that by taking heterosexual wedlock as the model to which other relationships must demonstrate similarity, persons seeking recognition for other types of intimate relationships will face an uphill battle: the more unusual the relationship, the steeper the hill. We will see this problem in the minority's decision in *Egan*: La Forest J.'s invocation of procreation as the central functional value of marriage made it impossible for him to recognize same-sex relationships as functionally similar to heterosexual relationships.<sup>67</sup> Similarly, one commentator has pointed to American cases where same-sex relationships were denied recognition because of fairly trivial departures from the paradigm of heterosexual wedlock.<sup>68</sup> I will leave the strategic problem aside, because it is more properly in the domain of those who are actively pursuing litigation strategies.<sup>69</sup>

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<sup>66</sup> Kant argued, *supra* note 55 at 96-98, that legal marriage is required to ensure that one does not become a mere means to another's sexual gratification. Woolley disagrees, *supra* note 51 at 505 n. 106, though without elaboration.

<sup>67</sup> See Part IV-C, below.

<sup>68</sup> "Looking for a Family Resemblance," *supra* note 49 at 1654.

<sup>69</sup> For a thorough discussion of the strategic element of this critique, see B. Cossman, "Family Inside/Out" (1994) 44 U.T.L.J. 1. Cossman notes, at 8-10, that the strategy of defining same-sex couples as families threatens to submerge the ways in which same-sex relationships are different from heterosexual relations, and in particular, to the extent the heterosexual family is an oppressive institution, same-sex couples will not want to adopt it as a model. See also N.D. Polikoff, "We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not 'Dismantle the Legal Structure of Gender in Every Marriage'" (1993) 79 Va. L. Rev. 1535 at 1536. But, at the same time, to insist that same-sex couples are not families may play into the hands of those who seek to continue the oppression of lesbians and gay men: Cossman at 38. She therefore suggests that neither strategy should be rejected outright. For a strategic argument against making the right to marry the focus of efforts by same-sex couples, see N. Duclos, "Some Complicating Thoughts on Same-Sex Marriage" (1991) 1 Law & Sexuality 31. Duclos argues at 60 that although same-sex marriage would bring some benefits to some lesbians and gay men, the overall effect is sufficiently unclear that seeking a "gradual accumulation of small gains" through litigation and legislative

The second functionalist mistake, according to the post-modern approach, is a conceptual one. The conceptual critique of functionalism is on its face more radical, yet has a potential for conservatism. The argument goes something like this.<sup>70</sup> There is no “essence” to human institutions, and in particular no “essence” to marriage, to cohabitation, or to gay and lesbian identity. All identities, sexual and otherwise, are constructed through discursive social practices, practices which have been and largely remain patriarchal and homophobic. In this context, for same-sex couples to buy into the heterosexual standard of marriage would not simply be a strategic mistake possibly making them worse off, it would misconceive what same-sex couples really ought to be after. Because social identities are constructed, we are free to define same-sex relationships any way we want to, and we should draw on the experiences of gay men and lesbians to seek a sense of what they want and what they need. No overarching definition of what same-sex relationships, or any other relationships, should look like will emerge from this process; instead, we “try[] to identify some common concerns of different groups that emerge from their many differences and to direct reform efforts in those directions.”<sup>71</sup> A more sweeping version of this argument suggests that the rights and benefits that same-sex couples are seeking through legal recognition of their relationships should be available to all regardless of the status of their intimate relationships.<sup>72</sup> On this view, the right strategy is not to litigate about spousal benefits at all, but to seek change on a larger political scale.

Arguments of this sort are generally presented as liberatory: realizing that existing institutions are not natural but are constructed, not neutral but in the service of someone’s interest, should free one to create institutions that, though no more natural, would be better in that they would be more inclusive, more responsive to experience, more aware of their own partiality. But if identities are socially constructed and the issue is who has the power to construct them, then there is no reason to suppose that those who oppose the recognition of same-sex relationships, indeed those who would persecute gay men and lesbians

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reform is a wiser strategy. For a response to the strategic critique, see W.N. Eskridge, *The Case for Same-Sex Marriage* (New York: The Free Press, 1996) at 51-75.

<sup>70</sup> In summarizing this argument, I have drawn on Duclos, *supra* note 69 at 35-41; Cossman, *supra* note 69 at 13-21; J. Freeman, “Defining family in *Mossop v. DSS: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation*” (1994) 44 U.T.L.J. 41 at 63-74; and C. Weedon, *Feminist Practice and Poststructuralist Theory* (Oxford: Basil Blackwell, 1987) at 12-42.

<sup>71</sup> Duclos, *supra* note 69 at 39; see also Cossman, *supra* note 69 at 36-37.

<sup>72</sup> Polikoff, *supra* note 69 at 1549.

generally, will not be the ones who will succeed in constructing sexual identity in a way that entirely excludes same-sex relationships from public life.<sup>73</sup> Unless one argues, much as Lukács did for the industrial proletariat,<sup>74</sup> that the experience of oppression guarantees both insight into the truth about society and eventual accession to power, the anti-essentialist insight guarantees no liberation.

But to be aware of the dangers or the imperfect promises of post-modernism is not necessarily to become an essentialist about the family, or, worse, to argue that heterosexual wedlock is the norm. It is quite possible to remain agnostic about what the family is, while drawing on experience and pursuing specific objectives that will benefit people in relationships that are not yet legally equivalent to marriage.<sup>75</sup> From this rather modest perspective, there is a great deal to be said for including cohabitation and same-sex relationships within the scope of the protection of spousal incompetency. Regardless of the precise definition of marriage or family, regardless of the precise set of benefits that should attach to it, there is no rule of evidence that disadvantages cohabitants and same-sex couples, as compared with legally married couples, as much as the rule of spousal incompetency.

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<sup>73</sup> N. Hartsock, "Rethinking Modernism: Minority vs. Majority Theories" (1987) 7 *Cultural Critique* 187 (arguing that post-modernism is strategically dangerous for marginalized groups). See also Woolley, *supra* note 51 at 499:

What response can the anti-essentialist make to a court which does not believe that homosexual relationships count in our definition of marriage? The judge, as a perceiver of society, can claim as much authority to identify the definition of marriage as the anti-essentialist. The anti-essentialist can claim that the particular judge has failed to appreciate the complexity of our society, but cannot point to a universal principle which makes this failure of appreciation an error.

See also K.A. Appiah, "The Marrying Kind" (1996) 43:8 *New York Review of Books* 48 at 50 (arguing that certain radical gay practices such as "outing" cannot be understood as post-modern because they presuppose an essentialist understanding of gay identity). For a perspective on post-modernist analysis emphasizing its inability to offer liberation, see S. Fish, *Doing What Comes Naturally* (Durham, N.C.: Duke University Press, 1989); and S. Fish, *There's No Such Thing As Free Speech And It's A Good Thing Too* (New York: Oxford University Press, 1993) (arguing that post-modernism has no implications for politics or anything else).

<sup>74</sup> G. Lukács, *History and Class Consciousness* trans. R. Livingston (Cambridge, Mass.: M.I.T. Press, 1971) at 68-69 and 209.

<sup>75</sup> This is the strategy recommended by Duclos, *supra* note 69 at 59-60, and by Freeman, *supra* note 70 at 80-83. For a philosophical account of truth which, though not evidently post-modern, would be consistent with this sort of strategy, see C. Misak, *Truth and the End of Inquiry* (Oxford: Oxford University Press, 1991); and C. Misak, "Pragmatism and the Transcendental Turn in Truth and Ethics" (1994) 30 *Transactions of the Charles S. Peirce Society* 739.

*D. The Relationships Protected by the Rule of Spousal Incompetency*

The functionalist and the liberal approaches to marriage offer cogent reasons for treating marriage differently from other relationships: within these approaches, there is something distinctive about marriage as a vehicle for the pursuit of certain interests. Further, the functionalist and the liberal approaches offer no reasons for distinguishing between legally married couples on the one hand, and cohabitants and same-sex partners on the other; indeed, the functionalist approach is often invoked precisely for the purpose of bringing some sort of equality to these relationships. In contrast, the post-modern approach offers no reasons for distinguishing, or not distinguishing, marriage and quasi-marital relationships from each other or from other relationships; at most, it seems to recommend a strategy of continual redefinition of identity.

Thus, in order to make the argument that the benefits of spousal incompetency should not extend beyond legally married couples, cohabitants, and same-sex relationships, one would have to be satisfied that either the functional or the liberal view of the family was correct, and that the correct view offered a plausible reason for this limitation. But that is not the argument I have undertaken in this article. I am concerned, first, to show that the *Charter* implies that the rule of spousal incompetency, whatever its shape, should apply equally to legally married couples, cohabitants, and same-sex partners; and, second, to explore the *Charter* arguments for *restricting* the scope of the rule. Neither of these arguments precludes the possibility that evidentiary protections should be available to other relationships as well. I now turn to the specification of the *Charter* arguments for my first position.

## IV. EXTENDING THE RULE

Persons in an intimate relationship—such as cohabitation, same-sex partnership, or indeed some other domestic arrangement—are not, according to existing doctrine, entitled to the protection of the rule of spousal incompetency. In this Part, I consider an argument based on section 15(1) of the *Charter* for expanding the scope of the rule.

### A. *Spousal Benefits and the Charter*

In *Egan*<sup>76</sup> and *Miron*,<sup>77</sup> the Supreme Court has considered the question of whether the *Charter* permits certain benefits provided to participants in certain intimate relationships to be denied to others. In the aftermath of these cases, it is going to be very difficult for the state to justify a refusal to extend the benefits of legal marriage to cohabitants, and while it may appear to be somewhat easier to justify refusal to extend benefits to same-sex couples, there is no principled reason for this refusal. In the remainder of this part of the article, I argue that the holdings in *Egan* and *Miron* support the extension of the rule of spousal incompetency to cohabitants and to same-sex couples.<sup>78</sup>

### B. *The Decision in Miron*

Miron and Valliere had lived together in what the court described as a “common law relationship” for four years. They had two children. There is no doubt that they would be considered “spouses” under Part III of the Ontario *Family Law Act*<sup>79</sup> for the purposes of triggering support obligations (though this issue was not before the court). In August 1987, Miron was a passenger in a vehicle driven by Trudel. Trudel’s vehicle was involved in an accident with a vehicle driven by McIsaac, and Miron was injured. Neither driver was insured. Miron therefore claimed benefits for loss of income and damages

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<sup>76</sup> *Supra* note 52.

<sup>77</sup> *Supra* note 31.

<sup>78</sup> As a preliminary matter, it should be noted that the common law origin of the rule of spousal incompetency is no bar to a *Charter* attack. Where the state invokes a common law rule as the basis for some action which engages the interests protected by the *Charter*, that common law rule can plainly be challenged under the *Charter*: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 599 [hereinafter *Dolphin Delivery*]. Thus, for instance, where the Crown invokes a procedural or substantive common law rule in the course of a trial, the rule may be challenged by the accused: *R. v. Swain*, [1991] 1 S.C.R. 933 (*Charter* challenge to a common law procedure permitting the Crown to raise the issue of the accused’s insanity); and *R. v. Daviault*, [1994] 3 S.C.R. 63 (*Charter* challenge to the substantive common law rule that self-induced intoxication, even when it puts the accused in a state akin to automatism, is not a defence to crimes of general intent). Further, the accused has the right to challenge the competency of any witness that the Crown produces against him. So, where the Crown seeks to compel a cohabitant or same-sex partner of an accused person to testify, either that person or the accused himself may challenge the common law restriction of the benefit of spousal incompetency to legally married spouses.

<sup>79</sup> *Supra* note 11.

pursuant to the uninsured motorist coverage from Valliere's insurer.<sup>80</sup> These particular terms of the policy were determined by statute and regulation,<sup>81</sup> and made the benefits in question available to the "spouse" of the insured. The term "spouse" was not defined, but a majority of the court concluded that it referred to legally married spouses.<sup>82</sup>

Miron therefore submitted that the limitation of benefits to legally married couples violated section 15 of the *Charter*. His argument succeeded by a 5-4 majority. McLachlin J. (Sopinka, Cory, and Iacobucci JJ. concurring) held that marital status was a ground of distinction analogous to those listed in section 15.<sup>83</sup> Although cohabitants may not easily fit the description of a "discrete and insular minority," that language was only one tool for determining whether a given basis of distinction was an analogous ground:

The fundamental question is whether [a particular group] characteristic may serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual?<sup>84</sup>

Marital status was just such a basis of distinction. To discriminate on this basis is to violate human dignity by impinging on "a matter of defining importance to individuals": "the ... freedom to live life with the mate of one's choice in the fashion of one's choice."<sup>85</sup> Further, even if cohabitants are not a "discrete and insular minority," they have historically suffered various forms of discrimination, "rang[ing] from social ostracism through denial of status and benefits."<sup>86</sup> Finally, although it is true in theory that cohabitants can change their status by becoming legally married, various constraints often operate to prevent

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<sup>80</sup> The facts are based on Gonthier J.'s presentation: *Miron*, *supra* note 31 at 430.

<sup>81</sup> *Insurance Act* *supra* note 31, ss. 231, 233, Sch. C; and R.R.O. 1980, Reg. 535.

<sup>82</sup> Eight members of the court adopted this interpretation: *Miron*, *supra* note 31 at 482-83, McLachlin J. (Sopinka, Cory, and Iacobucci JJ. concurring), and at 433, Gonthier J. (Lamer C.J., La Forest, and Major JJ., dissenting). At 465 L'Heureux-Dubé J. (concurring) assumed the point without deciding it.

<sup>83</sup> *Ibid.* at 465. L'Heureux-Dubé J. provided the fifth vote to sustain Miron's claim. Although the structure of her s. 15 analysis differed from McLachlin J.'s, when she applied that structure to the facts of the case, she relied on many of the same considerations as McLachlin J.

<sup>84</sup> *Ibid.* at 495.

<sup>85</sup> *Ibid.* at 497, McLachlin J.; see also *ibid.* at 471-75, L'Heureux-Dubé J. (concurring).

<sup>86</sup> *Ibid.* at 498, McLachlin J.; see also *ibid.* at 469-71, L'Heureux-Dubé J. (concurring).

legal marriage, even where one or both cohabitants desires it.<sup>87</sup> Thus, marital status is a ground analogous to those enumerated in section 15(1).<sup>88</sup>

The next step was to determine whether the distinction created by the statute was discriminatory. McLachlin J. noted the declining legal importance of the difference between legally married and cohabiting couples, particularly with respect to support obligations, and concluded that there was no justification for the distinction. Therefore, the distinction was discriminatory.<sup>89</sup>

Following these holdings, it is difficult to see how the discriminatory denial of benefits could be justified under section 1. The state was able to demonstrate a pressing and substantial objective: “to sustain families when one of their members is injured in an automobile accident.”<sup>90</sup> But the discriminatory distinction was not a “reasonably relevant marker” for limiting benefits to serve this purpose: it was neither rationally connected to the purpose of the legislation nor the minimally impairing method of achieving the legislation’s purpose.<sup>91</sup> The restriction of benefits to the legally married was thus unconstitutional; the appropriate remedy was to “read up” the legislation, using the definition of “spouse” which was actually incorporated by the legislature in 1990, three years after the facts of *Miron* arose, and which included cohabitants.<sup>92</sup>

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<sup>87</sup> *Ibid.* at 498, McLachlin J.; see also *ibid.* at 473-74, L’Heureux-Dubé J. (concurring).

<sup>88</sup> *Ibid.* at 499-500.

<sup>89</sup> *Ibid.* at 500-02. L’Heureux-Dubé J. had a somewhat different reason for finding discrimination. In her view, at 476, “the value of this interest [the adverse economic impact resulting from the distinction] in constitutional terms is limited, and ... this distinction does not restrict access in any meaningful way to any fundamental social institution.” More important, in her opinion, was the potential for this distinction to “promot[e] or perpetuat[e] a view amongst persons in relationships analogous to marriage that they are less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration”: *ibid.* at 477. These considerations flow from L’Heureux-Dubé J.’s view that s. 15 analysis should proceed by looking at the impact of the legislative distinction on society’s view of the affected individuals’ dignity and worth.

<sup>90</sup> *Ibid.* at 503; and at 477-78, L’Heureux-Dubé J. (concurring).

<sup>91</sup> *Ibid.* at 504-07. L’Heureux-Dubé J. held at 479 that the distinction was simply not rationally connected to the purpose of the legislation: “as of August, 1987, common law spouses in Ontario were ... bound by an obligation of mutual support yet were excluded from a Standard Automobile Policy whose basic purpose was almost inextricably related to that mutual obligation and to the relationship of interdependency upon which that obligation is premised.”

<sup>92</sup> *Ibid.* at 508-10. The definition of “spouse” was amended by S.O. 1990, c. 2, s. 56. See *Insurance Act* R.S.O. 1990, c. I.8, s. 224.

The essence of Gonthier J.'s dissent, concurred in by Lamer C.J., La Forest, and Major JJ., was that, even if marital status was analogous to the grounds enumerated in section 15(1), the distinction imposed by the statute was not discriminatory. Despite the support obligations imposed by statute on married couples and cohabitants alike, Gonthier J. held that married couples and cohabitants did not have the same support obligations.<sup>93</sup> It was thus not improper for the legislature to distinguish between them, particularly since the function of the legislation at issue was to provide economic support in case of injury.<sup>94</sup>

It is submitted that a section 1 justification of a discriminatory denial of benefits is even more difficult than the court in *Miron* assumed. The focus in a section 1 analysis should be on the *limitation* of the right: the question should be whether the *limitation* serves a pressing and substantial objective, whether the *limitation* is rationally connected to that objective, and so forth through the other stages of the *Oakes* test.<sup>95</sup> As McLachlin J. put it in *RJR-MacDonald Ltd. v. Canada (A.G.)*, “[t]he objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified.”<sup>96</sup> The limitation in *Miron* is the failure of the statute to provide the benefits at issue to cohabitants as well as to legally married couples. Given the conclusion in the section 15 analysis that this failure is irrational, *i.e.*, that the distinction between cohabitants and married couples has no functional basis, it is hard to see how the state could satisfy any of the steps of the *Oakes* test.<sup>97</sup>

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<sup>93</sup> *Ibid.* at 458-61, Gonthier J. (dissenting).

<sup>94</sup> *Ibid.* at 461-65.

<sup>95</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-140 [hereinafter *Oakes*]. In order to justify a limit on a Charter right, the state must first point to an objective that is sufficiently pressing and substantial. The limitation must then pass a three-step proportionality test: the limit must be rationally connected to the objective; the limit must be the least rights-impairing method of achieving the objective; and the deleterious effects of the limit on the right must not be disproportionate to the beneficial effects of achieving the objective.

<sup>96</sup> [1995] 3 S.C.R. 199 at 335 [hereinafter *RJR-MacDonald*] [emphasis in original]. See also *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 722 [hereinafter *Schachter*] (distinguishing between the purpose of the unemployment insurance scheme as a whole, and the purpose of a violation of s. 15(1) of the Charter within that scheme).

<sup>97</sup> Gonthier J. (dissenting) distinguished carefully between the rationality of a distinction under s. 15(1), and the possible justification under s. 1 of a distinction that infringed s. 15(1). He described the first as a question of “*relevance*” and the second as a question of “*reasonableness*” *Miron*, *supra* note 31 at 444 [emphasis in original]. “[E]ven where a distinction is based on an irrelevant personal characteristic, and is therefore discriminatory, it is still possible for the discrimination to be rationally connected to a pressing and substantial government objective”: at 444. But he noted, at 447, “that there may indeed be significant overlap between the assessment of

But in *Miron*, McLachlin J. approached the section 1 question by looking to the purpose of the *legislation* rather than the purpose of the *limitation on the right*<sup>98</sup>. She thus enabled the government to argue that the beneficial purposes of the legislative scheme as a whole were relevant to a section 1 justification of the particular part of the scheme that infringed section 15(1) of the *Charter*. While it is surely the case that the purpose of a legislative scheme can assist in understanding the pressing and substantial objective of an infringing part of that scheme, it is submitted that this approach has no place in the later stages of the *Oakes* test. Consider, for instance, the minimal impairment branch of the test, where the question is whether the infringement of the right impairs the right as little as possible, taking the pressing and substantial objective as a given.<sup>99</sup> If the pressing and substantial objective is taken to be the objective of the *legislation*, then virtually any infringement can be shown to have its place in the scheme and thus be justified; but if the pressing and substantial objective is taken to be the objective of the *limitation*, then the state is faced with the more difficult task of justifying the particular limitation in terms of the effects of that limitation on the purposes of the legislation and on the rights of individuals itself. Thus in *Miron*, once the court had determined that it was discriminatory not to provide the benefit in question to both married couples and cohabitants, it would be very hard for the state to argue that the limitation had any beneficial effects on the objectives of the legislation to weigh against its deleterious effects on rights.

In any event, the result of *Miron* is that the failure to provide a benefit, particularly a benefit related to economic support, equally to

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the functional values of the legislation under s. 15, and the purpose of the legislation under s. 1.” Further, the case he cited to illustrate the point is *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, which is not concerned with the provision of a benefit. It is submitted that in benefits cases, there will be an almost perfect overlap between the “functional values” under s. 15(1) and the pressing and substantial purpose of the legislation under s. 1, such that a finding of discrimination will exclude the possibility that the irrational limitation of benefits to one group rather than another will have a pressing and substantial objective.

<sup>98</sup> Hogg notes that a legislative objective “can be expressed at various levels of generality”: P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 868. On this view, McLachlin J. in *Miron*, *supra* note 31 was working at a high level of generality and McLachlin J. in *RJR-MacDonald* *supra* note 95, was working at a lower level of generality, so that the infringement was more difficult to justify in the latter case. Hogg suggests, at 868, that “[t]here is no logical or factual basis for preferring one version of the law’s objective to the other.” With respect, it seems to me that something more can be said. By focusing on the objective of the limitation, rather than the objective of the legislative scheme as a whole, one can at least narrow the range of possible pressing and substantial objectives that the state can put forward; one can insist that the pressing and substantial objective have something to do with the limitation on the right.

<sup>99</sup> *Oakes*, *supra* note 95 at 139.

legally married couples and cohabitants will likely violate section 15(1) and will be difficult to justify under section 1.

### C. *The Decision in Egan*

Egan and Nesbit lived for thirty-eight years in an intimate, same-sex relationship marked by commitment and interdependence similar to that which one expects to find in a marriage. When Egan turned 65, he began to receive various benefits under the *Old Age Security Act*<sup>100</sup> when Nesbit turned 60, he applied for a spousal allowance under section 19(1) of the *OAS*. This allowance is designed to enhance the income of a couple when one member is receiving *OAS* benefits, but the other is not yet eligible for the benefits that begin to flow at the age of 65. There is no doubt that if Nesbit had been a woman, he would have been eligible for the spousal allowance;<sup>101</sup> section 2 of the *OAS* defines “spouse” to include not only a legally married spouse, but also a cohabitant who has lived with the person for “at least one year,” provided that the two “have publicly represented themselves as husband and wife.” Thus, the only bar to Nesbit’s receipt of a spousal allowance was the fact that his relationship with Egan was a same-sex relationship. He challenged this distinction under section 15 of the *Charter*.

The court unanimously accepted Egan and Nesbit’s submission that sexual orientation is a ground of distinction analogous to those enumerated in section 15(1).<sup>102</sup> The question, then, was whether the distinction was discriminatory. The court split 5-4 in Egan and Nesbit’s favour. The majority on this point<sup>103</sup> held that “the distinction is related

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<sup>100</sup> *Old Age Security Act* R.S.C. 1985, c. O-9 [hereinafter *OAS*].

<sup>101</sup> *Egan*, *supra* note 52 at 598, Cory J. (dissenting).

<sup>102</sup> *Ibid.* at 528-29, La Forest J. (Lamer C.J., Gonthier, and Major JJ. concurring); at 599-603 (Cory and Iacobucci JJ. dissenting). McLachlin J. (dissenting) expressed at 625 “substantial agreement” with Cory and Iacobucci JJ. L’Heureux-Dubé J. (dissenting), at 566, preferred not to speak of “enumerated and analogous grounds,” but had no hesitation in saying that “the impugned distinction excludes the rights claimants because they are homosexual.”

<sup>103</sup> The lead judgment on this point was co-authored by Cory and Iacobucci JJ., with Cory J. being given credit for this portion of the reasons. Sopinka J. agreed with Cory J. on this point, *ibid.* at 572, while McLachlin J. expressed “substantial agreement” with Cory and Iacobucci JJ., at 625. L’Heureux-Dubé J., at 566, analyzed the discrimination claim under s. 15(1) somewhat differently, focusing on whether “the distinction is one which is capable of either promoting or perpetuating a view that the appellants Egan and Nesbit are, by virtue of their homosexuality, less capable or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.” In concluding that the distinction was discriminatory in this sense, she referred, at 567, to many of the same considerations as Cory J.:

to the personal characteristic of sexual orientation.” While not all homosexuals would form a same-sex relationship, “[i]t is the sexual orientation of the individuals involved which leads to the formation of the homosexual couple.”<sup>104</sup> Given that sexual orientation was an analogous ground, and absent a reason to distinguish between same-sex and legally married couples, the only effect of the distinction was to “reinforce[] the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples.”<sup>105</sup> The distinction was therefore discriminatory.

The minority on this point<sup>106</sup> found a reason for the distinction. Although sexual orientation was an analogous ground, distinguishing same-sex couples from legally married couples and cohabitants was not discriminatory because “marriage is by nature heterosexual.”<sup>107</sup> Specifically, the heterosexual couple “is the social unit that uniquely has the capacity to procreate children and generally cares for their upbringing, and as such warrants support by Parliament to meet its needs.”<sup>108</sup> There was therefore no discrimination in failing to extend the benefit at issue to Egan and Nesbit; “[h]omosexual couples are not ... discriminated against; they are simply included with ... other couples”<sup>109</sup> such as “brothers and sisters or other relatives, regardless of sex, and others who are not related, whatever reasons these other couples may have for doing so [cohabitating] and whatever their sexual orientation.”<sup>110</sup>

I will leave to others the task of providing a detailed refutation of La Forest J.’s reasons.<sup>111</sup> It is sufficient for my purpose to note that the purported distinction between same-sex and heterosexual couples is

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same-sex couples were vulnerable and had “suffered considerable historical disadvantage;” sexual orientation was “possibly biological and ... at the very least a fundamental choice;” and the legislation conveyed the message that same-sex relationships were “less worthy of respect, concern and consideration” than heterosexual relationships.

<sup>104</sup> *Ibid.* at 598.

<sup>105</sup> *Ibid.* at 604.

<sup>106</sup> *Ibid.* at 536, La Forest J. (Lamer C.J., Gonthier, and Major JJ. concurring).

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.* at 537 [emphasis in original].

<sup>109</sup> *Ibid.* at 539.

<sup>110</sup> *Ibid.* at 535.

<sup>111</sup> For an early response, emphasizing the irrelevance of child-bearing or child-rearing to the legislative scheme in question, see Berg, *supra* note 50.

implausible on its own terms.<sup>112</sup> Same-sex couples can and do raise children in the stable and caring manner that concerns La Forest J.; so can single men and single women; and, as La Forest J. himself notes, so can other units (*e.g.*, a parent and a grandparent). If the concern is about procreating rather than about raising children, one may observe that single women and lesbian couples can and do procreate through alternative insemination; in any event, it is difficult to see why the short-term biological function of procreation should be more significant in this context than the long-term social process of raising a child.<sup>113</sup> Thus, it is certainly not the case that the heterosexual family unit is “uniquely” capable of creating children,<sup>114</sup> and although it remains statistically true that heterosexual couples “generally” care for their upbringing,<sup>115</sup> it is hard to see why this statistical fact should justify the type of distinction that is at issue in *Egan*. Further, La Forest J. does not point to any characteristic of same-sex couples that makes them less fit to raise children than heterosexual couples. Thus, even if the ability to create and to raise children is relevant to the treatment of intimate relationships, which is doubtful given that the benefit at issue is related to retirement and not to child-rearing, La Forest J.’s reasons do not demonstrate how this ability is relevant to the distinction between heterosexual and same-sex couples.

While there was a 5-4 majority for Egan and Nesbit on the section 15(1) issue, a differently constituted 5-4 majority, speaking through Sopinka J., held that the infringement of section 15(1) was

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<sup>112</sup> The points I make here are familiar; see, for example, Woolley, *supra* note 51 at 480; Hohengarten, *supra* note 49 at 1513-23; Eskridge, *supra* note 69 at 96-110; and Mossop, *supra* note 47 at 631-34, L’Heureux-Dubé J. (dissenting).

<sup>113</sup> Hohengarten, *supra* note 49 at 1518-23.

<sup>114</sup> It is still the case that one needs sperm, which comes from a man, and an ovum, which comes from a woman, to create a child; but one does not need the heterosexual family unit, as a social institution, to create a child. Compare *ibid.* at 1519.

<sup>115</sup> For a brief discussion of this issue, see M. Eichler, *Families in Canada Today*, 2d ed. (Toronto: Gage, 1988) at 14-16 and 227-79. More recent data indicate that the traditional family unit of a married couple with children now accounts for 45 per cent of Canadian families. (Of these, 90 per cent are families in which the children are the biological or adoptive offspring of the couple.) Lone-parent families now account for 14 per cent of the total number of families: Statistics Canada, *The Daily* (19 June 1996). (*The Daily* is no longer released in paper form, but is available on the Internet at <http://www.statcan.ca/Daily/English/today/daily.htm>.) The definition of the family used by Statistics Canada does not include same-sex partnerships; same-sex partnerships with children are presumably included in the category of lone-parent family.

justified under section 1.<sup>116</sup> Sopinka J.'s approach to section 1 was, to say the least, "novel."<sup>117</sup> He took the objective of the legislation to be "alleviation of poverty of elderly spouses."<sup>118</sup> This objective is surely pressing and substantial, and thus arguably enables the limitation to pass the first stage of the *Oakes* test. But, as argued above,<sup>119</sup> at the subsequent stages of the *Oakes* test, it is necessary to focus on the limitation on the right, to see how that limitation serves the objective. Sopinka J. instead looked at the history of the legislation, noting its extension to couples other than legally married couples and accepting the government's hint that the legislation might one day be extended to same-sex couples. He noted further that the legislation was a mediation between the interests of different groups, and that extending the benefit at issue in this case would have implications for "the benefits contained in some 50 federal statutes."<sup>120</sup> These considerations persuaded him that the *legislation*, when looked at as a whole, was rationally connected, minimally impairing, and proportional. But he did not examine the question of whether the *limitation* of the benefit to heterosexual couples was rationally connected to the objective, minimally impairing of the equality right, and proportional to the detriment to that right. Finally, in a puzzling move, Sopinka J. appears to have held that the fact that sexual orientation has only been recently identified as an analogous ground is somehow relevant to a section 1 justification: "I am not prepared to say that by its inaction to date [in not extending the benefit], the government has disintitiled itself to rely on s. 1 of the *Charter*."<sup>121</sup> As L'Heureux-Dubé J. put it, "permit[ting] the novelty of the appellants' claim to be a basis for justifying discrimination" is surely antithetical to the spirit of the *Charter*.<sup>122</sup>

Iacobucci J., speaking for the minority on the section 1 issue, agreed with Sopinka J. as to the purpose of the legislation as a whole,

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<sup>116</sup> Sopinka J., who agreed in *Egan, supra* note 52 at 572-77, that s. 15(1) was infringed, held that the infringement was justified under s. 1. He was joined by La Forest J. (Lamer C.J., Gonthier, and Major J.J. concurring), who had held at 539-40 that s. 15(1) was not infringed, but who agreed with Sopinka J.'s reasons under s. 1.

<sup>117</sup> *Ibid.* at 571, L'Heureux-Dubé J. (dissenting).

<sup>118</sup> *Ibid.* at 574.

<sup>119</sup> *Supra* notes 94-98 and accompanying text.

<sup>120</sup> *Egan, supra* note 52 at 576.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.* at 572, L'Heureux-Dubé J. (dissenting); see also *ibid.* at 618-19, Iacobucci J. (dissenting).

but held that the limitation on the section 15(1) right passed none of the three steps in the proportionality test. Given the holding under section 15(1) that there was no reason to distinguish between heterosexual and same-sex couples, the lack of rational connection was immediately apparent:

The exclusion of same-sex partners is simply not rationally connected to the goal of alleviating poverty among elderly couples. If there is an intention to ameliorate the position of a group, it cannot be considered entirely rational to assist only a portion of that group. A more rationally connected end would be to assist the entire group, as that is the very objective which is sought.<sup>123</sup>

On the question of minimal impairment, the government sought to rely on a provincial benefit that Nesbit had received but would not have been entitled to if he had been a “spouse” under the *OAS*. Iacobucci J. held that this benefit had no real connection to the federal scheme at issue and that, in any event, “not all same-sex couples discriminatorily denied the spousal allowance are in a similar position.”<sup>124</sup> Finally, Iacobucci J. adopted the reasons of Linden J.A., holding that the limitation was not proportional because there was nothing to balance the detrimental effect of the complete denial of the right.<sup>125</sup>

The fact that the majorities on the two issues in the case were differently constituted means that if *Egan* as a whole stands for any propositions, it must be the following: sexual orientation is a ground of distinction analogous to those enumerated in section 15(1); it is discriminatory and a violation of section 15(1) to exclude same-sex couples from benefits enjoyed by heterosexual couples; but this discrimination can sometimes be justified under section 1 if it is part of an evolving scheme of benefits in which the government has to mediate among the interests of different groups.<sup>126</sup>

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<sup>123</sup> *Ibid.* at 608, Iacobucci J. (dissenting).

<sup>124</sup> *Ibid.* at 614.

<sup>125</sup> L’Heureux-Dubé J. largely agreed with Iacobucci J.’s reasons on s. 1, noting, at 569, the close connection between the s. 15(1) and the s. 1 analysis in a case like this: “It would be strange, indeed, to permit the government to justify a discriminatory distinction on the basis of presumptions which are, themselves, discriminatory.”

<sup>126</sup> Two recent cases take *Egan*, *supra* note 52, to stand for just this proposition: *M. v. H.* (1996), 27 O.R. (3d) 593 at 615 (Gen. Div.) [hereinafter *M. v. H.*], *aff’d* (1996), 31 O.R. (3d) 417 (C.A.), leave to appeal to Supreme Court of Canada granted 24 April 1997: [1997] S.C.C.A. No. 101 (Q.L.); and *Rosenbergv. Canada (A.G.)* (1995), 25 O.R. (3d) 612 (Gen.Div.).

D. *Extending the Benefit of Spousal Incompetency to Cohabitants*

The Court's decision in *Miron* refutes the reasons given in *Duvivier* and *Thompson* for refusing to extend the benefit of spousal incompetency to cohabitants. The essence of the holdings in these cases was that marital status was not a ground of distinction analogous to those enumerated in section 15(1) of the *Charter*. Cohabitants were not members of a discrete and insular minority;<sup>127</sup> cohabitants should not be thought of as a group because they could choose to marry and thus obtain the benefits of a different marital status;<sup>128</sup> and cohabitants could not show that they suffered any disadvantage from their status, or at least no disadvantage that could not be remedied by legal marriage.<sup>129</sup> The majority in *Miron* discounted each of these considerations as reasons for distinguishing between legally married couples and cohabitants. As noted above, the Court held that cohabitants had suffered from historical disadvantage, and continue to suffer from denial of benefits provided to legally married couples, and that to require them to choose between submitting to these disadvantages and changing their status would not only be unrealistic in some cases, but would also undermine an important aspect of human dignity, namely, the ability to construct an intimate relationship outside the formal institution of marriage. Thus, making a distinction on the basis of cohabitation is analogous to distinguishing on the grounds enumerated in section 15.

Next, it must be determined whether the distinction imposed by the restriction of spousal incompetency to legally married couples is discriminatory. The key to this question, according to *Miron* and *Egan*, is whether the ground of distinction is used appropriately or inappropriately. If the ground of distinction is used appropriately, the distinction is not discriminatory.<sup>130</sup> Since the reason for finding that marital status is an analogous ground is that cohabitation is much like legal marriage in its meaning and function for the participants, it is difficult to see how this distinction could be appropriately applied to spousal incompetency. Even on the minority's view, a rationale is hard to find. Gonthier J. held that the distinction between cohabitants and legally married couples created by the *Insurance Act* was justified by the fact that their support obligations differed. But the rule of spousal

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<sup>127</sup> *Thompson*, *supra* note 16 at 14; *Duvivier*, *supra* note 16 at 211.

<sup>128</sup> *Thompson*, *supra* note 15 at 16.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Miron*, *supra* note 31 at 500.

incompetency is unrelated to support obligations; its sole function is to preserve marital harmony. Since the court has held that the intimate relationships of cohabitants are as valuable as those of legally married partners, the harmony of the relationship must be entitled to the same protection. There is nothing about cohabitation that would justify differential treatment with respect to testimonial capacity, so the distinction is discriminatory.

The analysis under section 1 proceeds similarly. It is easy to see that the pressing and substantial objective of testimonial competence in general is that criminal trials cannot proceed without evidence. But, as argued above, section 1 analysis should proceed by focusing on the *limitation* of the right, in the context of the overall scheme of which the limitation is a part. The limitation of the right is the refusal to extend the benefits of spousal incompetency to cohabitants. The objective of this limitation, in its context, can only be to make it easier to convict people who are not legally married. This objective cannot be pressing and substantial. But even assuming that it is, and that it passes the first two stages of the proportionality test, the effect of the infringement must be grossly disproportionate to the benefit in pursuing the objective. The rationale for the rule of spousal incompetency is that marital harmony is worth preserving, even at the price of allowing some guilty persons to escape punishment. According to the section 15(1) analysis, there is no reason to reverse this reasoning for cohabitants. Therefore, the costs of the limitation in terms of the *Charter* right must exceed its benefits in terms of additional convictions.

On McLachlin J.'s approach, that is, taking the purpose of the overall scheme as the pressing and substantial objective, the infringement is even harder to justify. The overall scheme makes everyone a competent witness for the prosecution, subject to an exception that protects marital harmony. Given the conclusion under section 15(1) that cohabitants and married couples are equally entitled to this protection, the denial of the benefit cannot be rationally connected to this objective; indeed, as in *Miron*, the objective is frustrated because the benefit is underinclusive. Cohabitation is not a reasonably relevant marker for requiring a person to testify against her spouse, thus disrupting a relationship deserving of protection. Thus, there is no way to justify this infringement of section 15(1).

E. *Extending the Benefit of Spousal Incompetency to Same-sex Couples*

It is difficult to anticipate the arguments that the state might use, either under section 15(1) or under section 1, to resist a *Charter* argument extending the benefits of spousal incompetency to same-sex couples.<sup>131</sup> First, as we have seen, the Court in *Egan* was unanimously of the view that sexual orientation is a ground of distinction analogous to those enumerated in section 15(1). Second, the failure to extend the benefit is discriminatory for the reasons given in *Egan*: to say that the marital harmony of legally married couples is entitled to protection but that harmony in an intimate relationship between same-sex partners is not simply “reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships ... in the same manner as heterosexual couples.”<sup>132</sup> It is true that the minority’s reasons for refusing to recognize the distinction between same-sex and heterosexual couples in *Egan* could be deployed to uphold the limitation of spousal incompetency to legally married couples, but it would be as illogical here as it was there.

The section 1 analysis would be substantially the same as for cohabitants. Once the failure to extend a benefit is found to violate section 15, it is difficult to see how it can pass section 1; the irrationality that makes the denial a violation of the equality right is fatal to the possibility of its justification in a free and democratic society.

Further, even if Sopinka J.’s unusual section 1 justification is correct for *Egan*, there are two reasons why it does not apply to the benefit of spousal incompetency. The first has to do with the relative lack of statutory change in the area of spousal incompetency. In *Egan*, Sopinka J. looked optimistically at the progress the federal government had made in alleviating the poverty of elderly spouses<sup>133</sup> and considered

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<sup>131</sup> If same-sex couples were permitted to marry, or were granted the same legal status as cohabitants, this section of the paper would of course be redundant. For arguments in favour of same-sex marriage, see Woolley, *supra* note 51 (right to same-sex marriage based on a liberal, agency-oriented conception of the person); Hohengarten, *supra* note 49 at 1523-31 (right to same-sex marriage based on the functional value of marriage and the right to privacy under the U.S. Constitution); Eskridge, *supra* note 69 at 123-52 (right to marry based on constitutional right of privacy); and C.A. Lewis, “From This Day Forward: A Feminine Moral Discourse of Homosexual Marriage” (1988) 97 Yale L.J. 1783 (right to same-sex marriage supported by integrating the functional approach with a jurisprudential perspective drawn from feminism rather than rights theory).

<sup>132</sup> *Egan*, *supra* note 52 at 604, Iacobucci J. (dissenting); see also *Egan* at 595, Cory J. (dissenting); and at 566-68, L’Heureux-Dubé J. (dissenting).

<sup>133</sup> *Ibid.* at 574-76.

sympathetically the choices about benefits that the federal government has to make.<sup>134</sup> In light of these factors, he concluded that the government's failure to extend the benefit to same-sex couples could be justified under section 1. But these factors are simply inapplicable to spousal incompetency. There has been no legislative movement extending the benefits of spousal incompetency to marginalized or disadvantaged groups; and the extension of the benefit involves no significant choices about the allocation of the federal government's fiscal resources. There is simply no excuse for legislative inaction in this area.<sup>135</sup>

Second, there is no obvious parliamentary policy decision to defer to since the rules relating to spousal incompetency, though modified by statute, are judge-made rules. The most that can be said, and it is not a great deal, is that the nineteenth century decision to make the accused and his spouse competent witnesses for the defence, without altering their incompetency for the prosecution, indicates legislative acceptance of the marital harmony rationale. If the section 15(1) argument indicates that this rationale should be extended to same-sex couples, it is difficult to see any factor that would block extension of this legislative acceptance.

## V. CONTRACTING THE RULE

The arguments presented in Part III of this article turn on conceiving of spousal incompetency as a benefit enjoyed by married couples. But there is another, quite different, way of thinking about spousal incompetency: it can be seen, not as a benefit, but as a disability, a rule that prevents a person from assuming her full role in public life because of her status as the spouse of an accused person. On this view, the values of autonomy and human dignity that are enshrined in the *Charter* might be invoked to support a contraction of the rule of spousal incompetency. Before turning to the merits of this view, I briefly consider some procedural questions raised by a proposal to contract the scope of the rule.

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<sup>134</sup> *Ibid.* at 572-73.

<sup>135</sup> Compare *M. v. H.*, *supra* note 126 at 617.

*A. Procedural Issues*

The issue of contracting the rule of spousal incompetency would probably arise as follows: the Crown would call the spouse as a witness. The defence would object to the competency of the witness. At this point, someone would argue for the witness's competency, that is, for contracting the rule. There would seem to be two persons who could make this argument: the Crown or the spouse herself. Neither possibility is free from difficulty.

The Crown can certainly carry the argument against the rule of spousal incompetency, if it is framed, as in *Salituro*,<sup>136</sup> as a modification of a common law rule in accordance with the values in the *Charter*. But, in my view, the argument against the rule should not be framed in this way. The argument would be for reversal, rather than limitation, of a common law rule, and it would be based on repudiating, rather than taking seriously, the common law rationale for the rule. The complete abolition of the rule of spousal incompetency would not be an incremental change in the common law, not just because it would be a complete abolition, but because it would be driven by a reversal of the policy judgment that underlies the rule.<sup>137</sup>

It is thus more plausible to describe the argument for contracting the rule as a *Charter* attack on the rule. Who could make this *Charter* argument? The argument in favour of the Crown itself bringing the argument is based on the Attorney General's role in representing the larger public interest. John Edwards argued forcefully that, in the *Charter* context, "the Attorney General would be in serious dereliction of his larger constitutional duty to ensure that the wider public interest [in the constitutionality of legislation] is adequately represented"<sup>138</sup> if he or she limited himself or herself to a narrow representation of the state's position. Edwards points to the possibility that private litigants may not have the resources to mount a *Charter* challenge and to the

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<sup>136</sup> *Supra* note 10.

<sup>137</sup> *Hawkins*, *supra* note 13 at 1043-44. Compare at 1066-67, describing the Crown's success in persuading one judge of the Ontario Court of Appeal to make a fairly dramatic change in the common law of spousal incompetency, a change which would have made nonsense of the accepted rationale for the rule.

<sup>138</sup> J.L.J. Edwards, "The Attorney General and the Charter of Rights" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 45 at 53.

constitutional role of the Attorney General as factors supporting this sort of intervention.<sup>139</sup>

On the other hand, it might seem that the role of the Attorney General, as represented by Crown counsel, in a constitutional challenge should be to put forward the best arguments in favour of the law that is being challenged; if the Crown doesn't support the law, who will?<sup>140</sup> In particular, where the law being challenged represents the policy of the government of which the Attorney General is a member, the Attorney General should not be heard to argue against it. As Peter Hogg puts it, "the Attorney General is a member of the government. Like other ministers, he or she is committed to the policies of the government, and will normally be obliged to defend the legality of those policies."<sup>141</sup>

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<sup>139</sup> *Ibid.* at 53-54; see also K. Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1994) para. 5.270. In *R. v. Lines*, [1993] O.J. No. 3284 (Gen. Div.) (QL) [hereinafter *Lines*], the Crown was granted public interest standing, under the doctrine of *Canada (Justice) v. Borowski*, [1981] 2 S.C.R. 575, to argue that s. 25(4) of the *Criminal Code*, R.S.C 1985, c. C-46 (the "fleeing felon" rule), violated the s. 7 *Charter* rights of suspects and innocent bystanders.

<sup>140</sup> Edwards suggests that "[s]teps to ensure that the government's more restricted interests are adequately represented can readily be accomplished through senior departmental counsel": Edwards, *supra* note 138 at 54. The difficulty with this suggestion is that it seems to envision a personal appearance by the Attorney General, and another appearance by a senior member of the Department of Justice; in effect, the same party (the state) would be represented by two parties taking two different positions. The justification for this unusual arrangement would be found in Edwards's vision of the Attorney General as having an independent role as guardian of the public interest.

<sup>141</sup> Hogg, *supra* note 98 at 1265. Edwards, *supra* note 138 at 47, suggested that one response of an Attorney General faced with a *Charter* challenge to legislation within the competency of his or her government would be to advise the government to change the statute or executive action at issue. In two recent Ontario cases involving same-sex couples, the Attorney General for Ontario has appeared to argue against the constitutional validity of legislation that could have been changed by the provincial legislature: *K. (Re)* (1995), 23 O.R. (3d) 679 (Prov. Ct.); and *M. v. H.*, *supra* note 126. In considering the propriety of the Attorney General's position in these cases, it must be remembered that her government lacked the political will to make legislative changes that would have made these constitutional challenges redundant. In 1994, the Ontario government introduced Bill 167, *An Act to amend Ontario Statutes to provide for the equal treatment of persons in spousal relationships*, 3d Sess., 35th Leg., Ontario, 1994 (1st Reading 19 May 1994, 2d Reading negatived 9 June 1994). This Bill would have amended numerous Ontario statutes to provide for equal treatment of same-sex and cohabiting heterosexual couples. In particular, in the definition of "spouse" in s. 29(1) of the *Family Law Act*, *supra* note 11, which is applicable to spousal support, the words "either of a man or a woman" would have been replaced with the words "either of two persons of either sex." Bill 167 was defeated on second reading when the government declined to impose party discipline to ensure its passage. Twelve New Democratic M.P.P.s voted against the bill. See C. McInnis, M. Mittelstaedt & J. Rusk, "Ontario Bill on Gay Rights Defeated" *The [Toronto] Globe & Mail* (10 June 1994) A1. (In *M. v. H.*, the Attorney General's position changed during the course of the litigation, as a result of the change of government in the election of June 1995: *M. v. H.*, *supra* note 126 at 617.)

The discussion is complicated by the federal dimension of the problem. The rule at issue is a common law rule, any modification of which is within the legislative competency of the federal Parliament. It could therefore be argued that while the rule should not be attacked by federal Crown counsel, there would be no impropriety in provincial Crown counsel's doing so; it is not his or her government's policy decision (or lack thereof) that is at issue.<sup>142</sup> But this argument would lead to the somewhat anomalous position that the rule of spousal incompetency could be challenged in a prosecution under the *Criminal Code*, where the prosecution is carried by the provincial Crown, but not in a prosecution under the *Narcotic Control Act*<sup>143</sup> where the prosecution is carried by the federal Crown.

It is therefore worth considering whether the spouse herself could make a *Charter* argument against the common law rule. As a practical matter, it may be unlikely that a spouse would have the interest and the resources to pursue the argument, but I am concerned here with the question of whether the spouse would be permitted to make the argument. In effect, the spouse would be applying for standing to make an argument respecting her own rights in a case that is concerned with the accused's rights.<sup>144</sup>

There are two general situations in which the question of third party intervention in a criminal trial has arisen. One type of situation concerns a prior breach of the third party's *Charter* rights, while the other concerns the possibility that the court itself may do something that affects the third party's *Charter* rights. The first situation commonly arises where the police conduct a search and seizure that (allegedly) infringes a third party's section 8 rights, but which produces evidence against the accused. It would appear that in this situation, the accused has no standing to challenge the *Charter* violation, because the right that

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<sup>142</sup> This was the situation in *Lines*, *supra* note 139, para. 40, where the Attorney General for Ontario challenged s. 25(4) of the *Criminal Code*, *supra* note 139, while the Attorney General for Canada appeared to support the legislation (though defence counsel made the actual submissions).

<sup>143</sup> R.S.C. 1985, c. N-1.

<sup>144</sup> If the spouse has standing to argue about the impact of the rule of spousal incompetency on her *Charter* rights, then a cohabitant or same-sex partner should have standing to argue for a contraction of the rule. *Duvivier*, *supra* note 16, was an application for an order to quash a subpoena compelling Johnson to testify at a preliminary hearing; the issue of Johnson's standing to argue for her own rights in *Duvivier*'s trial thus did not arise directly, though the Court of Appeal was of the view that either Johnson or *Duvivier* could make the s. 15 argument at *Duvivier*'s trial: *Duvivier C.A.*, at 26 and 28.

has been violated is not the accused's right.<sup>145</sup> This reasoning logically suggests that the person whose rights have been violated should be the one to challenge the search and seizure;<sup>146</sup> but in such cases, the courts have been reluctant to grant standing to third parties in the accused's trial. The suggestion has been that the third party should pursue other remedies and not meddle in a matter that is between the state and the accused.<sup>147</sup>

The second situation arises where a court order made as a result of some issue raised by the Crown or by the accused will affect interests of a third party that are protected under the *Charter*. So, for instance, if compelling a witness to testify might affect his right to silence under section 7,<sup>148</sup> or if disclosing a witness's psychiatric records might affect his or her privacy interests,<sup>149</sup> or if a publication ban requested by either the Crown or the accused might affect someone's freedom of expression under section 2(b),<sup>150</sup> then a third party will be granted standing to argue that the order should not issue.<sup>151</sup>

The situation of a spouse who seeks to raise a *Charter* challenge to the common law rule of spousal incompetency resembles the second class of cases much more than the first. It is the court's ruling preventing her from testifying, not any previous conduct by the state authorities, that engages her *Charter* rights. Therefore, the spouse should have standing to raise the *Charter* argument for contracting the rule, regardless of the position taken by the Crown.

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<sup>145</sup> *R. v. Pugliese* (1992), 8 O.R. (3d) 259 (C.A.), approved in *R. v. Edwards*, [1996] 1 S.C.R. 128 at 142-44 [hereinafter *Edwards*].

<sup>146</sup> "A claim for relief under s. 24(2) can only be made by the person whose *Charter* rights have been infringed": *Edwards*, *supra* note 145 at 145, Cory J.

<sup>147</sup> *R. v. Thompson* (1994), 25 C.R.R. (2d) 310 (Ont. Ct. (Gen. Div.)).

<sup>148</sup> *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451 [hereinafter *S.(R.J.)*].

<sup>149</sup> *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536.

<sup>150</sup> *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [hereinafter *Dagenais*].

<sup>151</sup> This procedure raises, of course, the vexatious question of whether the *Charter* applies to court orders; the majority of the Supreme Court has recently declined to reconsider this question: *ibid.* at 867-68, Lamer C.J. (Sopinka, Cory, Iacobucci and Major JJ. concurring); at 918-19, Gonthier J. (dissenting on other grounds). L'Heureux-Dubé J. (dissenting), *ibid.* at 908-12, was of the view that while the *Charter* does not apply to court orders, it does apply to any common law rule under which an order might issue. Lamer C.J., though declining to revisit the question of whether the *Charter* applies to court orders, was of the view that it is an error of law for a judge to issue a discretionary publication ban that does not conform with "the principles of the *Charter*": *ibid.* at 875. It is difficult to resist the logic of McLachlin J.'s argument that if it is an error of law to issue a court order that infringes *Charter* rights, then the *Charter* applies to that order: *ibid.* at 942-45, McLachlin J. (concurring in the result); and at 892-93, La Forest J. (dissenting in the result).

## B. *Substantive Issues*

The argument for contracting the rule would be founded on *Salituro*.<sup>152</sup> The accused and his wife were legally married but irreconcilably separated. The Crown argued<sup>153</sup> that the common law rule of spousal incompetency should not apply to irreconcilably separated spouses, and the Court accepted this argument: “Society can have no interest in preserving marital harmony where spouses are irreconcilably separated because there is no marital harmony to be preserved” and hence the rationale of the rule does not apply.<sup>154</sup>

The discussion could have ended there, as a straightforward and well-motivated modification of a common law rule.<sup>155</sup> Instead, Iacobucci J. went on to suggest that the rule of spousal incompetency might offend the values of the *Charter*. His discussion is not entirely clear—in particular, the *Charter* rights offended by the rule are not precisely specified—but two themes do emerge from the discussion. First, the rule is inconsistent with the value of individual choice, which is clearly central to the *Charter*.

The grounds which have been used in support of the rule are inconsistent with respect for the freedom of all individuals, which has become a central tenet of the legal and moral fabric of this country particularly since the adoption of the *Charter*. ... The common law rule making a spouse an incompetent witness involves a conflict between the freedom of the individual to choose whether or not to testify and the interests of society in preserving the marriage bond. ...

To give paramountcy to the marriage bond over the value of individual choice ... is inappropriate in the age of the *Charter*.<sup>156</sup>

Second, the rule is inconsistent with the value of human dignity:

The dignity of the person arises not only from the exercise of rights such as the freedom to choose, but also, and just as importantly, from the assumption of the responsibilities that naturally flow from participation in the life of the community. At the level of principle, it is just as much a denial of the dignity of an irreconcilably separated spouse to exempt the spouse from the responsibility to testify because of his or her status as it is a

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<sup>152</sup> *Supra* note 10.

<sup>153</sup> *Ibid.* The issue of Mrs. Salituro’s competency was not raised at trial; Salituro was convicted, and the competency issue was first raised in his appeal to the Ontario Court of Appeal.

<sup>154</sup> *Ibid.* at 676; and at 674 (“Where spouses are irreconcilably separated, there is no marriage bond to protect”).

<sup>155</sup> Iacobucci J. held that the modification of the common law rule in this case was consistent with the court’s power to develop and change the common law: *ibid.* at 665-70 and 678-79.

<sup>156</sup> *Ibid.* at 673-74.

denial of the spouse's dignity to deny his or her capacity to testify. This is all the more true where historically it has been women who have been unable to testify.<sup>157</sup>

These two themes are invoked as *Charter* values supporting the modification of the common law rule.

On this view, rather than mandating an extension of spousal incompetency, the *Charter* might demand that cohabitants and same-sex couples retain the obligation to testify; attaching a testimonial incapacity as an incident of their status would be an affront to their freedom of choice and their dignity. Further, the *Charter* might demand the modification or abolition of the rule of spousal incompetency even as it applies to legally married spouses; while Iacobucci J. is careful to limit his remarks to irreconcilably separated spouses, there is nothing about freedom of choice and human dignity that is unique to such spouses.

I argue in Part VI, below<sup>158</sup> that the freedom of choice theme from *Salituro* should play no role in the analysis of spousal competency. The argument for contracting the rule would then be based on the human dignity theme. This argument might be tied to the equality right in section 15(1). The argument would be that making the spouse's testimonial competence a function of her status would impose on her a burden, being unable to participate fully in public life, that is not imposed on unmarried persons. Whether this argument would succeed under the Supreme Court of Canada's current approach to the equality right turns on whether the spouse could identify a prohibited ground of distinction;<sup>159</sup> ironically, this argument could only involve the precise reversal of all the moves made in Part III, above. The spouse would have to argue that the ground of distinction is marital status, because the burden imposed on her is not imposed on cohabitants, and that the distinction was discriminatory because it was not connected in any rational way with the ground of distinction. At this point, the accused, defending the rule of spousal incompetency in its current form, would have to argue that the protection of marital harmony was a consideration that justified the distinction. This justification could occur either under section 15(1), as the accused tried to show that the distinction was not discriminatory, or under section 1, as the accused

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<sup>157</sup> *Ibid.* at 676. For a similar view, see *Hawkins*, *supra* note 13 at 1095, La Forest J. (concurring in the result).

<sup>158</sup> See text accompanying *infra* notes 171-73.

<sup>159</sup> The spouse's argument could be more directly under L'Heureux-Dubé J.'s approach, since the spouse would not have to identify a prohibited ground of discrimination but could argue directly that the distinction adversely affected her human dignity.

tried to show that the discrimination was justified.<sup>160</sup> In either case, the argument, sounding rather hollow in the context, would simply reiterate that intimate relationships are valuable, both socially and individually, and that permitting a spouse to testify would damage them. But, in order to overcome the spouse's equality claim, the argument would have to be that marriage was entitled to some special protection that is not available to other relationships. In order to make this argument, the accused would have to deploy one of the conceptions of marriage canvassed above and argue that the testimonial protection of marriage was rationally related to it.

## VI. CHOOSING BETWEEN THE TWO THEORIES

As we have seen, the rule of spousal incompetency can be plausibly construed as a benefit enjoyed by married couples or as a disability imposed on the spouse of an accused person. The *Charter* arguments about spousal incompetency pull in very different directions depending on which of these two descriptions is adopted. There are two ways to deal with these two different characterizations: the first is to attempt to find some resources within the *Charter* itself for determining which is appropriate; the second is to seek a rule of spousal incompetency that reconciles both characterizations while remaining consistent with *Charter* values.

### A. Does the Charter Imply Anything About Spousal Incompetency?

The argument for expanding the rule of spousal incompetency was that there is no longer any justification consistent with the *Charter* for restricting the benefits of the rule to legally married, heterosexual couples. The argument was not that the *Charter* itself required a rule of spousal incompetency; and there is little support in the *Charter* jurisprudence for the proposition that the Constitution requires any

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<sup>160</sup> Similarly, in *Lines*, *supra* note 139, paras. 56-60, it was the accused police officer who carried the burden of providing a s. 1 justification for the "fleeing felon" rule. In *Dagenais*, *supra* note 150 at 881-91, the accused requested a ban on a television program which they alleged was sufficiently similar to their cases to prejudice potential jurors. The court analyzed the problem as a balance between the public's right to freedom of expression and the accused's right to a fair trial, and placed the burden on the accused to show, along the lines of s. 1, why a publication ban, as a limitation on freedom of expression, would be justified. It is unclear, given that the two rights were not placed in a hierarchy, why the media were not required to show that the broadcast was a reasonable limit on the accused's right to a fair trial.

given benefit to be provided by the state. On the other hand, the argument for contracting the rule was based on the *Charter* rights of the spouse. It would seem, then, that if the *Charter* implies anything about spousal incompetency, it is hostile to the rule.

But there is an argument in favour of the rule which, though somewhat speculative, is based on the *Charter*. Suppose that one of the positive characterizations of marriage discussed above is appropriate; that is, suppose marriage is properly analyzed with the functional approach adopted by L'Heureux-Dubé J. in *Mossop* or by the liberal, agency-oriented approach advocated by Woolley. That is, suppose that the ability to have an intimate relationship is an essential aspect of human dignity. In either case, it may be that the *Charter* will demand certain incidents to be attached to marriage.<sup>161</sup>

This argument would be more persuasive if it were firmly attached to a particular *Charter* right. Some guidance may be found in the United States, where it has been suggested that the constitutional right to privacy might include protection for marital privileges. The argument is based on *Griswold v. Connecticut*,<sup>162</sup> which held that married couples had a right to privacy under the Fourteenth Amendment and that this right was violated by a statute criminalizing the sale of contraceptives to married couples. Some commentators have suggested that this right to privacy must include some evidentiary protection for married couples; if the state cannot interfere in reproductive decisions, the argument goes, then surely the state cannot require intimate partners to face a tragic choice between betraying each other's confidence or being held in contempt.<sup>163</sup>

The right to privacy under the *Charter* is of more recent origin. It is a commonplace that section 8 of the *Charter* protects reasonable

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<sup>161</sup> It could be argued that in *Salituro*, *supra* note 10 at 304, Iacobucci J. suggested that there is a *Charter* right to divorce: after quoting Wilson J.'s invocation of human dignity as a *Charter* value in *R. v. Morgentaler* [1988] 1 S.C.R. 30 at 166 [hereinafter *Morgentaler*], he refers to modern divorce law and to the modern conception of "marriage as a partnership between equally free individuals." The context of these remarks suggests that one of the incidents that the *Charter* requires to be attached to marriage is the right to terminate it.

<sup>162</sup> 381 U.S. 479 (1965). This right to privacy was expanded beyond the marital context in *Roe v. Wade*, 410 U.S. 113 (1973), which held that a woman's right to privacy under the Fourteenth Amendment included the right to decide to abort a fetus during the first trimester of pregnancy.

<sup>163</sup> "[I]nvasion of the marital chamber is no more acceptable when it brings out all the facts in litigation than when it enforces policies against birth control or abortion": Reutlinger, *supra* note 28 at 1392. See also Black, *supra* note 28 at 48; and "Privileged Communications," *supra* note 44 at 1583-85.

expectations of privacy,<sup>164</sup> but since section 8 is clearly concerned only with search and seizure, a more general right of privacy has to be sought in section 7 of the *Charter*. Speaking for herself in *Morgentaler*, Wilson J. held that the right to liberty in section 7 “grants the individual a degree of autonomy in making decisions of fundamental personal importance”<sup>165</sup> and drew on the American case law mentioned above to conclude that “the decision of a woman to terminate her pregnancy falls within this class of protected decisions.”<sup>166</sup> More recently, L’Heureux-Dubé J. has drawn on these sources to conclude that “[r]espect for individual privacy is an essential component of what it means to be ‘free.’ As a corollary, the infringement of this right undeniably impinges upon an individual’s ‘liberty’ in our free and democratic society.”<sup>167</sup> Thus, although the Supreme Court has recently affirmed that there is a constitutional right to privacy under the *Charter*, its scope is still unclear.

The right of privacy under section 7 has so far been deployed to protect individual interests, not relationships such as marriage or its equivalents. But if marriage is one of the vehicles through which the human need for intimacy and companionship is legally protected, and if those needs are part of the human dignity that is protected under the *Charter*, it is plausible to think that a law or a set of laws that would strip those protections from married couples might be vulnerable to *Charter* attack. Thus, the *Charter* might support the evidentiary privileges around marriage (the rule of spousal incompetency and the spousal

<sup>164</sup> *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

<sup>165</sup> *Supra* note 161 at 166.

<sup>166</sup> *Ibid.* at 171.

<sup>167</sup> *R. v. O’Connor*, [1995] 4 S.C.R. 411 at 484. The entire court concurred with this part of L’Heureux-Dubé J.’s reasons. Further tentative support for a right to privacy under s. 7 may be found in *B.(R.) v. Children’s Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315 [hereinafter *C.A.S.*]. La Forest J. (Gonthier and McLachlin JJ. concurring) characterized the right to liberty under s. 7 at 368 as follows:

On the one hand, liberty does not mean unconstrained freedom . . . . On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

L’Heureux-Dubé J. concurred with this portion of La Forest J.’s reasons: *C.A.S.* at 392. Iacobucci and Major JJ. (Cory J. concurring) (concurring in the result) appear to have rejected La Forest J.’s view that the scope of the liberty interest under s. 7 is quite broad, but rejected his application of it to the facts of the case: *C.A.S.* at 430-34. Sopinka J. (concurring in the result) did not comment on this question: *C.A.S.* at 428. Lamer C.J., (concurring in the result), was the only judge to reject La Forest J.’s characterization of the liberty interest outright: *C.A.S.* at 331-50.

communication privilege<sup>168</sup>) if they were seen as a way of protecting intimate relationships.

B. *Is There a Rule That Reconciles Both Characterizations?*

One response to the question of whether the rule of spousal incompetency is a benefit or a disability is to say that it can be both.<sup>169</sup> The rule makes a spouse less than a complete participant in the judicial process of her society; but that lack of participation may be perceived as a very real benefit by some spouses and as a disability by others. Is there a rule of spousal incompetency that would enable the question to be answered in this way?

The *Charter*-based arguments for expanding and for contracting the rule of spousal incompetency suggest that there are three values, each of which has some claim to be a *Charter* value, in play:<sup>170</sup> first, the preservation of marital harmony; second, the state's right to every person's evidence and the person's corresponding responsibility to participate in the judicial process; and third, the value of free choice. The best rule of spousal incompetency would be one that accommodated all of these considerations in some principled way.

It should first be noted that, despite its apparent importance in *Salituro*, the spouse's freedom of choice about whether to testify should play only a minor role, if any, in the analysis, because it is in irreconcilable tension with another deeply rooted legal idea. That is the

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<sup>168</sup> For a brief description of this privilege, see *supra* note 15. Courts in the United States have usually held that the spousal privileges have no constitutional status and can therefore be modified legislatively or judicially. See, for instance, *United States v. Hicks*, 420 F. Supp. 533 at 536 (N.D. Tex. 1976); *United States v. Benford*, 457 F. Supp. 589 at 597 (E.D. Mich. 1978); and *Young v. Oklahoma*, 428 F. Supp. 288 at 294 (W.D. Okla. 1976). But in *Re Application of A* *supra* note 45 at 378, the court invoked the right to privacy under the United States Constitution to protect an accused minor child's communications made in confidence to his parents. The court said: "It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relations which exist among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father." The court was of the view that requiring the parents to testify in these circumstances would be "shocking to our sense of decency, fairness and propriety": *ibid.* at 380, and would probably destroy the relationship: *ibid.* at 380-81. It is difficult to see why the same sort of reasoning would not apply to the spousal privileges.

<sup>169</sup> Another common law rule that derives from a disability but can be a benefit is the common law rule making the contracts of infants voidable at the infant's option.

<sup>170</sup> These arguments also suggest that the benefits of the rule should be equally available to legally married couples, to cohabitants, and to same-sex couples; but this point is logically distinct from the subject matter of this section of the article.

principle that the state is entitled to every person's evidence, which the Court has recognized as a principle of fundamental justice.<sup>171</sup> This principle is obviously vital for proper fact finding, and it is as important to the accused as to the prosecution: either party can invoke the court's process to compel a witness to testify. Iacobucci J.'s reasons in *Salituro* suggest that although this principle involves state compulsion of an individual, it conforms with human dignity: individual participation in judicial processes, even under compulsion, is one of the responsibilities of citizenship. But the principle certainly does not conform with the value of choice.<sup>172</sup> Further, a *Charter* argument based on freedom of choice in testimony could not be confined to spouses; there is nothing about one's freedom of choice as a spouse that is more important, or more protected by the *Charter*, than one's freedom of choice generally. If a spouse can claim exemption from the principle that the state is entitled to every person's evidence on the ground that she should be able to decide whether to testify or not, then any witness should be able to claim such an exemption. Given the importance of the principle, and the absence of any hint in *S.(R.J.)* that freedom of choice as such could limit it,<sup>173</sup> there is no reason to think that the spouse's freedom of choice about whether to testify should play any role in the analysis of spousal incompetency.

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<sup>171</sup> *S.(R.J.)*, *supra* note 148 at 517-18; see also *Trammel*, *supra* note 5 at 50-51.

<sup>172</sup> In *S.(R.J.)*, *supra* note 148, the Court considered a situation where two accused were charged with the same offence but were tried separately. The Crown sought to compel one accused (J.P.M.) to testify at the trial of the other accused (R.J.S.). This situation generated tension between the principle against self-incrimination and the principle that the state is entitled to every person's evidence. The resolution of a majority was not to give the witness a testimonial privilege to refuse to answer incriminating questions, but to require the witness to answer and to provide him or her with a form of immunity from the Crown's use of evidence derived from his or her testimony: *S.(R.J.)* at 544-66, Iacobucci J., (La Forest, Cory, and Major JJ. concurring); at 468, Lamer C.J. concurring. A differently constituted majority (Lamer C.J. and L'Heureux-Dubé, Gonthier, Sopinka, and McLachlin JJ.) held that in some cases, a witness in J.P.M.'s situation would be entitled to an exemption from having to testify. For Lamer C.J., this protection was in addition to derivative-use immunity; for the other four judges, this protection was a substitute for derivative-use immunity, which they would not have granted. Neither majority was concerned about J.P.M.'s individual choice. See also *Hawkins*, *supra* note 13 at 1069-71. Lamer C.J. and Iacobucci J. express, *obiter*, the view that some change to the rule of spousal incompetency might be desirable, but their reasons depend on "the autonomy and dignity of an individual spouse," not on the spouse's freedom of choice.

<sup>173</sup> In *S.(R.J.)*, *ibid.*, the right against self-incrimination is a limitation on the principle that the state is entitled to every person's evidence. It is derived from a right expressly guaranteed in s. 11(c) of the *Charter* and is well-recognized under s. 7. The limitation does not derive from the witness's freedom of choice.

Thus, two values remain in play: the value of participation in trials, and the value of preserving marital harmony. The present rule privileges the second over the first. By the same token, simply overturning the rule and making spouses generally competent for all purposes would privilege the first over the second. Thus, a rule which would make the spouse competent, but not compellable, leaving her the choice of whether to testify, might seem the best. This rule would substitute the spouse's choice about the value of marital harmony, or the spouse's assessment of whether the marriage would in fact be disrupted by her testimony, for the common law's blanket rule. In addition to reconciling the two major values in play, it would also leave some room for the minor value of freedom of choice.

But this rule is vulnerable to two criticisms. First, it runs counter to the generally accepted view that a witness who is otherwise competent is also compellable. Under current doctrine, this question arises only under very narrow circumstances. A spouse who is competent by virtue of the *Canada Evidence Act* is also compellable;<sup>174</sup> but is a spouse who is competent by virtue of a common law exception compellable?<sup>175</sup> This question has been answered in different ways,<sup>176</sup> but the most persuasive answer was given by McLachlin J.A. (as she then was) in *R. v. McGinty*.<sup>177</sup> The accused was charged with assault causing bodily harm; the victim was a man whom she later married. The husband was a competent witness by virtue of the common law exception for offences involving the spouse's "liberty, health or person;" but he said he would rather not testify, so the question was whether he was compellable. McLachlin J.A. reviewed the case law on this question, and concluded that an otherwise competent spouse was compellable. The common law contained a "general principle ... that competent witnesses are compellable witnesses;"<sup>178</sup> although McLachlin J.A. did not have to determine the constitutional status of this principle, *S.(R.J.)* suggests that it may well be a rule that emerges from the principle of fundamental justice which says that the state is entitled to every person's evidence.

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<sup>174</sup> Subsections 4(2) and 4(4) of the *Canada Evidence Act* *supra* note 1, make the wife or husband of an accused person "competent and compellable" in certain circumstances.

<sup>175</sup> This issue could also arise under s. 4(1) of the *Canada Evidence Act* *supra* note 1, which makes the spouse "a competent witness for the defence" but does not mention compellability.

<sup>176</sup> *Hoskyn v. Metropolitan Police Commissioner* [1979] A.C. 474 (H.L.) (spouse competent by virtue of common law exception not compellable). *Contra*: *R. v. Czipp* (1979), 25 O.R. (2d) 527 (C.A.).

<sup>177</sup> [1986] 1 Y.R. 27 (C.A.) [hereinafter *McGinty*].

<sup>178</sup> *Ibid.*; see also A.W. Mewett, "Editorial" (1980) 23 *Crim. L.Q.* 1 at 2.

The second argument is based on a serious policy concern. If a witness is competent but not compellable against the accused, she may be threatened or intimidated by the accused to prevent her testimony. This possibility is particularly strong where the witness is the accused's spouse, stronger still where the offence charged falls under the common law exception for offences involving the spouse's "person, health or liberty." This concern was McLachlin J.A.'s second reason for holding that it would be better to make otherwise competent spouses compellable. While it was true that the marital harmony of spouses was deserving of protection, even where one had committed an offence against the other, a rule giving the spouse a choice would further neither the search for justice nor marital harmony:

a rule which leaves to the husband or wife the choice of whether he or she will testify against his aggressor-spouse is more likely to be productive of family discord than to prevent it. It leaves the victim-spouse open to further threats and violence aimed at preventing him or her from testifying, and leaves him or her open to recriminations if he or she chooses to testify. It seems to me better to leave the spouse no choice and to extend to married persons the general policy of the law that victims are compellable witnesses against their aggressor.<sup>179</sup>

Thus, for reasons both of principle and policy, McLachlin J.A. held that a competent spouse was compellable.

The rule is quite different in the United States, where the accused's spouse is treated not as an incompetent witness, but as a competent witness whose testimony may be subject to various privileges.<sup>180</sup> The privilege most closely related to the Canadian rule of spousal incompetency is what Wigmore gave the somewhat baroque name of the "privilege for anti-marital facts."<sup>181</sup> This privilege permitted the spouse not to testify against the accused. Historically, the privilege belonged to the accused, but in *Trammel*,<sup>182</sup> the United States Supreme Court held that it should belong to the spouse. The Court held that "[w]here one spouse is willing to testify against the other in a

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<sup>179</sup> *McGinty*, *supra* note 177 at 60. Iacobucci J. approved of this reasoning in *Salituro*, *supra* note 10 at 306. See also *Hawkins*, *supra* note 13 at 1069-71, Lamer C.J. and Iacobucci J.

<sup>180</sup> How the English common law rule of spousal incompetency became, in the United States, a testimonial privilege is somewhat mysterious: "[w]hat began as a disqualification of either spouse from testifying at all yielded gradually to the policy of admitting all relevant evidence, until it has now become simply a privilege of the criminal defendant to prevent his spouse from testifying against him": *Hawkins v. United States* 358 U.S. 74 at 81 (1958), Stewart J. [hereinafter *U.S. Hawkins*]. Wigmore, *supra* note 11, § 2227, identifies the common law rule as a privilege and, at § 2242, regards the term "incompetency" as producing "confusion" in this context.

<sup>181</sup> Wigmore, *supra* note 11, c. 79.

<sup>182</sup> *Supra* note 5.

criminal proceeding ... there is probably little in the way of marital harmony for the privilege to preserve.”<sup>183</sup> Thus, giving the privilege to the spouse “furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.”<sup>184</sup> In reaching this conclusion, the Court did not address the possibility that the accused might coerce the spouse into not testifying, no doubt because the alternative was not to make the spouse compellable by the prosecution but to maintain the rule that the privilege was the accused’s. But the essential policy judgment expressed in *Trammel*, which is that giving a spouse a privilege not to testify would protect marital harmony to the extent appropriate in each case, would support a rule making a spouse competent but not compellable.

The decision in *Trammel* has been criticized, not for its failure to consider the possibility that the accused might coerce the spouse, but for its failure to consider the possibility that the *prosecution* might coerce the spouse. The Court referred repeatedly to the voluntariness of the spouse’s testimony and to the spouse’s choice to testify against the accused. But her decision to testify in *Trammel* itself arose from a plea bargain, in which the spouse was charged with conspiracy to import heroin and agreed to testify against her husband after receiving “assurances that she would be given lenient treatment.”<sup>185</sup> To describe her testimony as “voluntary,” under these circumstances, is unpersuasive.<sup>186</sup> It is true that the prosecution had every right to offer the spouse this plea bargain, and that she was no doubt better off taking the bargain than going to jail for her role in the conspiracy; but her conduct was voluntary only in the weakest sense. She was not coming forward to testify out of any sense that justice should be done, or after weighing the effects of her testimony on her relationship with the accused. Rather, she was responding to very forceful pressure from the

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<sup>183</sup> *Ibid.* at 52. The Court here reversed not just the result but the reasoning of *U.S. Hawkins*, *supra* note 180 at 77-78, where it had rejected the government’s argument that the willingness of one spouse to testify against the other was an indication that there was no marital harmony to protect: “[N]ot all marital flare-ups in which one spouse wants to hurt the other are permanent. ... Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.”

<sup>184</sup> *Trammel*, *supra* note 5 at 53.

<sup>185</sup> *Ibid.* at 39-40. In the end, she was not prosecuted: at 43 n. 2.

<sup>186</sup> Lempert, *supra* note 1 at 733-37. See also *U.S. Hawkins*, *supra* note 180 at 83, Stewart J. (concurring) expressing doubt that the testimony was voluntary because the witness spouse “had been imprisoned as a material witness and released under \$3000 bond conditional on her appearance in court as a witness for the United States.” By way of comparison, a confession obtained from an accused person in the circumstances of *Trammel*, *supra* note 5, or *U.S. Hawkins*, would certainly not be considered voluntary under Canadian law.

prosecution. It may well be that the rule in *Trammel* makes things worse for marital harmony than the rule it replaced.

This concern about voluntariness would also apply to a Canadian rule making the spouse competent but not compellable; the spouse would be confronted not only with pressure and possibly intimidation from the accused, but with potentially quite coercive pressure from the prosecution. In the circumstances of a criminal prosecution, it is difficult to know how the spouse's decision whether or not to testify could ever be truly voluntary, or could ever accurately reflect the spouse's assessment of the balance between her civic duty to participate in the justice system and the harmony of her marriage. The attraction of the American rule is that it is supposed to accommodate concerns about marital harmony with concerns about the search for the truth. But if the witness spouse is subject to all sorts of pressures from both the accused and the prosecution, it is unlikely that her true assessment of the value of her marriage will ever be embodied in her decision about whether to testify. These considerations support making the rule of spousal incompetency, whomever it applies to, an all or nothing proposition: the spouse should be either competent and compellable, or incompetent.

### C. *Charter Rights and Charter Values: The Case for Statutory Reform*

Concerns about coercion of and interference with the spouse's decision, however valid they may be, are not *Charter* arguments; it might therefore be argued that if a rule making the spouse competent for the prosecution but not compellable is required by the *Charter*, these concerns should give way before it. I want to suggest here that reversing the common law rule of spousal incompetency is properly the decision of the federal Parliament, not of the courts.

The Supreme Court has expressly distinguished between *Charter* rights and *Charter* values.<sup>187</sup> If one's rights under the *Charter* are violated, then one must have a remedy either under section 24(1) or section 52(1). But there are many situations in which, according to the Court, the *Charter* does not apply. In these situations, the *Charter* may still be relevant, in that the Court sees itself as having a duty to develop the common law in accordance with *Charter* values.<sup>188</sup> But the use of *Charter* values is a much vaguer and less demanding method of proceeding than the invocation of a *Charter* right.

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<sup>187</sup> *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1140 at 1170 [hereinafter *Hill*].

<sup>188</sup> *Ibid.* at 1164-72; and *Dolphin Delivery* *supra* note 78 at 603.

A challenge to the common law rule of spousal incompetency, according to the Supreme Court's analysis, seems to fall somewhere in between *Charter* rights and *Charter* values. On the one hand, the spouse's inability to testify is arguably the result of state action; on the other hand, the spouse is going to carry the argument against the rule and the accused is going to carry the argument in its favour.<sup>189</sup> Thus, the argument for contracting or eliminating the rule of spousal incompetency can be put either in terms of *Charter* rights or in terms of *Charter* values. In the former case, the proposed witness would have to argue that her rights were actually being violated by her exclusion from the judicial process, while in the latter case, the argument would simply be that the rule of spousal incompetency did not conform with the ideals of human dignity and equality found in the *Charter*. But, as we have seen, the argument that the existing rule violates rights is not overwhelming; the *Charter* argument against the rule must be weighed against the possible *Charter* argument for the rule. It is much more plausible to say that the rule is possibly inconsistent with *Charter* values; although it is then still the case that the argument against the rule must be weighed against the potential detriment to marital harmony that would result if the rule were abrogated.

All of these considerations suggest that any dramatic restructuring of the rule of spousal incompetency is best left to Parliament.<sup>190</sup> The rule as it stands embodies a policy judgment that marital harmony is more important in some cases than truth-finding. Although *Charter* values may point the other way, it is very hard to say that the *Charter* demands reversal of this policy judgment. At the same time, it is hard to say that the *Charter* demands the maintenance of the rule as it exists. Some legislative intervention would be highly desirable.

## VI. CONCLUSION

There is widespread agreement that the rules of spousal incompetency are due for a systematic revision, with more explicit attention to the underlying policy judgment implicit in the current rules.

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<sup>189</sup> In *Hill*, *supra* note 187 at 1166, Cory J. listed *Salituro*, *supra* note 10, among the cases "where government action was based upon a common law rule;" but he goes on to observe that "the common law rule in *Salituro* was not alleged to infringe a specific *Charter* right. Rather, it was alleged to be inconsistent with those fundamental values that provide the foundation for the *Charter*": at 1167.

<sup>190</sup> Compare *Hill*, *supra* note 187 at 1171.

In this article, I have been concerned only indirectly with this question; instead, I have focused on the question of whether the *Charter* has any implications for the rule of spousal incompetency. My positive conclusion is, when considered in light of recent developments under section 15 of the *Charter*, rather modest: whatever the rule of spousal incompetency is, it should apply equally to legally married couples, to cohabiting heterosexual couples, and to same-sex couples. This conclusion is, when considered in relation to the rule as it stands, an argument for expanding the rule. But I have also considered the question of whether the *Charter* has anything to say about the rationale for the rule as it stands. My conclusions here are more equivocal; the *Charter* arguments on either side are not well grounded in existing case law, and there seems to be no knockdown *Charter* argument for or against the rule of spousal incompetency, though certain *Charter* values can be invoked on either side of the issue. Thus, my negative conclusion is that the Court ought not to contract the rule of spousal incompetency via the *Charter*; any reform in this direction should be left to the legislature.