In the German system, which recognizes the right of affected citizens to challenge or bring under review every type of state activity, the judges of course bear a very heavy responsibility. I daresay they have been able to live with this responsibility. No unsound results have been reached on the whole. In particular, the Constitutional Court has rarely found itself in open conflict with Parliament. A few laws intended to carry out major new reform policies have been struck down. One may mention an abortion law, which gave the woman the right to interrupt the pregnancy during the first ninety days; the Court thought this contravened the guarantee of the right to life contained in Article 2, that some specific justification for abortions was necessary, and that an absolute right of the mother to decide the fate of the foetus could not be reconciled with the constitution. A new law enlarging or liberalizing recognition of conscientious objection to military service, by allowing young men simply to state that they refused service on grounds of conscience without having to prove the grounds of objection further, was held irreconcilable with the constitution because it entailed inevitably a discriminatory application between those who were honest and those who were dishonest in their declarations, and so violated the principle of equality.

In instances where such major statutes were struck down by the Constitutional Court there was some talk about a need to reform the Court or complaints that it exceeded its proper function by making political choices rather than applying legal standards. However, after a while, those criticisms faded away and I think that today there is broad general trust in the Court and no real suggestion for doing away with the Court or limiting its powers. It has stood the test of time.

Professor C. Edwin Baker

Some United States Experience and Points of View

I am in substantial agreement with the spirit, and with most of the conclusions, of Professor Beckton's references to American law. However I would like to discuss one troubling area where American law has not resolved an important debate, and on which, despite some earlier contrary comments by others, I would suggest the United States experience will be relevant to Canada.

Professor Beckton suggested that in the United States it is not controversial that freedom of expression is protected and that it is only the degree of protection that is subject to debate.

That may be going too fast.

In fact, I think, there are three questions under debate, not just the one, as to the extent of the protection. There is, apparently, an issue in the

United States as to what type of conduct is contemplated by the First Amendment. Secondly, there is debate as to what amounts to an abridgement of that conduct. Finally, if it is found that the conduct is protected and that it appears to have been abridged, there is then the question whether that abridgement is justified; in short, what degree of protection is to be allowed. These questions could be merged into one, but that may lead to a confusion of the analysis and an inadequate understanding of what the issues in American thinking are. Thus I will attack them separately.

The first question — what conduct is protected — is a staple of constitutional debate in the United States, and I will not attempt now a summary of the law. Our experience, which may soon also be yours under the *Charter* and which seems to have been that under the European Convention as described by Professor Jacobs, has been one of expansion to include one area after another. As a practical matter, we have discovered that democracy is better without limits that at one time were thought necessary and reasonable.

By reference to general theory, Canadians may be able to avoid some of the slow movement that has been the experience in the United States. If you carefully analyze what your freedom of expression guarantees are concerned with, you may be able to immediately determine an appropriate range of protected conduct.

As to what amounts to an abridgement, that too is a subject of extensive discussion, jurisprudence and literature in the United States. Many laws restricting freedom of expression are accepted, not because the restriction is counterbalanced by other values or consideration, but because they are not seen as abridging freedom of expression at all. For example, taxation laws that leave one with less personal wealth to spend on political advertising are not directed at restriction of speech and are not viewed as involving freedom of expression. Furthermore, we generally do not think of trespass laws, which enable persons to exclude others from their houses, as abridging freedom or speech, even although it might be used to prevent someone from entering to express views on a whole set of issues. However there is a considerable discussion as to whether more concrete criteria for identifying abridgement are needed and what they might be.

Finally, there is the question as to the degree of protection that should be given to what is recognized as a constitutionally sensitive claim. The United States has experienced two answers to this question. One is that once it has been decided that the conduct is protected and has been abridged, that is an end of the discussion. Many jurists and scholars, most notably Mr. Justice Black and Mr. Justice Douglas, have taken this position, but perhaps the best scholary argument for this position has been made by Professor Thomas Emerson. The other view is that this is a matter requiring some sort of balancing analysis or an inquiry into whether the limitation is reasonable.

I wish to argue that this debate has relevance to Canada and, with that possibility in mind, to go through some of the reasons that in the United States have been given in favour of the so-called 'absolutist' approach.

In suggesting the relevance of American law to Canada, I of course defer to your own much more substantial expertise on Canadian law and the *Charter*. All I would wish to persuade you of is not how your *Charter* should be read but only that its language is not so clear as to rule out as irrelevant or inadmissible these interpretations.

Section 1 of the *Charter* speaks of the rights and freedoms it sets out as being "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Obviously one must consider the phrase "reasonable limits", but today I wish to focus on "demonstrably justified in a free and democratic society".

One could argue that a free and democratic society is capable of living without those limits and that they are not demonstrably justified in such a society.

The world is not overly filled with societies we would unquestionably regard as free and democratic. Many lack something. The presence of limits on constitutional rights in societies that may be regarded as free and democratic seems to me much less persuasive in showing that those limits are demonstrably justified than the absence of those limits in a free and democratic society is in showing that they are not demonstrably justified.

In the seminar held before this Conference, it was suggested, in a discussion of sections 1 and 7, that it would appear odd to maintain that some governmental action is not in accord with principles of fundamental justice (section 7) but that it still is demonstrably justified in a free and democratic society (section 1). Reading the *Charter* as a whole, it would seem better to say that action that is not in accord with principles of fundamental justice is to be assumed not to be demonstrably justified in a free and democratic society.

I would want to argue for a similar analysis of section 2. In order to do that, one would have to consider the purposes of the provisions. If the conclusion were that the protection of rights to dissent against majority views, to take part in public life, or whatever content you give the rights, is a foundation of a free and democratic society, or part of the meaning of a free and democratic society, then, once it had been determined those rights had been abridged, the question whether that abridgement was justified would answer itself, in the negative.

Without expecting you to accept that argument, I venture to suggest that, just as the United States courts have concluded, notwithstanding the apparently absolute protection of free speech given by the Constitution, balancing is appropriate. Therefore in Canada, where the *Charter* does

not mandate but at least opens the possibility of "balancing" interests or applying tests of "reasonableness", the text is open to interpretation that could lead to conclusions as strongly protective of free expression as the positions reached by certain United States judges under their more rule-oriented or "absolutist" analysis.

What types of argument are there for engaging in a "balancing" or "reasonableness" analysis as opposed to a rule-oriented analysis?

There is an inclination towards the 'balancing' approach for very understandable reasons. Some are quite plausible; others are more troublesome. The judicial role in non-constitutional matters — in common law and administrative law cases — is typically to work out what is reasonable in those contexts. Often the court is filling in the law where the legislature has been idle or insufficiently clear in establishing law. A legislative body itself is generally assumed to be trying to promote the general welfare, to balance the various concerns and considerations going in one direction or another. Accordingly, it is natural enough that a court under various statutory mandates would engage in this sort of balancing. Essentially this approach recognizes that balancing is essentially a legislative task but in some situations courts are obliged to do something quite similar.

But constitutional adjudication is of a rather different character. The context is that of a larger arrangement under which some sort of political order will be legitimated, where legislation will have some role, where democracy will have its force, and also under which the realm of democratic decision will be limited, or, at least, where democratic decisions will be restrained or compelled to consider and debate fundamental individual rights. Once it is recognized that this is what is done by constitutional provisions, then it is not so clear that the type of "balancing" and "reasonableness" analysis usually applied to legislation is appropriate in the constitutional context.

One of the aspects of "balancing", in the United States experience at least, is that it has been used to "domesticate" free expression rights. Once one engages in the "balancing" or "reasonableness" type of analysis, one can avoid forming clear theoretical understandings of what is to be protected. The results are often congenial and acceptable to legal and community opinion. However, to the extent First Amendment provisions are concerned with protecting behaviour that is "unreasonable", behaviour that is dissident from majority values or viewpoints, it is less clear that this type of balancing analysis is appropriate. If respect for individual liberty, equality and autonomy are crucial constitutive aspects of a just political order, and that is the reason such provisions are included in the fundamental constitutive documents organizing a country, then it would seem that restrictions on individual autonomy merely to promote the "general" welfare destroy the moral basis of the legal order. The design

of the legal order may be better conceived in terms of a democratic community trying generally to promote legislation and policy valuable to the people in the community but at the same time respectful of the processes of change, rights to dissent, rights of individual autonomy and rights of equality that are prerequisites to the legitimacy of that democratic order. If that is the case, a "balancing" or "reasonableness" measure may be an inappropriate basis for limiting individual rights.

It may also be questioned how far it is appropriate for courts to work out a balancing of interests, a function typically carried out by legislatures. In fact in most cases when courts have applied this type of analysis in considering the validity of legislation, they have concluded that what the legislature has done is reasonable and acceptable. It has been the Justices who view the legislative process as taking place within an order that gives priority to certain individual rights, to which they try to give theoretically a very precise content, who have been able to give a large and strong protection to those rights. So, my suggestion is that "balancing" will lead either to almost uniform deference to the legislative body or to the judges merely replacing the legislative bodies in essentially legislative roles.

The "balancing" approach is particularly objectionable in respect of rights whose prime value is to protect individuals against the majority, to protect dissent, advocacy of social and political change, personal beliefs and values. When these are in issue, to inquire what mainstream society thinks is reasonable is essentially to go against the entire thrust or meaning of the constitutional rights provisions.

On a less theoretical level, I would like to conclude with a few comments on the practical implications of adopting a balancing analysis rather than a more rule-oriented or categorical approach. In thinking of a system of individual rights — say, freedom of expression — one needs an approach that can not only be justified in theoretical terms but also work in practice to provide the actual protections needed. The general experience, in my reading of United States constitutional history — and this view might be debatable — is that to the extent we have adopted "balancing" or "reasonable" approaches, considerable protection has been extended to rights in quiet times, relatively free of social turmoil and strife; times when legislative bodies themselves would not be moved to impose restrictions. However, in times of turmoil and change, when First Amendment rights are most needed, these "balancing" approaches tend to contract rights, in a sort of "accordion" effect, as people in power, reacting to perceived threats of change, tend to view restrictions on the advocacy of such change as "reasonable". So, the result of the balancing analysis is to give protection when it is least needed; and to give the least protection when it is most needed.

Also on the practical level, I would add this point. Constitutional rights provisions are directed in the first instance, not to courts, but to

legislative bodies or to officials. If all they are told is that they are to protect *Charter* rights when those rights are "reasonable", very few are likely to think that a measure or restriction that they desire is "unreasonable". They will have little on which to rest resistance to constituents who are advocating restrictions. If instead, there are constitutional principles that give clear guidance, showing what is and what is not within the protected realm, and a notion that what is included is to be protected with considerable force and vigilance and not to be overridden by even apparently popular and powerful arguments for restrictions, then there is a larger hope that the *Charter* provisions will provide useful guidance to those who in the first instance need to apply and interpret them. Without that, they may be inclined to continue to view matters much as they would have done prior to the *Charter*.

Although time is limited, you will wish me to address at least briefly the question of resolving apparent "conflicts" of rights. In general terms, my argument would be that in United States experience, the courts, by looking closely and carefully at the rights involved, have been able on a routine basis (at least in relation to the First Amendment) to find that there are really not conflicts of constitutional rights. Questions of equality, fair trial, and so on can be resolved without abridging First Amendment rights. As my time has elapsed, I will spare you the elaboration of the details.