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A Wayne MacKay
Dalhousie University

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Judging and Equality: For Whom Does the Charter Toll?

A. Wayne MacKay*

1. INTRODUCTION

No man is an *Iland*, intire of it self; every man is a peece of the *Continent*, a part of the *maine*; if a *Clod* bee washed away by the *Sea*, *Europe* is the lesse, as well as if a *Promontorie* were, as well as if a *Mannor* of thy *friends* or of *thine owne* were; any mans *death* diminishes *me*, because I am involved in *mankinde*; And therefore never send to know for whom the *bell* tolls; It tolls for *thee*.

—John Donne¹

While it may be in questionable taste to begin an article on equality with a poem that uses “man” in the global sense, John Donne’s

* Professor of Law at Dalhousie University, presently engaged in researching and writing a book on Supreme Court of Canada Judges entitled, *Benchmarks*. This is a co-authored work and one of the author’s collaborators is Professor McBride, who authored the preceding article in this volume and made useful comments on an earlier version of this article. Fellow colleagues at the law school also read earlier drafts of this article and thanks are in order for professors Leon Trakman and David Fraser. Osgoode Hall law professors Allan Hutchinson, Patrick Monahan and Andrew Petter were also of assistance by sharing their views on this topic in both oral and written form. Special acknowledgement is owed to Peter Swan and Stephen Malikail. The former, a graduate of Dalhousie Law School, provided research on the jurisprudential theories and educated the author about the Critical Legal Studies Conference. The latter is a third year Dalhousie Law student, who did research on the early *Charter* cases and provided a critique on some of the critics of liberal theory. Finally, a general debt is owed to the members of the Charterwatch seminar during the 1983–84 and 1984–85 terms who stimulated my thinking about the role of judges and the *Charter* in promoting social change and educated the author on the implications of feminist theory for such change.

1 As quoted in E. Hemingway, *For Whom The Bell Tolls* (New York: Charles Scribner’s Sons, 1940), p. 3.

words do evoke a sense of community that feminists would applaud.² The tension between an individualistic and communitarian approach to the world is crucial to how equality will be defined in Canada. Violations of equality diminish the rights and dignity of all Canadians and not just the particular individuals or the specific groups who are the immediate victims of inequality. This recognition is only the beginning of the complex task of defining equality as guaranteed in section 15 of the *Charter of Rights and Freedoms*.³ Unravelling the concept of equality at a theoretical level is the focus of the articles by Peter Rogers and Colleen Sheppard which follow this one. Defining equality in specific situations is the thrust of the articles on prostitution, pornography, homosexuality and pensions for women in the second part of this volume. My task is to explore the role of judges in promoting equality as a link between the more general comments on judging by Professor McBride that precede this article and the more direct treatment of equality in the articles that follow.

It is the relationship between judging and equality that I wish to explore. In order to pursue this, related questions must also be addressed. What are the limits and strengths of the *Charter* as a means to a more egalitarian society?⁴ What is the nature of judging and is it distinct from the larger political process?⁵ What has been the record of the Supreme Court of Canada to date on *Charter* issues and how can this be extrapolated to emerging equality issues?⁶ What is the proper

2 While I am aware that feminist theory is in its formative stages and is by no means monolithic, a preference for communitarian values over individualistic ones does appear to be an important theme. C. MacKinnon, "Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence" (1983), 8 *Signs: Journal of Women in Culture and Society* 635, and *Feminism in Canada: From Pressure to Politics*, G. Finn and A. Miles, eds. (Montreal: Black Rose Books, 1982).

3 Part I of the *Constitution Act, 1982*, Sched. B. of *Canada Act, 1982*, c. 11 (U.K.). [Hereafter referred to as the *Charter*.]

4 Encompassed in this question is the relationship between law and social change. This issue and the desirability of a rights model as an approach to equality will be explored in Parts 2 through 4 of this article.

5 This question is addressed by Professor McBride in his article, *supra*, and will be more fully explored by W. MacKay, E. McBride, R. Balcome and D. Russell, *Benchmarks* (Toronto; Carswell, forthcoming). I shall also return to this question in Parts 4, 5 and 6 of this article.

6 The Supreme Court of Canada has been selected because of its influence and the availability of material to assess. I am aware that many *Charter* issues including those on equality will be resolved outside the courts and those that do go to court will be resolved at lower judicial levels. Assessing the general judicial response to the *Charter* is beyond the scope of this article. The responses of the Supreme Court are examined in Part 6 of this article.

role for the courts in promoting equality in comparison with other institutional mechanisms?⁷

These are difficult questions that demand more than a traditional legalistic analysis. Both the concepts of equality and judging are grounded in the ideology of the liberal state.⁸ Thus I shall consider the various jurisprudential theories that emerge under the umbrella of liberalism as well as more radical theories that challenge the basic assumptions of liberalism. Such theories will not be examined in depth or for their own value, but as a means of casting light on the concepts of judging and equality. Whether they realize it or not, judges are influenced by theories about the nature and the role of law. These influences are most often unconscious and few judges would adopt, or even be able to articulate, a particular judicial philosophy. However, judges do not exist in a vacuum and they are not immune from jurisprudential and political theories. To understand judging requires more than a functional analysis of the courts as institutions⁹ or a series of judicial biographies.¹⁰ Judging must be examined in its broader social and political context. That is the aim of this article.

The importance of theory and ideology in defining equality is explored elsewhere in this volume, most notably by Peter Rogers and Colleen Sheppard. If the open-ended concepts enshrined in the *Charter* are not anchored in some broader philosophy, the *Charter* jurisprudence will have no coherence at all. Judges need not overtly adopt a particular philosophy but they should at least be informed about the jurisprudential and political implications of their decisions. Some understanding of legal and political theory is essential to an understanding of the *Charter* as well as the decisions that flow from it.¹¹ Like

7 I speculate in Parts 3 and 5-7 of this article about what can reasonably be expected of judges and the *Charter* in respect to equality. This involves a consideration of the relative strengths and weaknesses of courts in a liberal-democratic society.

8 The term "liberal" is used throughout this article not as a contrast to "conservative" in the political sense of those terms, but rather as a broad term to describe mainstream political thinking in Canada. Its components will be explored in Part 4 of this article.

9 J. Snell and F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985) offers an informative and useful history of an important institution but reveals little about the nature of judging in Canada.

10 D. Williams, *Duff: A Life in the Law* (Vancouver: U.B.C. Press, 1984) makes a significant contribution to Canadian literature but fails to put Duff in his political context or explore the nature of the judicial role. This view is shared by D. Stanley, in her review of *Duff: A Life in the Law* in (1985), 9 Dal. L.J. 820.

11 N. Lyon, "The Teleological Mandate of the Fundamental Freedoms Guarantee: What to Do with Vague but Meaningful Generalities" (1982), 4 Sup. Ct. L.R. 57.

judging, the *Charter*, too, must be placed in its broader political context.

There are important basic questions about whether a rights model is the best approach to equality.¹² Karl Marx rejected all "rights discourse" as inherently individualistic and generally inconsistent with economic determinism.¹³ He also argued that law is used to mask basic economic inequalities. This explains why Marxism has generally ignored law and judging as indistinguishable components of the oppressive capitalist ideology. If a "rights discourse" is accepted as a legitimate way to pursue an egalitarian society, there are still disputes about how rights should be defined. Most discussions of rights focus on the individual as the bearer of rights,¹⁴ and this evokes a sympathetic response from most judges trained in the individualistic common law. Within these individual rights schools of thought there are differences about which rights are most fundamental. H.L.A. Hart¹⁵ champions liberty as the most fundamental right, while Dworkin¹⁶ advocates equality as the most basic value.

Whether both equality and liberty can be defined in communitarian rather than individualistic terms is an important theme throughout this article. The traditionally accepted antipathy between liberty and equality may disappear if both concepts are defined in relation to collective rather than individual values.¹⁷ Those who support a more collectivist or communitarian approach to rights come from a variety of political perspectives, while those who support an individual rights model normally embrace liberalism. Joseph Raz, for one, questions the idea that the individual is the ultimate rights bearer and prefers to

12 Some of the limits inherent in a "rights discourse" are explored in Part 4 of this article. This is really a subset of the limitations of legalism or "law talk" in relation to basic values disputes.

13 *Theories of Rights*, J. Waldron, ed. (New York: Oxford Univ. Press, 1984), pp. 1-3.

14 J. Rawls, *A Theory of Justice* (Cambridge: Harvard Univ. Press, 1971) and R. Dworkin, *Taking Rights Seriously* (London: Duckworth & Co. Ltd., 1977) are two leading exponents of this school.

15 H.L.A. Hart, *The Concept of Law*, 10th ed. (Oxford: Oxford Univ. Press, 1979).

16 *Supra*, note 14.

17 T. McCormack, "Two (b) or Not Two (b): Feminism and Freedom of Expression," in *Se Connaitre: Politics and Culture in Canada*, J. Lennox, ed. (Toronto: York Univ., Dept. of Communications, 1985) at p. 64 is one example of reading a traditionally individualistic right in a more collective fashion, in order to make it more acceptable to women.

speak of fundamental collective values.¹⁸ At the other end of the spectrum, Marxists, to the extent that they would engage in rights discourse at all, would embrace collective rights. Feminists and members of the Critical Legal Studies Conference would also prefer collective rights, although there would be disagreement as to which collective rights should prevail.¹⁹

Judges will be directly confronted with the problem of deciding not only which individual rights should prevail when there is a conflict, but also when collective rights should be the basis of a decision. The balance between collective and individual rights is implicit not just in theory but also in the structure of the *Charter* itself. There is thus a meeting of theory and practice in the process of adjudication. Whether the *Charter* will promote or stultify equality depends on many variables. Foremost among these are the nature of the *Charter* itself, the limits of the theory and practice of rights in a liberal state and the potential and limits of judging in Canada. These variables will be considered in turn before speculating about what we can reasonably expect from judges as promoters of equality in Canadian society. At this point, judges might conclude that the bell tolls for them.

2. THE PROMISE OF JUDGES AND THE CHARTER

Unless this Court is willing to say that the condition of Duncan's (the accused) purse is no ground upon which to qualify or limit his rights as a citizen of the United States . . . then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will.²⁰

Canada's *Charter* has real potential in its broad and open-ended language and invites lawyers and judges to engage in a debate about basic values in Canadian society. The critical question raised by the opening quotation is whether the promise of the *Charter* is only a "promise to the ear to be broken to the hope." If the *Charter* creates an illusion of rights that cannot in fact be enforced, it is a bad thing for Canadians. Not only will raised expectations be dashed, but the limited energy for reform will have been diverted from more useful

18 J. Raz, "Right-Based Moralities," in Waldron, *supra*, note 13 at p. 182.

19 MacKinnon, *supra*, note 2 and D. Kennedy, "The Structure of Blackstone's Commentaries" (1979), 28 Buff. L.R. 205, are good examples of the respective views of the two groups on this issue.

20 *Edwards v. People of California*, 314 U.S. 164 at 172 (1941), per Jackson J.

channels. After four years it is far from clear whether the *Charter* is a good or bad thing for the real protection of rights in Canada.

Legal academics are divided on the potential of the *Charter*. There are the *Charter* optimists, who, either as a matter of prediction or advocacy, make broad claims about the *Charter* as a vehicle for change.²¹ Another group of academics might be labelled as the *Charter* skeptics.²² A third group is the *Charter* pessimists.²³ This latter group views the *Charter* as an obstacle to real change in society. If the *Charter* can be analogized to a religion, as Professor McBride does in his article, the optimists are the true believers, the skeptics are the agnostics and the pessimists are the atheists or heretics. Heretics may be the better term for the last group as they reject the *Charter* but embrace other religions. Practising lawyers and judges would also divide along similar lines.

21 Examples of people in this category would include the following:

C. Beckton, "Freedom of Expression" in *Canadian Charter of Rights and Freedoms: Commentary*, W. Tarnopolsky and G. Beaudoin, eds. (Toronto: Carswell, 1982), pp. 75-121;

D. Gibson, "The Charter of Rights and the Private Sector" (1982), 12 Man. L.J. 213;

Lyon, *supra*, note 11;

M. Manning, *Rights, Freedoms and the Courts* (Toronto: Emond-Montgomery Ltd., 1983);

W. Tarnopolsky, "The Equality Rights" in *Canadian Charter of Rights and Freedoms: Commentary*, W. Tarnopolsky and G. Beaudoin, eds. (Toronto: Carswell, 1982), pp. 395-442.

22 Examples of people in this category would include the following:

W. Mackay, "Fairness After the Charter: A Rose By Any Other Name?" (1985), 10 Queen's L.J. 263;

R.A. MacDonald, "Postscript and Prelude—The Jurisprudence of the Charter: Eight Theses" (1982), 4 Sup. Ct. L.R. 321;

P. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review," an address delivered at the Legal Theory Workshops, University of Toronto, December, 1985;

A. Petter, "The Politics of the Charter and The Early Charter Decisions of the Supreme Court of Canada" (1986), 8 Sup. Ct. L.R. (forthcoming);

R.A. Samek, "Untrenching Fundamental Rights" (1982), 27 McGill L.J. 755;

J. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983), 13 Man. L.J. 425.

23 Many but not all of the people in this category would be people who reject the basic tenets of liberalism. Two examples of this category are D. Fraser, "Truth and Hierarchy: Will the Circle Be Unbroken?" (1985), 33 Buff. L.R. 729 and A. Hutchinson, "High court changes the constitutional game: Will a judicial whirlwind blow itself right out? *Toronto Star*, February 8, 1986 and "Charter Rhetoric avoids real issue: the quality of life," *Globe and Mail*, May 1, 1984.

Assessment of the *Charter* and its implications for change may, for sake of clarity, be considered at three separate levels:

1. the choice of the rights paradigm as the central means of addressing the relationships amongst individuals and between individuals and the state;
2. the judicial treatment of the *Charter*;
3. the content of the *Charter* itself.

Most of what follows this part of the article will be concerned with the first two levels of analysis. This part of the article examines the *Charter* as a document. Since the words of the *Charter* only gain life from judicial interpretation, it is impossible to totally ignore the second level analysis but it will be kept to a minimum. I shall begin by considering the positive side of the *Charter*—its potential.

(a) Broad Potential

The *Charter* contains broad and ringing phrases that invite creative arguments from lawyers and innovative responses from judges. While the catalogue of rights and their expression is not ideal, the wording is broad enough to encompass most of the important value disputes in Canadian society. Sections 7 and 15 are prime examples. The former has already been used on both sides of the abortion debate and in respect to the testing of cruise missiles in Canada. Out of section 7 there have also been claims of a right to die, a right to an education and a right to basic social security, to name but a few. The equality guarantees in section 15 offer an even broader scope and the kind of issues that will arise under it will be discussed in Part 2 of this article.

Implicit in the *Charter* is a balancing of interests that moves judges to a more overt policy-making role. This balancing will involve not only a weighing of individual rights against societal claims to reasonable limits in section 1 but also the weighing of one individual right against another. Often an equality right will be on one side of the scale and one of the liberty rights on the other. Thus the structure of the *Charter* may force judges to be more overtly political than they have been in the past. Patrick Monahan views this interest balancing role with some alarm:

Even a cursory analysis of the language and structure of the *Charter* indicates that most *Charter* litigation may well turn on the issue of the "wisdom" of legislative choices. In part, this is a product of the abstract and

generalized nature of the rights protected by the *Charter*. The very process of defining the content of the rights protected by the *Charter* seems inherently political. Many of these rights—most notably the right to “equality” and “liberty”—contain little or no substantive criteria; they resemble blank slates on which the judiciary can scrawl the imagery of their choice. But there is a second problem. Having given content to these open-ended rights, the judiciary must then “balance” these rights against considerations of the general welfare under section one. This process of “interest balancing” seems just another way of asking the fundamental legislative questions: “is this worth what it costs?” The process of balancing individual against collective interests is a calculation which would have already been made by the legislature when it passed the statute under review. Since the government passed the statute, it must have calculated that the interests to be served outweigh those to be sacrificed. Section one of the *Charter* appears to invite the Court to assess and second-guess the “wisdom” of the balance struck by the legislature.²⁴

In response to his concern about courts that may become too actively involved in assessing the wisdom of government action, Professor Monahan articulates a theory of judicial review based upon the promotion of democratic values; these include the rights to participate in decision-making, equality of access and fair distribution of benefits. He goes beyond a strict process standard of review but stops short of having the judges evaluate outcomes.²⁵ Monahan’s touchstone is the democratic values implicit in Canadian society, which are distinct from those in the United States. This evolution of a distinct Canadian jurisprudence is one of the promising features of the *Charter*.

W.R. Lederman has also fixed his attention on the phrase “free and democratic society” in section 1 of the *Charter*, but to a rather different purpose than that of Monahan. Professor Lederman predicts that independent courts and democratic legislatures will both pursue the goals of the *Charter* in a spirit of partnership.²⁶ The re-thinking of

24 Monahan, *supra*, note 22 at p. 12.

25 One of the clearest articulations of process-based review in the United States is J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard Univ. Press, 1980). Monahan’s theory of judicial review also appears to have been influenced by Dworkin’s views on equality. Dworkin, *supra*, note 14.

26 W.R. Lederman, “The Canadian Charter of Rights and Freedoms: One Year Later” (1983), 21 *Trans. Royal Soc. of Can.* 81, and “Democratic Parliaments, Independent Courts and The Canadian Charter of Rights and Freedoms,” in *The Canadian House of Commons: Essays in Honour of Norman Ward*, J.C. Courtney, ed. (Calgary: Univ. of Calgary Press, 1985). The latter article is also to be published in a forthcoming issue of the *Queen’s L.J.*

the comparative roles of legislators, administrators and courts is another promising feature of the *Charter* that is likely to be realized.

Part of the above reconsideration of institutional roles is a concern about the best way to protect minorities, defined as those who have been excluded from power; this includes all the groups specified in section 15 of the *Charter* and many more as well. Courts may offer minorities a shield against the majority, and this may be particularly important in times of political conservatism and economic restraint. Even those who are *Charter* skeptics see a useful role for the courts in relation to minorities.

Nevertheless, we should also see the *Charter* as a brave and necessary step in enhancing the civility of the Canadian state. The diversity of Canada has made it a polity with many minorities, which are everywhere vulnerable to the passing whims of majorities. Our history is full of instances where a national majority has imposed its will on local minorities, as in the imposition of the tariff or conscription in a way that created deeply-rooted resentments which lasted for generations, or where local majorities in particular provinces or regions abused the rights of their own minorities, such as Japanese-Canadians in British Columbia, Jehovah's Witnesses in Quebec and francophones in Manitoba. The *Charter* as it stands might not have been strong enough to protect or help them, but its ultimate object was to nourish an atmosphere of civility which will act as a restraint on the old Adam in us all. A truly civil polity is a very fragile thing, as it is, as Frank Scott said, a work of art that is never finished. It is very easy to destroy or damage it. It requires restraint and discipline to preserve it.²⁷

Another promising aspect of the *Charter* is the opening up of legal discourse to a wider range of sources and influences.²⁸ Courts will have to reconsider what sources to use in resolving a *Charter* question and how they can become informed on matters beyond the law. Mr. Justice Gerald La Forest made the following encouraging statement about *Charter* sources before being appointed to the Supreme Court of Canada and it appears to be a view shared by many of his present colleagues on the Court:

27 J.R. Mallory, "The Charter of Rights and Freedoms and Canadian Democracy," an address delivered as The Timlin Lecture at the University of Saskatchewan, Saskatoon, Saskatchewan, March 8, 1984, at p. 9.

28 The value of examining political and judicial philosophy has been discussed in Parts 1 and 4 of this article. Based on the early *Charter* cases, the Supreme Court does make extensive use of academic writings about the *Charter*.

the *Charter* forces us to look at questions differently than before. However clear a statute or its purposes may be, courts will be asked to make a value judgment about it, a duty that is very different from the traditional role of the court. This should profoundly affect the sources on which courts must rely for guidance. . . . Our courts must be guided by the felt needs and traditions of our own society. But they will be invaluable in raising the issues that must be considered. So often we fail to see that a course of action may unnecessarily infringe on the rights of the individual because we have simply become accustomed to that way of doing things.

I hope, too, that our search will also lead us to seek light from disciplines other than the law, for many of the questions we will have to consider transcend the legal system. Rights continue to emerge from the human experience.²⁹

Perhaps the greatest potential for the *Charter* lies in its use outside the courtrooms, but it has important uses within too. While the judges play a crucial role in interpreting the *Charter*, it is the front-line lawyers who must take the lead in this new constitutional dance. Lawyers must be open to representing a wider range of clients and be prepared to raise innovative arguments, supporting alternative versions of reality. Judges, particularly those at the lower levels, are likely to resist such creative advocacy but there will be judges willing to break new ground. Furthermore, the polycentric nature of issues that arise under the *Charter* beg a larger role for intervenors and Brandeis style briefs in the litigation process. This opening up of the adjudicative process will have a positive effect even beyond *Charter* cases.

The growing media interest in *Charter* litigation also invites the use of the *Charter* as a political tool. This was high on the agenda of Operation Dismantle when they challenged the testing of cruise missiles in Canada on the basis of the *Charter*. Such litigation is expensive but for the amount of media exposure it may be a bargain. Some groups, however, cannot afford to litigate even if it offers an opportunity for political education. For such groups, the *Charter* may be used as part of the public debate about the issue, which may result in concessions in order to avoid bad press or possible litigation.

Whether Canadians like it or not, courts will become a more overt political forum under the *Charter*. As J.R. Mallory observes, this has been the situation in the United States for many decades:

29 G.V. La Forest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983), 61 Can. Bar. R. 19 at 24.

The *Charter* opens up a new avenue—one which has for a long time been available to interest groups in the United States. Attempts to extend civil rights to blacks could never succeed as long as there were powerful veto groups in the Congress which could stop any law on the subject. Accordingly, the strategy of shifting the action to the courts not only prodded the courts into interpreting the law and the constitution in a more liberal way, but also created a great deal of publicity which helped to mobilize public opinion and thus encourage legislative and executive compliance. In the past there were slight prospects for this strategy to succeed in Canada. Now that the *Charter* is part of the constitution we may expect a substantial number of issue-groups, from environmentalists to pro- and anti-abortion groups, to fight their battles in the courts, which will greatly enhance their capacity to mobilize public opinion.³⁰

The new political use of courts is not as novel as many people suggest. What may be new is the extent to which courts can now provide a forum for a wider range of political views. If minority interests will have as much chance to state their case in court as large corporate interests, that would be a promising step towards equality. I shall explore in the next part of the paper whose voices have been heard in the courts during the first four years of the *Charter*.

Some writers would dispute the distinction between the legal and political uses of the courts.³¹ As Professor McBride suggests in the preceding article in this volume, there is politics at some level in all adjudication. It is really a question of kind and degree. Mark Gold has argued that judges are advocates in rendering a decision and aware of the value of rhetorical devices.³² In some senses, judges are political actors in the adjudicative process, but they are restrained by training and institutional structures in ways that distinguish them from naked legislators.³³ I shall return to this theme in the concluding part of this article.

30 *Supra*, note 27 at p. 8.

31 Members of the Critical Legal Studies Conference would take the view that judging is an inherently political act. Kennedy, *supra*, note 19, Fraser, *supra*, note 23 and Hutchinson, *supra*, note 23 would be examples. Allan Hutchinson may not consider himself a member of the Critical Legal Studies Conference, but he appears to agree on the political nature of judging.

32 M. Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada" (1985), 7 *Sup. Ct. L.R.* 455 and "Constitutional Fate: The Rhetoric of Constitutional Argumentation" (1985), 35 *U. of T. L.J.* 154.

33 The Patriation Reference is a good illustration of politics in a judicial guise. W. MacKay, "Judicial Process in the Supreme Court of Canada: The Patriation Reference and Its Implications for the Charter of Rights" (1983), 21 *Osg. Hall L.J.* 55.

A final promising feature of the *Charter* is its value as an educational tool. The role of the judge as teacher and expositor of the law was recognized before the *Charter*.³⁴ As McBride indicates in the preceding article, this role is extended to broader audiences by the *Charter*. To a significant extent, the Supreme Court of Canada has become the leader of a national symposium on fundamental rights and values. While education in itself offers no panacea, the value of raising a "rights consciousness" should not be discounted. There is a potential in the *Charter* that suggests that it may be more than "a promise to the ear," but there are also limitations.

(b) Charter Limitations

Section 52 of the *Constitution Act, 1982* declares that the *Charter*, as part of the Canadian Constitution, is the supreme law of the land and any conflicting policy is void. In spite of this declaration of judicial supremacy, there are limitations in the *Charter* as a document that make the label "judicial primacy" more applicable to the Canadian scene.³⁵ While some lament the dilution of judicial power, others argue that the "joint primacy" of judicial and legislative institutions is both desirable and appropriate in the Canadian context.³⁶ Supremacy of parliament as inherited from the United Kingdom has been qualified but not discarded. Whether this is a strength or limitation is a matter of opinion, but in terms of what judges can do with the *Charter* it is a limitation.

The clearest indication that supremacy of parliament is still alive is section 33 of the *Charter*. This section allows legislators to over-ride sections 2 and 7-15 of the *Charter* for a five-year period, which can then be renewed. It is significant that both sections 7 and 15, which are the broadest ones in the *Charter* with respect to equality, are included. Interestingly, section 28, dealing with sex discrimination, is outside the scope of the over-ride clause. On most important issues the legislators can still have the final say.

During the patriation process, the *Charter* sales people (mostly at the federal level) argued that it would be politically unpopular to use

34 B. Laskin, "The Judge and Due Process" (1972), 5 Man. L.J. 235.

35 H. Brun, "The Canadian Charter of Rights and Freedoms as an Instrument of Social Development," in *The Courts and the Charter*, C. Beckett and W. Mackay, eds. (Toronto: Univ. of Toronto Press, 1985), p. 1.

36 *Ibid.* See also Lederman, *supra*, note 26.

section 33 and it would thus have little impact. That has not been the case. In Quebec, under René Levesque's Parti Québécois, every Quebec statute contained a section 33 over-ride clause. In early 1986, the province of Saskatchewan became the first province outside of Quebec to use section 33. It was used in the context of back-to-work legislation to end rotating strikes by the Saskatchewan Government Employees Union. These uses were not overwhelmingly unpopular and other such uses will emerge in the future.³⁷

Section 33 represents a political limit on the use of the *Charter* and is a reaffirmation of majority rule. Whatever the courts say about what rights should be protected in Canadian society, these same rights can be over-ridden if there is the political will to do so. This has led some critics of the *Charter* to question the value of a document that only protects politically acceptable rights. Dean Rod Macdonald of McGill Law School is one such critic, and he argues that a proper analysis of the *Charter* requires an examination and justification of the basic tenets of liberal political theory.³⁸ An attempt will be made in Part 4 of this article to assess the *Charter* in its legal and political context. Only when painting on this broader canvas will the strengths and limitations of the *Charter* appear.

Macdonald asserts that history teaches that charters of rights are ineffective in intolerant societies and unnecessary in tolerant ones. I would question the historical accuracy of this generalization, but even if it is true in most cases, does this undercut the value of the *Charter*? Surely there will be a few victories under the *Charter* that would not otherwise have occurred, and these will have some effect on unlitigated claims and administrative practices. Furthermore, the *Charter* itself and the litigation and debate that emerges from it has an educational component that can change social attitudes about rights.

37 A. Petter, "Charter Loophole Imperils Basic Rights," *Globe and Mail*, February 20, 1986, argued that the over-ride clause might be used to prevent doctors using the *Charter* to challenge Ontario's legislation banning extra-billing. While this use would be unpopular with doctors and some other segments of society, it would be popular in many quarters. In July, 1986, Nova Scotia's Attorney-General, Ron Giffin, threatened to use section 33 if the courts interpreted the *Charter* to include the right for homosexuals to serve in the police forces. Unfortunately, homosexuals are more likely targets for section 33 than doctors.

38 Macdonald, *supra*, note 22 at p. 323. Macdonald himself does not attempt to uncover or justify these basic assumptions but R. Unger, in his *Knowledge and Politics* (New York: The Free Press, 1975), does attempt to uncover and dissect the essential components of the liberal state in Chapters 1-3.

There will be cases where political actors are more progressive than their judicial counterparts. In such cases, judges may use the *Charter* to impede rather than promote change. This is a limitation on the *Charter* but not a case for discarding it. When there is no political will to uphold civil liberties a judicial entrenchment of rights can buffer the effect of this absence. When there is such a political will the existence of the *Charter* may expedite the judicial acceptance of a similar view. The approach of the Supreme Court of Canada to the *Charter* in contrast to its approach to the *Canadian Bill of Rights* offers some evidence of the value of a *Charter* as an education for judges. In an increasingly conservative political climate there is also some solace in the fact that even a conservative judiciary can hold the fort against an extreme shift away from human rights.

Many of Macdonald's complaints, and he is typical of many of the *Charter* skeptics, are against what judges will do with the *Charter* rather than the *Charter* itself. It is difficult to distinguish judicial interpretation from the words of the *Charter* as they converge to give meaning to the guaranteed rights. Whether the *Charter* should be read expansively or narrowly depends on assumptions about whether judges are promoters or inhibitors of rights. I shall return to the role of judges as protectors of equality in the latter parts of this article.

Section 1 of the *Charter* is the vehicle by which judges can limit the rights guaranteed in the document:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

What are the reasonable limits on broad rights such as equality, that judges will find acceptable? The burden of demonstrable justification rests with the state but judges will be the final arbiters of what limitations are reasonable in "a free and democratic society." To put the question in the present context, what reasonable limitations on equality will be tolerated in Canada, as a free and democratic society? Judges will claim to reflect broader social values in making such judgment but they will inevitably impose their own values as well. Thus, the extent to which section 1 limits the impact of the *Charter* depends on the value structure implicit in both the judicial and the larger political process. These values will be examined later.

A significant limitation on the reach of the *Charter* is the application section 32. The majority view on this section is that the *Charter* will encompass legislative and government action, broadly defined,

but will not be extended to the private sector.³⁹ There is a minority view that section 32 can be read to include the private sector and thus extend the *Charter* to all activity.⁴⁰ Many violations of equality do occur in the private sector, and if it is immune from the *Charter*, the *Charter* will be blunted as an instrument of equality. Hester Lessard's article in this volume⁴¹ emphasizes the negative impact that a state action interpretation of the *Charter* would have on combating discrimination against women. The division of the world into public and private spheres has been identified by others as a limitation on legal reform generally.⁴²

Perhaps the most important limitation on the *Charter* is in the form of things that were omitted from the document. One such omission is a guarantee of the funding necessary to pursue a *Charter* challenge. This limits the real access to the *Charter*, as is discussed in the next part of this article. Limitations are also inherent in the choice of rights for inclusion in the *Charter* and the inferential exclusion of others.

One of the best critiques of the *Charter* on a philosophical basis is that presented by Robert Samek.⁴³ He argues that the rights protected in the *Charter* are the predictable legal and political rights that characterize the liberal state. They are aimed at removing the negative constraint of the state on individual freedom of choice. There is a notable absence of social and economic rights that would require a more positive intervention on the part of the courts.⁴⁴

As the title of his article suggests, Professor Samek is concerned about "untrenching" fundamental rights.⁴⁵ In his view, real fundamen-

39 K. Swinton, "Application of the Canadian Charter of Rights and Freedoms," in *The Canadian Charter of Rights and Freedoms: Commentary*, W. Tarnopolsky and G. Beaudoin, eds. (Toronto: Carswell, 1982), p. 41.

40 D. Gibson, *supra*, note 21 and "Distinguishing the Governors from the Governed" (1983), 13 Man. L.J. 505.

41 H. Lessard, "The Idea of the 'Private': A Discussion of State Action Doctrine and Separate Sphere Ideology," *infra*.

42 Members of the Critical Legal Studies Conference have been particularly vocal in attacking the public/private distinction. Their critique is examined in Part 4 of this article. Petter, *supra*, note 22, argues that democratically elected governments have been historically more favourable to the disadvantaged than the courts. Thus, it is odd to see the former as the villains and the latter as the heroes.

43 Samek, *supra*, note 22.

44 The limits of this selection are also emphasized by Macdonald and Petter, *supra*, note 22.

45 Samek, *supra*, note 22.

tal rights have a dynamism that denies a specific ideological content and precludes a static articulation and interpretation by the courts. Furthermore, he argues that most of the rights protected by the *Charter* are not fundamental. Samek takes the word "fundamental" in the term "fundamental rights" very seriously. He states that fundamental rights are rights that inhere in us *qua* human beings and not as participants in a particular political and social mix. Thus, the equality provision comes closest to capturing what Samek feels is a fundamental right. Language rights and mobility rights may be rights, but they are not fundamental rights, in Samek's view. Rights that are fundamental do not arise from conferral by the state. Neither can they be removed by the state. This is clearly a philosopher's objection to the *Charter*.

While I am in general agreement with the Samek critique and particularly like his link between rights and needs, there are also some problems with his analysis. Even if rights do inhere in people, the regulation of their exercise must involve the state. Another philosopher, Jacques Maritain, has argued that while fundamental rights are possessed by people and not conferred by the state, their exercise is a function of being recognized or limited by the state.⁴⁶ Petter makes the perceptive comment that the *Charter* is not a distributive document but represents a "zero sum" game in which rights are given to citizens at the expense of governments.⁴⁷

The argument about what rights should be included in the *Charter* presupposes an assumption about the value of courts as protectors of fundamental rights. Since Samek is opposed to the entrenchment of fundamental rights, it appears that he is skeptical about the role of courts as a protector. Thus, one would expect him to be happy with the fact that social and economic rights, which he regards as real fundamental rights, are outside the *Charter*. This is not the case.⁴⁸ Indeed, sections 7 and 15 could be broadly interpreted to encompass social and economic rights. A more difficult question is whether this would be a good thing.

When dealing with the issue of entrenchment of economic rights, *Charter* critics are as blind and legalistic as the objects of their scorn.

46 J. Maritain, *Man and the State* (Chicago: University of Chicago Press, 1951), pp. 101-103.

47 Petter, *supra*, note 22.

48 This same criticism can be made of McDonald, *supra*, note 22, although he may be more optimistic about the role of courts.

More would be required than the simple entrenchment of an economic or social right. Such a move would give the *Charter* more clout, but entrenchment is only the legal act. What would this entail in terms of an egalitarian redistribution of wealth in our society? Would those from whom this wealth would be taken remain in Canada? Would the capital flight from a country contemplating such a move result in an economy that could not maintain its present standards of welfare or jobs, let alone give effect to the legal right to a job or a guaranteed minimum income? Failure by legal commentators to recognize and address such concerns gives real meaning to the term disciplinary blindness. MacDonald appears blind to this, while Samek says only that we must be willing to pay the price for economic rights; on what that price is, he is conspicuously silent.⁴⁹

Is the *Charter* negative, positive or neutral as a means of promoting equality? The answer to this question has less to do with the document itself than how it is used. If the *Charter* will be used negatively, then the limitations on it are positive for equality. If the *Charter* will be used positively, then the opposite is true. The *Charter* has the potential for positive use, although such use is limited. Whether this potential will be realized depends on the political and judicial context. The rest of this article turns to these matters.

I have identified myself as a *Charter* skeptic or agnostic, rather than a true believer. The basis for my skepticism is not the *Charter* document itself but rather the limits that are inherent in the ideology of the liberal state and the process of judging. While the *Charter* is not self-enforcing, it offers the potential for significant change. There will be no revolution in Canadian society and none was intended by its drafters. The *Charter* will, however, change the lot of some Canadians. Whether the protection of fundamental rights will be extended to those with fundamental needs will be the true test of the *Charter*.

3. WHOSE INTERESTS WILL BE PROTECTED?

It is too early to properly assess who will be protected by the *Charter* in the long run, but I will attempt to take stock of the situation after four years. The performance of the Supreme Court of Canada will be reserved for separate treatment in Part 6 of this article. There has been no systematic analysis of lower court decisions but rather a

49 Macdonald and Samek, *supra*, note 22.

selection of some high profile cases that have attracted either scholarly attention or caught the fancy of the media. This analysis emphasizes the use of the *Charter* as a legal tool in courts and does not encompass its political and educational uses, which are also important. These latter uses may provide significant protection for groups and individuals by causing bureaucrats to be more rights conscious and by producing changes in administrative policy, as a way of avoiding *Charter* challenges. By focusing on court cases, my conclusions in this section may be more negative than if all elements of *Charter* impact were assessed. This is particularly true because the political and educational uses of the *Charter* are less costly.

Since the spin-off benefits of the *Charter* will not be assessed in this article, the question could more accurately be stated as—who will benefit from the *Charter* in the courts? This question has at least two components:

1. what voices will be heard in *Charter* cases? and
2. what interests will prevail?

Both components involve the institutional and human limitations of the courts and liberal democracy, which will be discussed in more detail later.

(a) Access Problems

There are critical problems of economic access to the courts to raise a *Charter* challenge. To raise an important *Charter* issue, litigants must be willing to fight their case all the way to the Supreme Court of Canada. This is a costly endeavour and weights the scales of justice on the side of the wealthy litigant. As a result, most of the early Supreme Court of Canada cases, outside the criminal law area, have been pursued by companies or economically comfortable individuals. Professor Petter suggests that the economic profile of these litigants affects not just whose voices are heard, but also the way that the rights are ultimately interpreted.⁵⁰ These economic limitations, inherent in a judicially enforced *Charter*, represent structural defects that severely limit *Charter* protection.

One way to diminish the financial obstacles to litigation is to encourage class actions. This would be a break with the Canadian trad-

⁵⁰ Petter, *supra*, note 22.

ition.⁵¹ Another way is to allow easy access to intervenor groups in *Charter* cases. Once again, this has not been the Canadian pattern, and the granting of intervenor status is a matter of judicial discretion. According to Kenneth Swan, Chairman of the Canadian Civil Liberties Association, even the Supreme Court of Canada has been reluctant to allow groups to intervene in *Charter* cases.⁵² Even if judges were more generous in granting intervention status, there are not as many Canadian groups aimed at the promotion of human rights as exist in the United States. Those groups that do exist are not as well funded and have less experience than their American counterparts. Unfortunately, those who are most in need of equality rights will be least capable of claiming them in courts, either as individuals or as members of public interest groups.⁵³

Corporate interests have made their voices heard in the early *Charter* cases. This has led some commentators to conclude that businesses will be the major beneficiaries of the *Charter*.⁵⁴ Not only can they afford the high costs of litigation, they can also deduct their court expenses for tax purposes. It does not automatically follow that business interests are served, from the fact that their voices are heard frequently. Private individuals can benefit from rights won by companies. There is an element of truth in that, but hopes should not be pinned on a trickle-down theory.

(b) Early Charter Approaches

To assess who is likely to win these early *Charter* battles, I shall consider the approach and attitude of judges on rights issues. On the crucial question of sources, judges have not been very adventurous in the early *Charter* cases. There has not been extensive use of empirical data or other extrinsic aids. A common practice has been to look to history to see what rights are fundamental. This is an approach

51 J. Bankier, "Class Actions for Monetary Relief in Canada: Formalism or Function" (1984), 4 Windsor Yearbook of Access to Justice 229.

52 K. Makin, "Brief Assails Move by Court to Curtail Intervenor Status," *Globe and Mail*, March 3, 1986.

53 Women may be an exception to this generalization as they have been an effective political lobby and have set up a Legal Education Assistance Fund (L.E.A.F.). Handicapped groups have also developed advocacy groups, but they are not as well funded.

54 L. McQuaig, "Business may benefit most from Charter of Rights," *Globe and Mail*, January 5, 1985.

guaranteed to promote traditional values and support the *status quo*.⁵⁵ It is an approach that has been approved by some academics⁵⁶ and adopted to resolve difficult value issues such as abortion. Parker C.J., in *R. v. Morgentaler*,⁵⁷ made the following statement before concluding that the right to marry and have children is a fundamental value, while the right to have an abortion is not:

In my opinion, a determination of rights encompassed by s. 7 should begin by an inquiry into the legal rights Canadians have at common law or by statute. If the claimed right is not protected by our system of positive law, the inquiry should then consider if it is so "deeply rooted in the conscience and traditions of our country as to be ranked as fundamental"⁵⁸

The above approach has been followed in a number of cases and is just as likely to be used in relation to section 15 as to section 7. A similar static approach can be seen in the early analysis of section 1 by the courts. Here the touchstones are both historical and comparative. If a particular limitation on rights has been around for a long time and used in several different countries, then it must be reasonable. As Professor Monahan indicates, such an approach confuses the descriptive with the normative.⁵⁹ Judges should be concerned with what limits *ought* to be regarded as reasonable and not with what ones have been in historical and comparative terms.⁶⁰ While the historical and comparative information is useful, to allow it to be determinative is a sure way of perpetuating the *status quo*. Change will come not from examining the past but considering present evidence on patterns of discrimination and standards of reasonableness.

As important as the judges' approach to the *Charter* is their views on the nature of rights. The kinds of rights judges read into the *Charter*

55 MacKay, *supra*, note 22 at p. 329.

56 L. Tremblay, "Section 7 of the Charter: Substantive Due Process?" (1984), 18 U.B.C. Law R. 201, and A. Roman, "The Charter of Rights: Renewing the Social Contract" (1982-83), 8 Queen's L.J. 188, are two examples.

57 (1984), 11 C.R.R. 116, 47 O.R. (2d) 353, 41 C.R. (3d) 193, 14 C.C.C. (3d) 258, 12 D.L.R. (4th) 502 (Ont. H.C.).

58 *Ibid.*, p. 171 (C.R.R.).

59 Monahan, *supra*, note 22 at pp. 14-16.

60 *Ibid.*, at p. 15. Monahan cites as an example of the need to look beyond history to the empirical evidence of discrimination the desegregation cases in the United States.

will determine who is protected. By training and inclination judges are disposed towards an individualistic rather than collective approach to rights. This disposition will be accentuated by reference to the American Bill of Rights experience, which emphasizes individual rights rather than collective ones. The *Charter* itself has many individual rights guarantees that would fit the classic American mould. Judges are inclined to view the individual as an atomistic rights bearer, and this affects how the *Charter* will be interpreted.

Canada does, however, have a collective rights tradition. Under the *Constitution Act, 1867* (formerly the *B.N.A. Act*), the only guaranteed rights were collective in nature—language and denominational schools rights. Furthermore, nearly one third of the rights guaranteed in the *Charter* could be characterized as collective.⁶¹ If majorities can be considered a collective, then even section 1 of the *Charter* may be viewed as a collective rather than individual guarantee. Sections 7 and 15 can also be interpreted as a protection of group rights, as well as individual rights. Indeed, these collective rights elements of the Canadian tradition have been cited as a reason why Canada should be careful in adopting American solutions to Canadian problems.⁶²

Joseph Magnet agrees that it is the bi-cultural and multi-cultural aspects of Canada that make her unique, and distinguish her from the United States.⁶³ He fears, however, that the courts have embarked on the American road to individualistic rights, to the detriment of more traditional communitarian values. Professor Magnet extends this indictment to the Supreme Court of Canada as well as the lower courts. In respect to the Supreme Court, he may have been premature because it has not had time to deal with the equality rights, which offer the greatest potential for a collective interpretation. The criminal law rights are by their nature individualistic and have consumed much of the Court's time to date. Nonetheless, there is some support for Magnet's concerns in the early judicial performance concerning section 7 of the *Charter*.

61 Sections 16–23, 25, 27 and 29 are examples.

62 Monahan, *supra*, note 22.

63 J. Magnet, "The Supreme Court of Canada and the Charter of Rights," an address delivered at a symposium on the Supreme Court of Canada at Ottawa, October 3–5, 1985. The proceedings of this conference are to be published. The significance of collective rights in the Canadian context is also explored by J. Woehrling in "Minority Cultural and Linguistic Rights and Equality Rights in the *Canadian Charter of Rights and Freedoms*" (1985), 31 McGill L.J. 50.

If equality is the likely foundation for a collective rights model, then liberty would be the basis of an individualistic model. One problem with a judicial emphasis on liberty is that it tends to work to the advantage of those who already have it, rather than those seeking to attain it. It also assumes a certain freedom of choice and action that is not the normal experience for members of groups who have been the victims of systemic discrimination. The doctors protesting Ontario's legislation banning extra-billing are a vivid illustration of the likely beneficiaries of a broad liberty approach to the *Charter*.⁶⁴ Freedom to earn money even at the expense of providing unequal medical services is hardly the basis for an egalitarian revolution.

In *Weinstein v. Minister of Education for British Columbia*,⁶⁵ the following broad definition of liberty was adopted from *Meyer v. Nebraska*:⁶⁶

[w]hile this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁶⁷

In *R. v. Robson*,⁶⁸ liberty was defined as "so grand a concept, [that] it may not be possible to capture its meaning in words." This statement was adopted in *Re Mia and Medical Services Commission of B.C.*,⁶⁹ where a doctor's right to earn a livelihood was anchored in section 7. Recognizing that such an economic extension of section 7 went beyond American interpretations of liberty, the judge resorted to the common law heritage:

I am aware that, generally speaking, American courts have been reluctant to interfere in the legislative settlement of economic problems. I

64 L. Newberry, "Doctor's civil liberties violated medical association lawyer says," *Toronto Star*, February 13, 1986.

65 [1985] 5 W.W.R. 724, 65 B.C.L.R. 46, 20 D.L.R. (4th) 609 (B.C.S.C.).

66 262 U.S. 390 (1923).

67 *Ibid.*, as cited in *Weinstein*, *supra*, note 65 at p. 619 (D.L.R.).

68 (1984), 11 D.L.R. (4th) 727 at 732 (B.C.S.C.).

69 (1985), 15 Admin. L.R. 265, 61 B.C.L.R. 273, 17 D.L.R. (4th) 385 (B.C.S.C.).

accept that as a general rule, but I am not concerned with duly enacted legislation in this case, and even if I were, there are some rights enjoyed by our people including the right to work or practice a profession that are so fundamental that they must be protected even if they include an economic element.

At the very least, liberty must include those freedoms of lawful conduct always enjoyed by Canadian and by our predecessors in the Anglo-Saxon heritage. If we have enjoyed a right for many centuries then it must surely be included in "liberty" whether specifically stated in the *Charter* or not.

Rights we have enjoyed for centuries include the right to pursue a calling or profession for which we are qualified, and to move freely throughout the realm for that purpose. These are rights our people have always taken for granted. Who would question them until now?⁷⁰

Another use of a section 7 liberty argument occurred in *D & H Holdings Ltd. v. City of Vancouver*.⁷¹ Here protection was extended to the right to operate a hotel and not have a licence arbitrarily removed. An argument that there was also a violation of equality was rejected. It is noteworthy that all these cases emanate from the British Columbia Supreme Court and might be regarded as a west coast aberration. However, other cases have adopted a similar property orientation to section 7.⁷² Some cases have taken a more circumspect approach to section 7, but such rulings have often come when the litigants were less well established.

It is difficult to identify the likely *Charter* victors without a more exhaustive analysis of the cases. The likely losers in *Charter* litigation are easier to identify. One of the likely losers is labour unions. Since

70 *Ibid.* at p. 412 (D.L.R.). It should be noted that another series of cases has refused to extend section 7 of the *Charter* to economic and commercial interests: *R. v. Videoflicks* (1985), 48 O.R. (2d) 395, 15 C.C.C. (3d) 353, 5 O.A.C. 1, 9 C.R.R. 193, 34 R.P.R. 97, 14 D.L.R. (4th) 10 (Ont. C.A.); *Gershman v. Motor Transport Bd.*, [1985] 2 W.W.R. 63, 31 M.V.R. 67, 10 Admin. L.R. 253, 14 D.L.R. (4th) 722, 32 Man. R. (2d) 308, 15 C.R.R. 68 (Man. Q.B.), affirmed [1986] 1 W.W.R. 303, 16 Admin. L.R. 1, 22 D.L.R. (4th) 520, 36 Man. R. (2d) 81, 17 C.R.R. 132 (Man. C.A.); and *Sebastian v. Saskatchewan Securities Comm.* (1984), 39 Sask. R. 252 (Sask. Q.B.).

71 (1985), 15 Admin. L.R. 209, 64 B.C.L.R. 102, 21 D.L.R. (4th) 230 (B.C.S.C.).

72 *R. v. Fisherman's Wharf Ltd.* (1982), 40 N.B.R. (2d) 42, 135 D.L.R. (3d) 307 (N.B.Q.B.), affirmed on other grounds (1982), 44 N.B.R. (2d) 201, 144 D.L.R. (3d) 21 (N.B.C.A.), read property rights into the phrase "security of the person". This approach was rejected in Nova Scotia: *Re Workers' Compensation Board of Nova Scotia and Coastal Rentals Sales & Services Ltd.* (1983), 12 D.L.R. (4th) 564 (N.S.T.D.).

union power is based upon collective rather than individual rights, the courts' apparent preference for the latter, coupled with their traditional antipathy to labour, is an ominous combination.⁷³ Labour unions have lost most of their *Charter* challenges in the lower courts, and there are a host of cases in the Supreme Court of Canada that will provide a signal as to whether the Court will be collective or individualistic in its approach. Some American commentators would suggest that the *Charter* will be a regressive step for the labour movement.⁷⁴ This is a view shared by many Canadian labour lawyers, who see more gains for employers than workers.

Claims for funds to finance experts in a utility hearing were unsuccessful when raised by a group of seniors.⁷⁵ An argument that the removal of social assistance payments was in violation of fundamental justice was summarily dismissed.⁷⁶ A single father's claim to family assistance was successful in Nova Scotia but the result was a threat by the government to discontinue such payments to all single mothers, rather than pay fathers.⁷⁷ Everyone loses in such a case, especially the children of single parent families. Even claims by fathers to have an equal claim to the custody of their children on divorce have been attacked as denying legitimate claims by mothers who have been given custody on the basis of merit and not discrimination.⁷⁸ Even the equality provisions may be used to the advantage of the dominant male society rather than women or children.

(c) Emerging Equality Issues

The early record of the *Charter* as a judicial tool for the disadvan-

73 L. Slotnick, "Charter cases major challenge facing unions," *Globe and Mail*, January 13, 1986.

74 K. Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1974), 64 *Minn. L.R.* 265.

75 *Manitoba Society of Seniors Inc. v. Greater Winnipeg Gas Co.* (1982), 18 *Man. R.* (2d) 440 (*Man. C.A.*).

76 *Elliot v. Director of Social Services* (1982), 17 *Man. R.* (2d) 350 (*Man. C.A.*), granted leave. The case was quickly dismissed on the merits, December 1, 1982 (*Man. C.A.*).

77 *Philips v. Lynch, Brown, Parsons et al.*, unreported, February 27, 1986 (*N.S.S.C.*). The government threat was delayed by a stay of proceeding, pending an appeal of the case.

78 M. Landsberg, "Only in male justice system does primary care count so little," *Globe and Mail*, March 15, 1986.

tagged is not encouraging. While some cases do vindicate the rights of the dispossessed, they appear to be the exception rather than the norm.⁷⁹ What does this tell us about who will be the likely victors of the early equality battles? How will the courts deal with equality issues that often pit egalitarian values against more traditional claims to liberty? The American experience is not encouraging, as the Bill of Rights has not been a sharp tool in slicing a path through discrimination. Ironically, some American lawyers are now attempting to avoid the Constitution in advancing equality claims in favour of relying on the better protections of British common law.⁸⁰

Section 1 of the *Charter* sets the tone for the document by balancing rights and limits in a free and democratic society. While the precise elements of a free and democratic society have not been defined, it is clear that the drafters of the *Charter* considered Canada to be one. In relative terms, Canada is free and democratic, although it is far from perfect on either score. In respect to equality, the question is whether equality is part of this free and democratic tradition. Freedom for doctors to extra-bill patients may result in a denial of equal access to medical services for the poor. Democracy, in its majoritarian form, may mean the suppression of the rights of minority groups. Will affirmative action programs become an accepted part of Canada society, in spite of the fact that they have not been accepted in other countries?

What impact the *Charter* will have on the promotion of equality largely depends on the limits of political theory and judging to be considered in the next parts of this article. The likely judicial approach to specific equality issues, such as sexual discrimination, prostitution, pornography and homosexuality, are considered later in this volume. In this part, I shall explore possible judicial responses to equality issues by three brief case studies.

(i) *Abortion*

The abortion issue represents one of the great value dilemmas of

79 One obvious area where the disadvantaged have benefited from the *Charter* is in the area of criminal law. Even here, the extent to which the *Charter* can be used depends upon the resources of the accused. The rights of the accused are individualistic in nature and are thus less jarring to judicial philosophy.

80 R. Dworkin, "A New Route To Equality" (1986), *Atlantic Monthly*, March. This argument is explored in a book review of C. Haar and D. Fessler, *The Wrong Side of the Tracks* (New York: Simon & Schuster, 1985).

our time. It has been vigorously debated in the legislative arenas and the press, and this will continue in the courts. Abortion is a complex issue that cannot be analyzed on the basis of a liberty and equality dichotomy. In some respects, it is the pro abortion women who come closest to a classic free choice argument. It is instructive that both the pro life and pro choice sides of the debate have relied on the guarantees of section 7 and both will draw upon the equality provision.

What are judges likely to do with the issue? In the past, courts have been content to leave the basic value choice in the hands of the legislators. The late Chief Justice Laskin refused to review the abortion laws, with respect to the claim that they were unequally administered in different provinces and in different hospitals within a province.⁸¹ He was also concerned about reaching for equality by judicially unmanageable standards, which had no anchor in the legislation. Laskin thus rejected a substantive due process attack on abortion.

Whether Laskin would have felt as constrained under the *Charter* as he did under the *Canadian Bill of Rights* is a question that will never be answered. The restrained judicial approach to abortion, charted by the late Chief Justice, was adopted by both courts in the post-*Charter* Morgentaler litigation.⁸² Such a restrictive analysis would preclude the protection of equality guarantees in the administration of the laws. This would stunt the evolution of section 15 and is surely wrong.

While I do not think Laskin would support such an interpretation of his words, there is evidence that he wished to keep the abortion issue out of the courts.⁸³ This does not reflect any particular view on abortion but rather a desire to have the issue aired in the proper forum. If the issue cannot be avoided by diverting attention to the issue of who should decide, the courts are likely to adopt another classic liberal approach—the process model. The role of the courts would be to provide a fair process, to which all have access, but leave the substantive

81 *R. v. Morgentaler* (1975), 4 N.R. 277 (S.C.C.).

82 *R. v. Morgentaler* (1984), 47 O.R. (2d) 353 at 392, 41 C.R. (3d) 193, 14 C.C.C. (3d) 258, 12 D.L.R. (4th) 502, 11 C.R.R. 116 (Ont. H.C.), appeal quashed (1984), 48 O.R. (2d) 519, 41 C.R. (3d) 362, 16 C.C.C. (3d) 1, 6 O.A.C. 53, 14 D.L.R. (4th) 184, 14 C.R.R. 107 (Ont. C.A.). See also *R. v. Morgentaler* (1985), 52 O.R. (2d) 353, 48 C.R. (3d) 1 at 49, 11 O.A.C. 81, 22 C.C.C. (3d) 353, 22 D.L.R. (4th) 641, 17 C.R.R. 223 (Ont. C.A.).

83 *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 24 C.R. (3d) 352, 24 C.P.C. 62, 130 D.L.R. (3d) 588, 39 N.R. 331, 12 Sask. R. 420, 64 C.C.C. (2d) 97 (S.C.C.). Laskin's denial of standing is puzzling in light of his earlier expansive approach to the issue.

value choices to others.⁸⁴ This approach may be indicative of what we can expect from judges on equality issues in a liberal state.

(ii) *Mandatory Retirement*

It is likely that the age discrimination provisions of the *Charter* will sound the death knell for mandatory retirement in many sectors of the work force. The Supreme Court of Canada has given a preview of its view on this issue in relation to a provincial human rights statute. In *Winnipeg School Division No. 1 v. Craton*,⁸⁵ the Court elevated human rights codes above regular statutes and by so doing indicated a preference for individual human rights over broader social policies. The result of the case is not surprising, but what is surprising is that many people (lawyers included) assume that mandatory retirement can no longer be defended.

The *Charter* does not mandate the removal of mandatory retirement in all sectors of the work force. It is open to either employers or unions to mount innovative section 1 arguments supporting mandatory retirement as a reasonable limitation on equality. In making such an assessment, courts should examine the effects of removing mandatory retirement and replacing it with competence tests or allowing people to work indefinitely. This is an ideal issue for the courts to make a ruling on the basis of empirical evidence rather than arid legalism. Such an approach requires judicial innovation.

It is interesting to note that those who benefited from the removal of mandatory retirement are white collar workers, such as teachers and university professors who are pursuing their own individual rights. Those who are opposed to its removal are blue collar workers, whether unionized or not, who are more concerned about their collective rights. Mandatory retirement is not a pressing issue if you are a Cape Breton miner exposed to black lung disease on a daily basis. Another possible loser in a sweeping removal of mandatory retirement are the consumers of the services of these white collar workers. If competence tests are introduced to replace the arbitrary age cut off, they will bring their own problems. Even mandatory retirement is a complex issue that cannot be solved by a knee-jerk individual rights approach.

84 S. Fairley, in "Enforcing The Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review" (1982), 4 Sup. Ct. L.R. 217, applauds this process approach.

85 [1985] 2 S.C.R. 150, [1985] 6 W.W.R. 166, 15 Admin. L.R. 177, 61 N.R. 241 (S.C.C.).

(iii) *Equal Pay For Work of Equal Value*

This is a complex, subjective and highly controversial issue. Courts will look to the experiences of the Canadian Human Rights Commission on this issue but it has not provided neat solutions or avoided controversy. Indeed, the issues of equal pay for women and affirmative action programs have raised the ire of some employers and led Geoffrey Hale, of the Canadian Organization of Small Businesses, to compare the activities of human rights workers to "McCarthyism and the Spanish Inquisition."⁸⁶ While most employers would be more reserved, there are significant differences in viewpoints about what constitutes equity in the work place.

What jobs are of equal value? Are day care workers more valuable than judges? Do legal secretaries deserve the same or higher financial rewards than the lawyers for whom they work? It is not too difficult to predict the judicial response to the latter two questions. Whether judges will use section 15 to get into this kind of issue at all is the bigger question. The kind of conclusion that judges would reach both about hearing the issues and making the ultimate value choices would be conditioned by their world view. This leads us to the task of putting the *Charter* in its political and judicial context.

4. THE LIMITS OF JUDICIAL AND POLITICAL THEORY IN A LIBERAL STATE

The highly politicized nature of the section one inquiry is merely exacerbated by the reference to "reasonable limits" that can be "demonstrably justified in a free and democratic society". In order to give content to this terminology, the courts will have to devise some normative theory about the nature of freedom and of democracy. The trouble with this is twofold. First, there is no fixed or uncontroversial "core meaning" to these concepts; they are "contested concepts", with a rich and sophisticated debate continuing within political theory over their content and application. Second, the judiciary is largely unaware of the nature and subtlety of these theoretical debates; legal training in Canada has always relegated such "political" questions to the domain of the academy or the

86 G. Hale made his remarks at a conference entitled—*The Impact of the Charter of Rights and Human Rights Laws on Human Resource Management*, held at St. Mary's University in Halifax, February 27–28, 1986. His remarks were reported in C. McIlveen, "Affirmative action program attacked," *Halifax Mail Star*, February 27, 1986 and "Hale blasts rights workers," *Halifax Mail Star*, March 1, 1986.

legislature rather than the courtroom. The enactment of the *Charter* is like an unscheduled "night drop", in which Canada's judges and lawyers have been parachuted unawares into the battlefield of political theory, without weapons, and with no knowledge of the deployment of the contending armies.⁸⁷ [footnotes omitted]

What Monahan states about judicial interpretation of section 1 is true of the *Charter* generally. Everyone would not agree that what lawyers and judges need to make sense of the open-ended language of the *Charter* is a theoretical framework.⁸⁸ Even among academics there are those who assert that the only useful guide to action is practice and that theorizing is counter productive.⁸⁹ I do not accept the clear division between theory and practice, but I agree that lawyers and judges dealing with the *Charter* can benefit from a broader political and legal perspective into which individual cases may be fitted.

The various legal and political categories discussed in this part of the article need not be adopted by either lawyers or judges. Labels are by definition restricting and they distort the true situation. Nonetheless, a certain amount of categorizing is necessary to make sense of reality. So long as one remembers that these categories are for convenience and not intended as a series of procrustean beds, they can serve a useful purpose. At a minimum, this part should provide a glimpse of the diversity of perspectives that can be brought to disputes about rights. It is also important that the key actors in this new *Charter* drama identify their own inclinations and biases because they will be influenced by these larger political trends, whether they realize it or not. Judges might even be willing to state their views in a more forthright fashion than has been the Canadian tradition.

There are other pragmatic benefits to an awareness of judicial and political theory. A recognition of the diversity of views about rights could lead judges to be more open to a variety of voices in the courts. This could have practical application to questions of standing and intervenor status. A broader philosophical framework might allow judges to present a more coherent pattern in *Charter* cases.⁹⁰ A greater

87 Monahan, *supra*, note 22 at p. 14.

88 The need for theory has been asserted by many other legal academics. Lyon, *supra*, note 11 and Roman, *supra*, note 56 are two examples.

89 S. Knapp and W. Michaels, "Against Theory" (1982), 8 *Critical Inquiry* 723.

90 Whether one thinks this is possible depends on the theory adopted. Marxists and feminists would say there is a pattern, but it is a negative one. Critical Legal Studies scholars would question whether any coherence is possible in existing law.

knowledge of varying perspectives on law could also affect the kinds of sources that would be tendered by lawyers and accepted by judges. Formalist judges would focus on the strict construction and analysis of legal materials, while functionalist judges would be more receptive to an evaluation of social fact data. A feminist judge might not only consult new sources, but might also adopt a different method of dispute resolution. Some theory is necessary to assess the proper role of the judge, unless we are willing to simply trust judges to do "good" in the individual case in accordance with their own values. To a large extent that is what presently occurs, but we assume that the individual choice of the judge is in some way limited by concepts, such as democracy and the rule of law.⁹¹

(a) Structure and Terminology

In presenting this part of the article there is a danger of falling victim to the formalism and categorizing that I condemn. With that in mind, I have attempted to simplify the terminology and structure, and apply it to judging and the *Charter*. This part is organized on two axes—one political and one judicial. For the latter I choose the term judicial rather than legal because it highlights judging, which is the focus of this article. Of course, a discussion of broader legal theory cannot be avoided, but it is considered within a more specific judicial framework.

(i) *The Political Axis: Liberalism and Radicalism*

Assuming that Canada has moved beyond the divine right of kings, a feudal structure of obligations and duties and conservative theories of enlightened despotism, I label mainstream political thought as liberalism.⁹² Included in this term is both conservatism and liberalism in the more traditional political sense. Liberalism as an ideology is based on the maximization of freedom of choice in all spheres of human endeavour. In political terms, this means an emphasis on the role of the individual in society and a championing of his or her free and democratic rights. In economic terms, liberalism

91 Both these concepts are embodied in the *Charter*—the latter in the preamble and the former in specific rights.

92 I recognize that elements of all these older political theories are present in liberalism but they have been subsumed by the latter.

translates into laissez-faire economics and the glorification of free choice in the market place. There is also a legal component to liberalism represented by the rule of law and an emphasis on process values.

The role of the state as a liberal structure—whether in its political or judicial guise—is to provide an open process for the resolution of value disputes. In political terms, this means an emphasis on democracy, which in theory will produce representatives of a host of different perspectives and values. In the judicial arena, the emphasis is on value-neutral judges who will adjudicate upon the competing versions of reality presented by opposing counsel. Needless to say, this is the ideal and not the reality. Perhaps it is the ideal version that Macdonald has in mind when he refers to the “true Canadian liberal—democratic tradition” that the *Charter* should promote.⁹³

An essential ingredient of liberalism is the silence of the state on what constitutes the “good”. This good is to be defined and pursued on an individual basis as much as possible; and the state should only intervene where one individual’s pursuit of happiness interferes with that of another. Such interference is a common occurrence, necessitating much more state intervention than would fit the ideal. An idealization of liberty and the pursuit of freedom are vital elements of liberal doctrine. There are, however, two kinds of freedom—positive and negative.⁹⁴ Negative freedom is concerned with preserving as wide a sphere of individual autonomy as is consistent with the general public welfare. Positive freedom is a more spiritual concept aimed at creating an order in society that will allow the self-actualization of every person. This positive approach may require state intervention on behalf of more disadvantaged individuals.

In the actual liberal state there are aspects of both variations of liberty, but it is most prevalent in its negative form. Within the *Charter*, the majority of guarantees would be interpreted as promoting freedom in the negative sense, but some of the collective rights mentioned earlier and sections 7 and 15 are open to a positive freedom interpretation. In some instances, such a positive interpretation would be the only way that the *Charter* could be used to produce fairness and equality. However, the key to liberal theory is freedom in the negative

93 Macdonald, *supra*, note 22. He does not suggest how the “truth” of a particular tradition is to be assessed. Fraser, *supra*, note 23, criticizes such assertions of truth.

94 I. Berlin, *Two Concepts of Liberty* (Oxford: Clarendon Press, 1958).

sense. Accordingly, freedom in the form of individual autonomy is likely to prevail over broader egalitarian or community values.⁹⁵

The legal form of liberalism emphasizes the same kind of value neutrality as the political variant. The rule of law is the credo, and value-neutral judges are to preside over the interpretation of the law. A process oriented view calls for a restrictive form of judicial review in which judges promote fair procedures and full participation in the resolution of value disputes but do not impose substantive values.⁹⁶ Judges should only intervene in a substantive way when the democratic and political structures have gone seriously off-track. This raises another aspect of liberal legalism—a focus on institutions and a concern about who should decide. What actually is decided is less important than the process of decision-making. Some Canadian academics have called for such a process approach to the *Charter*.⁹⁷

There have been many critics of liberalism both on the left and the right of the political spectrum. Most of these criticisms come from the Critical Legal Studies Conference (hereafter C.L.S.) and will be examined shortly as part of the radical critique of liberalism. Before turning to the radical end of my political axis, I shall give one example of an attack on liberalism from the right.

Ours, the liberal credo tells us, is an "open society" the rules of which call for a continuing (NEVER terminal) hearing for all ideas . . . for the reasons that are so often given by liberals themselves, that the ventilation of differing opinions can do much to drain misunderstanding, to make for progress, and harmony. The liberal ideology is putatively based on the maximization of choice at every level. What is important to the liberal,

95 Pornography is one area where individual rights to expression may prevail over broader egalitarian claims on behalf of women. Disputes about whether emissaries of South Africa should be allowed to defend apartheid in public forums raise a similar dilemma. An Ontario Supreme Court Judge rejected an injunction application from four University of Toronto professors seeking to prevent South African ambassador, Glen Babb, from speaking on campus: "Judge sides with South African envoy," *Ottawa Citizen*, January 31, 1986.

96 Ely, *supra*, note 25, articulates this view in the American context. He develops his theory in the context of abortion in "The Wages of Crying Wolf: A Comment on *Roe v. Wade*" (1973), 82 Yale L.J. 920.

97 Fairley, *supra*, note 84, expressly adopts the Ely, *supra*, note 96, process model. Monahan, *supra*, note 22, extends it and MacKay, *supra*, note 22, supports a procedural approach by the courts, in respect to section 7, but stops short of a full process model.

again putatively, is that there be choice The liberal ideology cannot develop beyond its present point so long as its root delusion is that method is substance.⁹⁸

The radical pole of my political axis will not be explored in the same depth as liberalism, as it is the latter that sets the political context for the *Charter* and judging. A more detailed analysis of the radical position will be considered in the context of a later section on the critique of liberalism. Marxism is obviously a radical political view that rejects the liberal orthodoxy. Since Marxists have little to say about law or judging, I shall comment on two other radical perspectives—C.L.S. and feminism. Indeed there are Marxist variants of both C.L.S. and feminism. Both groups also have non-Marxist strands. I describe these groups as radical not in a pejorative but in a descriptive sense. They offer a challenge to mainstream political and legal thought.

What sets these radical political schools apart from mainstream political thought is a rejection of the basic tenets of liberalism. Traditional hierarchy is refuted and the role of law and judges in society is downplayed. Indeed, law, in its present guise, is seen as an oppressor rather than a liberator of people. Both the C.L.S. school of thought and the feminist one abandon the liberal idea of value neutrality and do not apologize for trying to impose their values on others. These groups are willing to declare a political agenda and pursue it in an up-front fashion. Rather than focus on the individual as the atomistic rights bearer, both C.L.S. members and feminists emphasize collective and communitarian values. Law is seen as part of the larger political process, with little or no autonomous identity. Although there are parallels, there are also differences between members of C.L.S. and feminists, and these will be considered in a later section.

(ii) *The Judicial Axis: Formalism and Functionalism*

Rather than attempt a series of potted summaries of various schools of jurisprudence, for which I am ill equipped, I have attempted to organize brief comments on the leading theories in relation to two broad judicial theories—formalism and functionalism. The two categories are fairly distinct, but the theories discussed under them will sometimes fall into both categories. Functionalism, in particular,

98 W.F. Buckley, Jr., *Up From Liberalism*, 25th Anniv. ed. (New York: Stein and Day Publishers, 1984), pp. 183–84.

is an open-ended category embracing many different political and legal perspectives. My divisions may be more a matter of convenience than logic. There is no claim to a comprehensive survey of legal theories.

Accepting that there is no clear line between law and politics (in the broad sense), the two judicial theories are considered within the context of my political axis. Liberalism finds expression in both formalism and functionalism. Formalism is rejected by the radicals and functionalism is redefined to suit new political agendas. Both the C.L.S. school of thought and the feminist one regard the existing state of law as dysfunctional. Members of C.L.S. regard it as dysfunctional for a range of reasons. Those influenced by Marxism see law as a major vehicle for promoting the capitalist state and oppressing the workers. Members of the modernist branch of C.L.S. decry the dangers of reifying the law and diverting energies from a more fruitful political struggle. Feminists regard law as yet another means of imposing a male view of the world and oppressing women. The goal of both groups is to redefine the goals of law and make it functional in a new sense. This I have labeled—radical functionalism.

Formalism is a term used to describe a particular form of judgment writing, but more importantly, it is descriptive of a variant of judicial reasoning. A crucial tenet of formalism is that law is an autonomous entity with a coherence of its own. Logic and rationality are the watchwords of formalism and law is seen as a set of rules and principles that make sense and can be discovered by judges. The creation of categories and dichotomies is characteristic of formalism. There is a scientific element to much of formalism and in some cases even religious overtones. Formalists are generally concerned about objectivity and a search for truth. It is individualistic in orientation and accepts hierarchies as part of the natural order of things. In formalist thought, law is above politics and has an independent existence. Americans sometimes refer to formalism as “classical” legal thought, but there is no exact classical legal period in Canada as it existed in the United States.⁹⁹

Formalism is an underlying idea of the current legal order.¹⁰⁰ It has an important influence on judges and how they approach the law.

99 D. Kennedy, “Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940” (1980), 3 *Res. in Law and Society* 1.

100 R. Unger, *Law in Modern Society* (New York: The Free Press, 1976).

Mark Gold describes the link between formalism and judging as follows:

A formalist style of judgment writing is not related logically to any one theory of law; one is just as apt to encounter formalism in a judgment ostensibly rooted in natural law as in one informed by a positivist theory of law. Nevertheless, there is a certain image of law that one tends to find implicit in a formalistically styled judgment, and that is the conception of law as originating outside the actual decision of the judge. That "outside" may be the will of the legislator, the perceived imperatives of natural law, or that brooding omnipresence of the waiting to be discovered, but never created, common law. The common feature of all of these variations is the image of law and adjudication as somehow impersonal, objective and autonomous from the will of the judge. This view probably captures the public's general appreciation of courts and law, and remains an ideal around which much of the legal profession will rally.¹⁰¹ [footnotes omitted]

Functionalism is more amorphous than formalism and embraces a wider range of schools of thought. By redefining the functions, it can even be adopted by the radical pole of my political axis. The critical feature of this school of judicial thought is that it is often teleological.¹⁰² Law is not an end in itself but a means to certain goals. These goals are political and social in nature, ranging from the ill-defined "good" of the liberal state to much more specific objectives.¹⁰³ Functionalism is flexible and adaptable in contrast to the rigid categories of formalism. While formalism is inward looking and legocentric, functionalism is outward looking and views law as part of the larger social and political structure. Most functionalists consider law to be at least semi-autonomous but not independent from the larger society.

One of the judicial approaches often associated with functionalism is interest balancing.¹⁰⁴ Once law is accepted as a means

101 Gold, *supra*, note 32 at p. 461.

102 It is interesting to note that academics have called on judges to pursue a teleological mandate under the *Charter*. Lyon, *supra*, note 1.

103 Moral goals may also be pursued as part of functionalism, and it would thus include even some natural law theories. Law and economics would be another brand of functionalism in which law would be yet another means to economic efficiency.

104 Gold, *supra*, note 32, counterposes formalism and interest balancing. He also refers to the American equivalent dichotomy as classical and public law adjudication as defined in, Chayes, "Forward: Public Law Litigation and the Burger Court" (1982), 96 Harv. L. Rev. 4.

to social goals, judges can legitimately pursue those goals by a balancing of competing interests and values. Two important questions are left open by an interest balancing approach. What interests should be put on the balance? To what goal is the balancing of interests aimed? If strictly legal interests are balanced, then it is an example of formalism rather than functionalism. If only non-legal interests are balanced, it is functionalism in its most externalized form. As new interests are introduced to the balance and novel functions of law articulated, functionalism changes shape. Whatever its shapes, judges are involved in a more political process and the line between law and politics is blurred.

(b) Liberal Legalism: Mainstream Thought

(i) Formalism

As a more concrete illustration of formalism I shall briefly discuss three recognized schools of legal thought. These schools are Natural Law, Positivism and Dworkinian interpretivism. There were other possible candidates for discussion such as the Law and Economics school of thought, which some would consider formalist. All of the above theories also have elements of functionalism, so there is overlap between the categories.

A. *Natural Law*. There are many variants of natural law, and like most legal theories it has evolved over time. Centuries after the term was coined there is still no agreement upon what the term means. In the classical sense of the term, natural law has three major characteristics: it is universal and immutable in content, although its application may change over time; it is superior in force to written law in either legislative or judgment form; it is discoverable by reason or intuition and it is a judge's task to discover the natural law and apply it to a particular fact situation.¹⁰⁵ In many respects, natural law is analogous to the objectivist position in ethics.¹⁰⁶ Natural law accepts the exis-

105 My discussions of both natural law and positivism are based in part on useful letters on this topic exchanged by my *Benchmarks* co-authors, Ed McBride and Randall Balcome, between August and November 1985. I am particularly indebted to the September 4, 1985 and November 12, 1985 letters of Mr. Balcome, whom I must confess won me over to his side of the natural law debate. In all likelihood this is because we share a similar subjectivist disposition.

106 J. Mackie, *Ethics: Inventing Right and Wrong* (Singapore: Penguin Books, 1983).

tence of an external reality beyond the subjective experience of individuals. For some early theorists such as Thomas Aquinas this external source was divine.¹⁰⁷

Contemporary proponents of natural law have downplayed the external sources of law but have not abandoned it. External sources of law can now be more secular and implicit in the conditions of group life. Lon Fuller articulates this position:

there are external criteria found in the conditions required for successful group living, that furnish some standard against which the rightness of his decision should be measured.¹⁰⁸

For Fuller, one of the common threads of natural law in all forms is the pursuit of the basic principles of the social order that would allow satisfactory community life.¹⁰⁹ These principles represent a wedding of law and morality that is characteristic of natural law.

Not all modern writers accept this secularization of natural law. Canadian philosopher George Grant articulates the following version of natural law:

[t]here is an order in the universe which human reason can discover and according to which the human will must act so that it can attune itself to the universal harmony. Human beings in choosing their purposes must recognize that if these purposes are to be right, they must be those which are proper to the place mankind holds within the framework of universal law. We do not make this law, but are made to live within it.¹¹⁰

Descriptions of natural law as a discrete body of knowledge external to individual judges and morally based are classic examples of formalism. It is the logic and rationality of the natural law that dictates certain legal results and not naked politics or the subjective views of a particular judge. Because of its appeal to morality or higher logic, it is an excellent rhetorical device for judges, whether or not they accept natural law theory. It is the potential use of natural law as a means of legitimating value choices that concerns the critics of liberalism.

The idealized version of natural law resembles a caricature and is

107 The historical context of natural law is set in Q. Skinner, *Foundations of Modern Political Thought* (Cambridge: Cambridge Univ. Press, 1978).

108 L. Fuller, "Reasons and Fiat in Case Law" (1946), 59 Harv. L. Rev. 376 at 379.

109 L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale Univ. Press, 1969).

110 G. Grant, *Philosophy in the Mass Age* (Toronto: Copp Clark, 1966), p. 29.

easily attacked. More modern formulations, most notably that of Finnis, move natural law closer to positivism and in some respects even functionalism.¹¹¹ According to Finnis, there are basic values or self-evident goods that a legal structure should be designed to promote. He lists seven such objective values—life, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness and religion. In this restated version, the line between formalism and functionalism is blurred.

B. Positivism. The accepted dichotomy between natural law and positivism may be false. They are both formalist theories and are only different points within a fairly narrow spectrum. There are, however, significant differences in emphasis. While natural law in its idealized form weds law and morals, positivism is dedicated to a separation of the two. Like natural lawyers, positivists see the law as a coherent pattern of rules that is clear, concise and certain. Positivists emphasize the written law rather than some higher source and are thus more secular in their approach. Because the written law can change over time, the positivist is more relativist and is not inclined to objective and immutable rules. They share with the natural lawyers the view that law is autonomous and rational.

The logical and rational aspects of positivism are emphasized in the writings of Hans Kelsen.¹¹² While my knowledge of Kelsen comes only from secondary sources, he appears to be concerned with empirical statements about the world that can be verified by observation and experiment. The critical question for Kelsen is in what way can statements about law be verified in reality. Since only written laws were susceptible of such verification, they were the core of law. While moral judgments about the positivist law were relevant, they were distinct from law itself. Unlike the classical natural lawyer, Kelsen separates the empirical question of what is from the moral question of what ought to be.

Another leading exponent of positivism is H.L.A. Hart.¹¹³ Con-

111 J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980). The move towards positivism and functionalism is supported by N. MacCormick, "Natural Law Reconsidered" (1981), 1 *Oxford J. of Legal Studies* 99 at 109.

112 H. Kelsen, *What is Justice* (Berkeley: Univ. of Cal. Press, 1971) and *Pure Theory of Law* (Berkeley: Univ. of Cal. Press, 1967).

113 H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford Univ. Press, 1983); *Essays on Bentham* (Oxford: Oxford University Press, 1982); *supra*, note 15 and "Positivism and the Separation of Law and Morals" (1958), 71 *Harv. L. Rev.* 593.

solidating the earlier works of Austin and Bentham, Hart identifies three major themes of positivism. First, there is a separation between law and morals. Second, the analytical and scientific study of legal concepts is important. Third, law is essentially a command. In Austinian terms, the command was that of the sovereign. Hart goes on to formulate positivism in a way that brings it closer to natural law in its modern version.

Since positivists emphasized the written law, they had to accept a hierarchy of authority with a special place for the rule giver. The role of courts was fairly limited, except for the evolution of the common law, and the primary source of the law was the legislatures. Because positivism, like natural law, was individualistic in focus, the surrender of authority to government had to be justified on the basis of a social contract.¹¹⁴ This thinking still affects commentators on the *Charter*, as there has been a call for renewing the social contract in light of the *Charter*.¹¹⁵

Positivism is another convenient legal theory for allowing judges to make value choices, while pretending to make a mechanical and logical application of the law. In *Charter* cases it will be difficult for judges to articulate a separation of legal and moral issues; but judges will continue to insist on a rule of law rather than surrender to admittedly subjective responses to complex moral choices. Positivism can also be redefined; the written law now includes the *Charter* in a pre-eminent constitutional form and thus expands the role of judges even on this theory.

In a positivist tradition, open-ended concepts such as equality would offer little guidance to judges. This is a concern for Hart and other positivists.

Again, although Hart refers to the implications of what he calls the approximate equality between human beings, he himself recognises that no universal system of natural law or justice can be based upon the principle of impartiality, or that of treating like cases alike. For the essential question here is by what criteria we are to determine which cases are to be treated as alike, and no such feature of the physical or psychosomatic condition of human beings as embodied in the idea of approximate equality can indicate how a society may decide which cases are alike for this

114 J. Locke, *The Second Treatise of Government*, ed. T.P. Peardon (New York: The Bobbs-Merrill Co., 1952) and T. Hobbes, *Leviathan* (New York: The Bobbs-Merrill Co., 1958) are two examples.

115 Roman, *supra*, note 56.

purpose. Hindu society may justify distinguishing between categories of persons on the footing of the caste system, and other societies may regard as essentially unlike, slaves and freemen, male and female, or black and white, and so forth. The rule of equality, therefore, cannot be derived from any formal principle of impartiality, any more than it can be derived from the physical or psychic nature of human beings or from the character of human practice and experience in this or other ages. The idea of equality or non-discrimination is essentially a value-judgment which cannot be derived from any assertions or speculations regarding the nature of man. No insistence, therefore, on the idea of impartiality, or the rules of natural justice, or the "inner morality" of the law in the sense used by Professor Fuller can afford a basis for arriving at such a principle as that of non-discrimination. This, indeed, is fully recognised by Hart himself, when he remarks that the idea of impartiality is "unfortunately compatible with very great iniquity".¹¹⁶ [footnotes omitted]

C. *Dworkinian Interpretivism*. Ronald Dworkin¹¹⁷ occupies such a central position in current legal theory that it is difficult to know where to begin. He is not a positivist and he denies that he is a natural lawyer. Even putting him under the label of formalism might be objectionable, as Dworkin sees the pursuit of equality and justice as an important function of law. Nonetheless, there is an insistence on the autonomy and rationality of law as distinct from politics, that marks him as a formalist—albeit a sophisticated and modern one. In spite of his novel approaches, Dworkin does have deep roots in liberalism and some argue that he parallels A.V. Dicey on basic issues such as the rule of law.¹¹⁸ For Dworkin, the ideal world would be composed of individuals armed with rights against each other and the state, pursuing their own goals in a world of equal opportunity. He is more optimistic than Hart about equality as an organizing principle of society.¹¹⁹

A concise summary of Dworkin's more recent views is presented by Allan Hutchinson in the following passage:

116 Lloyd and M. Freeman, *Lloyd's Introduction to Jurisprudence*, 5th ed. (London: Stevens & Sons Ltd., 1986), Ch. 3.

117 Dworkin, *supra*, note 14.

118 N. McCormick, "Jurisprudence and the Constitution" (1983), 36 *Current Legal Prob.* 13.

119 Dworkin has generally not been well received by feminists who advocate a broader definition of equality. However, his principle of equal respect and concern has been applauded by women as well as men: S. Sherwin, "Taking Rights Seriously" (1979), 5 *Dal. L.J.* 818.

Dworkin's most recent writings have sought to demonstrate that "law . . . is deeply and thoroughly political . . . , [b]ut not a matter of personal or partisan politics". Judges are political actors, but their power is constrained by a society's history and its democratic character. The state does not give them a blank cheque on which to write in the political currency of their choice; "judges should decide hard cases by interpreting a political structure of their community . . . by trying to find the best *justification* they can find, in principles of political morality, for the [legal] structure as a whole". For Dworkin, legal theory is not so much about the legal materials, but the reading of them. The judge must breathe political life into the dormant words of legal texts. This is done by applying the twin tests of "formal fit" and "substantive justice". Any interpretation of the legal materials must be able to demonstrate some plausible connection with society's legal history. However, the better theory is not necessarily the one that accounts for the most decisions or opinions. It is only a heuristic device or rule-of-thumb. Accordingly, simply because Judge Posner might claim that his "economic efficiency" thesis *seems* to explain more cases than a "rights" thesis does not settle the jurisprudential debate in his favour. The requirement of fit interacts with the second requirement of "substantive justice" and merely acts as a threshold; "if an interpretation . . . is far superior 'substantively' it may be given the benefit of a less stringent test of fit for that reason."¹²⁰ [footnotes omitted]

Dworkin's formalism also emerges in his approach to interpretation. He believes that there is a right answer to even complex legal problems and that it can be found by the Herculean judge.¹²¹ Dworkin compares judges to a series of writers of chain novels with the later judges being restricted by what has been written before. The writers of the early chapters in the series of chain novels are least restrained. On this analysis, current judges are less restrained in dealing with the *Charter* than those who will come later to the task. This is true in practical as well as theoretical terms.

The interaction of the subjective reader and the objective text is recognized by Dworkin, but his emphasis is on the latter. This has implications for *Charter* interpretation. Using his analogy to the chess game, the underlying principles of the *Charter* into which individual cases must fit might be those implicit in a "free and democratic" society. In Dworkin's view, these should include equality, but time will tell whether judges agree. On his constructive model of morals, judges would be required to clearly articulate their decisions.

120 A. Hutchinson, "Of Kings and Dirty Rascals: The Struggle for Democracy" (1984), 9 *Queen's L.J.* 271 at 277-78.

121 Dworkin, *supra*, note 14.

The "constructive" model does not assume, as the natural model does, that principles of justice have some fixed, objective existence, so that descriptions of these principles must be true or false in some standard way. . . . It makes the different, and in some ways more complex assumption, that men and women have a responsibility to fit the particular judgments on which they act into a coherent program of action, or, at least, that officials who exercise power over other men have that sort of responsibility.¹²²

(ii) *Functionalism*

A. *Interpretivism*. The interpretivist school of legal theory borrows heavily from the field of literary criticism and stresses the interplay between the reader and the text. There is a significant debate within this school between the objectivists, of which Ronald Dworkin is a prime example, and the subjectivists, who focus on the reader more than the text. The latter group stresses that there are many meanings that can be drawn from a particular text and not just a correct objective meaning as Dworkin seems to suggest.

Owen Fiss has often been associated with the Dworkin side of this debate and might properly be categorized as a formalist. Fiss, however, occupies a position between the two extremes of objectivism and subjectivism. He recognizes that there are objective and subjective elements to interpretation, and that the range of valid interpretations of a particular text is restricted by the nature of the particular interpretive community.¹²³

These theories of interpretation have obvious implications for constitutional interpretation of the *Charter*. Fiss has made the following observation about the role of courts in the American constitutional process:

[t]he rightful place of courts in our political system turns on the existence of public values and on the promise of those institutions—because they are independent and because they must engage in a special dialogue—to articulate and elaborate the true meaning of those values. The task [is] discovering the meaning of constitutional values such as equality, liberty, due process or property.¹²⁴

122 *Ibid.*, p. 160.

123 O. Fiss, "Objectivity and Interpretation" (1982), 34 *Stanford L.R.* 739.

124 O. Fiss, "The Supreme Court 1978 Term—Forward: The Forms of Justice" (1979), 93 *Harv. L. Rev.* 1.

That is certainly the task that will face Canadian judges in interpreting the *Charter*, but how should they pursue the task?

Stanley Fish, who is also considered a moderate on interpretivism, is closer to the subjective position. He has taken direct issue with Dworkin and sees claims to objectivity in the text as closing off discussion.

[T]he objectivity of the text is an illusion and, moreover, a dangerous illusion, because it is physically convincing. The illusion is one of self-sufficiency and completeness. A line of print on a page is so obviously *there* . . . that it seems to be the sole repository of whatever value and meaning we associate with it.¹²⁵

Fish does not stress the power of the legal text or the author; rather, he emphasizes the power of the reader. In the *Charter* context, this would de-emphasize the precise language of the document and the intent of its creators in favour of the interpretive power of the judge. Interpretation, according to Fish, is not the art of construing but the art of construction. Poems are not decoded but created by the reader.¹²⁶ He does not posit absolute freedom in the hands of the interpreter, but like Fish, stresses the limits of the interpretive community in both literature and law. The shared values of a particular community allow the interpreter to judge between meanings that are "on or off the wall."¹²⁷

What is the appropriate "interpretive community" to which judges should refer in giving meaning to the *Charter*? Is it the larger political and social community or is it the smaller circle of judges and lawyers? It should be the former, but the main tasks of interpretation and *Charter* advocacy will be in the hands of people who are legally trained. Even if the larger political community is considered, will it be only those who accept mainstream liberal thinking or will it also include more radical schools? Canada's free and democratic tradition suggests that the interpretive community will be a liberal one.

On the subjectivist extreme of the interpretivist school is Sanford

125 S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge: Harvard Univ. Press, 1980), p. 43.

126 *Ibid.*, p. 327.

127 Fish expands upon some of his ideas in "Interpretation and the Pluralist Vision" (1982), 60 Texas L.R. 495; "Working on the Chain Gang: Interpretation in Law and Literature" (1982), 60 Texas L.R. 551 and "Wrong Again" (1983), 62 Texas L.R. 299.

Levinson. He has been attacked by Fiss as representative of a school of nihilists who have turned their backs on adjudication, in favour of a romance with politics.¹²⁸ Levinson, in political terms, might fall on the radical rather than liberal pole of my political axis. Drawing upon continental European philosophers, Levinson is concerned with deconstruction in literature and law. He concludes that there are no correct principles of interpretation but rather a cacophony of conflicting interpretations from which the individual interpreter must choose.¹²⁹ Showing his liberal roots, he applauds this plurality of interpretations, but on a more radical note he argues that the choice of meaning will depend on the purposes of the interpreter. The interpretivist school in general reaffirms a functional view of law and underscores the importance of the judge as interpreter. It tells us little about the precise function of law.

D. The Sociological School and the Realists. Members of the sociological school were the first to clearly reject formalism as the proper legal theory. The seeds of the more radical C.L.S. critique were sown by members of the sociological school and its off-spring—the realists. Oliver Wendell Holmes predates the sociological school but he expressed its essence when he proclaimed “the life of the law has not been logic: it has been experience.”¹³⁰ It was Roscoe Pound, as Dean of Harvard Law School, who developed the theory of sociological jurisprudence and coined the phrase “mechanical jurisprudence” to describe the formalism that he rejected.¹³¹ Justice Benjamin Cardozo applied the theory developed by Pound to the task of judging and expounded his insights in a famous lecture series that was later published.¹³²

The sociological school represents more than a rejection of formalism; it also represents a clear statement of a functional approach to law. If legal conclusions are not logically dictated, then some other

128 *Supra*, note 123 at p. 746.

129 S. Levinson, “Law as Literature” (1982), 60 Texas L.R. 373.

130 O.W. Holmes, *The Common Law*, ed. Howe (Boston: Little, Brown & Co., 1963), p. 5. He further elaborated on his views in, “The Path of the Law” (1897), 10 Harv. L. Rev. 457.

131 R. Pound, “Mechanical Jurisprudence” (1908), 8 Col. L.R. 605. Pound’s views are more fully developed in *Introduction to the Philosophy of Law*, rev. ed. (New Haven: Yale Univ. Press, 1954).

132 B. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale Univ. Press, 1921).

theory must explain them. This theory was that the law was an instrument to promote shared social goals within a society. The important thing was the goal being pursued and not the logic and methodology. Cardozo articulated this aspect of the theory clearly.

Not the origin, but the goal is the main thing. There can be no wisdom in the choice of a path unless we know where it will lead. The teleological conception of his function must be ever in the judge's mind. . . .¹³³

Because of the shift of emphasis from the internal logic of the law to the social goals it was designed to achieve, there was a need for extra-legal sources to resolve legal disputes. Social facts rather than arid law became the order of the day. Jerome Frank referred to himself as a fact skeptic and insisted that, even if a rule were relatively clear, the lower courts and juries decided cases on the basis of their interpretation of the facts.¹³⁴

As Denise Réaume indicates, there are clear links between the American school of sociological jurisprudence and Canada.¹³⁵ This is most notable in respect to Laskin, who studied under Felix Frankfurter in the United States, and under and with Caesar Wright in Canada. The influence of the sociological school on Laskin is reflected both in his speeches and his academic writings.¹³⁶ The rejection of the formalist tradition emphasizes that judges make choices and that they must look to broader social facts to make good choices. Law is not autonomous, but part of the larger society. These insights have obvious implications for the *Charter* and judging. Judges must not apply mechanical rules, but be prepared to make value choices after being informed by a wide range of sources. This opening up of the legal discourse to other disciplines would be a significant advance.

One of the major problems with the theories of the early sociological school is that it assumed a homogeneous society in which there were shared views about what was good. The realists who

133 *Ibid.*, pp. 102–103, as cited in D. Réaume, “The Judicial Philosophy of Bora Laskin” (1985), 45 U. of T. L.J. 438 at 445. I am generally indebted to this article for this encapsulated account of sociological jurisprudence.

134 J. Frank, *Law and the Modern Mind* (New York: Coward McCann Inc., 1930).

135 Réaume, *supra*, note 133. These links are apparent at the academic as well as judicial levels. Lederman, *supra*, note 26, sees the *Charter* as an expression of shared values. This view is articulated more directly in L. Barry, “Law, Policy and Statutory Interpretation under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms” (1982), 60 Can. Bar R. 237.

136 Réaume, *supra*, note 133 at pp. 442–47.

emerged from the sociological school recognized that there are conflicting groups in society who pursue different sets of goals. When the state steps in to make value choices, it favours one group over another. Thus the realists identified the inherently political dimensions of law, long before C.L.S. did.

There was also a scientific tone to the realist movement as legal academics discovered the world of social science.¹³⁷ Once they removed the blinkers of formalism, realists recognized that there was great freedom of choice in the individual judge. There was thus concern with predicting his or her behavior and finding constraints to judicial action. Some realists also recognized that most legal disputes are sorted out in the lower courts or administrative tribunals, if they go to formal adjudication at all. The emphasis on appellate judging may be misplaced. Therein lies an important insight for evaluating the real impact of the *Charter*. The political dimensions of judicial choice is another insight that has been expanded into more radical traditions.

(c) Critics of Liberalism: Radical Functionalism

(i) Critical Legal Studies

C.L.S. proposes a radical and direct frontal attack on liberal legalism. They do not wish to merely reform the existing legal structure, but to deconstruct it and put a new one in its place. Unlike many of their predecessors, members of C.L.S. consider themselves a political movement and attack the legal establishment as a matter of ideology. While many of their conclusions are not that jarring, the bluntness and unconventional nature of their attack is. Allan Hutchinson gives the following description of C.L.S. in the context of a review of Dworkin.

Notwithstanding the success of these particular challenges, the most unrelenting and unmitigated campaign against Ronald Dworkin has been waged by the so-called "Critical Legal Scholars". Put crudely, the main thrust of the Critical attack has been to follow through on the realist project and ally it to a programme of leftist radical politics. At its best, it has also incorporated the telling intellectual insights of a number of con-

137 A good example of a realist is K. W. Llewellyn, *The Common Law Tradition* (New York: Little, Brown & Co., 1960). His work is discussed in the larger context by W. Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicholson Ltd., 1973).

tinental philosophers. The major unifying feature of the group is its opposition to the intellectual and political dominance of the liberal establishment. As such, the group contains many different strands and its members run from the militant marxist through the disaffected liberal to the utopian anarchist.¹³⁸ [footnote omitted]

The origins of C.L.S. further accentuate its break with liberalism even in its realist stage. Rather than summarize, I shall quote from two Canadian scholars who have brought an awareness of C.L.S. to Canadians as well as Americans.

The C.L.S. movement was formally founded in 1977 by a small group of scholars who had become dissatisfied with the intellectual mood and direction of the Law and Society Association. These scholars took the view that the Association had become too closely identified with the "empirico-behaviorist" wing of social science and that the road to jurisprudential enlightenment lay down a less data-oriented, more theoretical path. The lifeblood of the C.L.S. movement was to be philosophy, not science.

From this splinter group, the Movement has mushroomed to a membership of 350. Its sixth annual conference at Harvard in the spring of 1982 attracted an audience of almost one thousand. Articles and notes with a Critical flavor are fast becoming a regular feature of many law reviews. The influence of C.L.S. is percolating through all levels of American law schools, from the New College of California to Harvard Law School. Its leading members include such accomplished scholars as Peter Gabel, Morton Horwitz, Duncan Kennedy, Karl Klare, Mark Tushnet, and Roberto Unger.¹³⁹

By denying the autonomous existence of law and revealing the inherent contradictions in the liberal state, C.L.S. is built upon the primary insights of the realists.¹⁴⁰ There is no agreed upon set of political principles for C.L.S., nor a single methodology, but there is a concern with the link between scholarship and practice on one hand, and the struggle for a more humane, egalitarian and democratic society on the other.¹⁴¹ Members of C.L.S. seek to explore the deep struc-

138 *Supra*, note 120 at p. 279.

139 A. Hutchinson and P. Monahan, "Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984), 36 Stanford L.R. 199 at 200-201.

140 M. Tushnet, "Critical Legal Studies and Constitutional Law: An Essay in Deconstruction" (1984), 36 Stanford L.R. 623 at 626.

141 D. Kennedy and K. Klare, "A Bibliography of Critical Legal Studies" (1984), 94 Yale L.J. 461 at 461.

tures of law that underly surface legal reasoning, in a way that moves them beyond the realists.¹⁴² There is at least one Canadian application of this deep structures analysis of the law.¹⁴³

A. *The Assault on Liberalism.* The C.L.S. attack on liberalism is so far reaching that it is hard to know where to begin. Once again I shall reply on a pithy quote from Allan Hutchinson which captures many elements of the critique of liberalism.

The enterprises of adjudication and legal scholarship merely serve to clothe this political organization with the essential garments of political legitimacy. Judges and scholars enable society to convince people that its present organization is not only rational and just, but necessary and inevitable. The construction of elaborate schemes and entitlements from available materials helps to justify the status quo and direct formidable barriers to social change. By pretending that legal outcomes are the product of an apolitical and neutral algorithm rather than the imposed preferences of an elite hierarchy, the rule of law manages to transform the jungle of social order into a world of legal right. Legal thought helps to suppress the horrible conditions of social life and offers itself as a timeless way of understanding and *conquering* the world. The esoteric and convoluted nature of legal discourse is the direct consequence of the need to obscure and mystify judicial choice. The evolution of legal doctrine is best understood as an endless series of fragile and makeshift compromises. At bottom, legal discourse is nothing more than a stylized version of political discourse.¹⁴⁴

The legitimating role of law is an important element of the C.L.S. attack. As Kennedy states, legal consciousness is created to obscure the fact that law and judging are simple matters of power politics.¹⁴⁵ Because liberal legalism is full of contradictions, not the least of which is the pursuit of individual rights and membership in a community, Kennedy asserts that legal fictions must be created to hide inconsistencies.¹⁴⁶ There is a frontal attack on the rationality and coherence of liberalism in either its formalist or functionalist guises.

142 Kennedy, *supra*, note 19.

143 P. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984), 34 U. of T. L.J. 47. Not only does he unmask the basic tension between a provincialist and pan-Canadian view of federalism, which underlies the cases, he also concludes that the legal reasoning is designed to hide the political choices.

144 *Supra*, note 120 at pp. 280-81.

145 *Supra*, note 99.

146 *Supra*, note 19.

Unger has simplified the critique of liberal legalism into two branches—an attack on formalism and an attack on objectivism.¹⁴⁷ The creation of categories, dichotomies and hierarchies is at the core of mainstream legal thought. These are rejected as smoke screens to hide political choices. Since C.L.S. members reject the autonomy of law, formalism is not acceptable.

The attack on objectivism is more complex. A full embrace of subjectivism would lead to a nihilist position, which most members of C.L.S. deny. In terms of adjudication, the objectivism of the liberal state emerges in the form of neutral principles. Judges do not impose values but decide cases on the basis of neutral principles. Paul Brest refutes such a claim in the following words:

[t]he fact is that all adjudication requires making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral. No form of constitutional decision-making can be salvaged if its legitimacy depends on satisfying Bork's requirement that principles be "neutrally derived, defined and applied."¹⁴⁸

As a further assault on the idea of neutral principles, Mark Tushnet argues that the values imposed under the guise of neutrality are not even those of liberal individualism but rather those implicit in conservative thought.¹⁴⁹ The *Charter* will directly raise questions about the neutrality of principles and the judges who apply them. While it is highly unlikely that any judge would embrace the C.L.S. view, he or she might profit from its skepticism about neutrality and other basic assumptions of the liberal state.

B. The C.L.S. Program and Implications for Judging. While members of C.L.S. are often attacked for having no constructive alternative to the established order that they attack, this attack is not entirely fair. Unger, in particular, has developed some rather elaborate theories for a post liberal society.¹⁵⁰ Others have also attempted to describe the legal world that would follow the deconstruction of the present legal order.¹⁵¹ There are religious overtones to these new versions of reality,

147 R. Unger, "The Critical Legal Studies Movement" (1983), 96 Harv. L. Rev. 561.

148 P. Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship" (1981), 90 Yale L.J. 1063 at 1091-92.

149 M. Tushnet, "Following The Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983), 96 Harv. L. Rev. 781 at 784-85.

150 *Supra*, notes 147, 100 and 38.

151 G.H. Taylor, "Deconstructing the Law" (1982), 1 Yale Law and Policy Rev. 158.

even if they are secular in nature. David Fraser advocates "moral terrorism" both as a means for disrupting the liberal state and imposing a "better" version of reality.¹⁵²

The implications of C.L.S. theory for judging are explored by Joseph Singer in his study of a New Jersey judge—Justice Pashman.¹⁵³ Regarding law as indistinguishable from politics, Singer applauds an activist judge who declares his political preferences overtly. An important part of the C.L.S. project is to get politics out into the open, not to decry its existence.

According to Justice Pashman, the question is not whether judges should make law, but whose interests they should protect. He sought to increase the number and variety of situations in which the legal system would require the community to come to the aid of the weak and disadvantaged in times of crisis. He also believes that the good society would be more egalitarian than the one in which we live. He therefore used his power to redistribute certain social and economic advantages from the privileged to the powerless. Was this an abuse of his judicial power? The answer depends not on abstract homilies about the judicial role, but with whom we place our sympathies.¹⁵⁴

This is not a vision of judging that I would accept. While it is important that judges be more open about their values, I do not feel comfortable about judges being given a blank cheque to define the good society. I am impressed by many aspects of the C.L.S. critique of liberalism, but do not feel they offer a coherent and workable alternative. What they are really proposing is a revolution and judges are unlikely people to occupy the barricades. We can profit from the insights of the C.L.S. movement without degenerating into a world of value terrorism.¹⁵⁵

(ii) *Feminism*

Some would argue that there is no coherent feminist jurispruden-

152 *Supra*, note 23 at pp. 773–75 and fn. 156.

153 J. Singer, "Catcher in the Rye Jurisprudence" (1983), 35 Rutgers L.R. 275. In typical C.L.S. fashion he acknowledges his debt to Duncan Kennedy in the form of both conversations and unpublished manuscripts.

154 *Ibid.*, p. 284.

155 Of course, we should not underestimate the extent to which value terrorism is practised, in subtle forms, in the Canadian liberal state. Two wrongs do not make a right.

tial theory or, if it exists, it is in its infancy.¹⁵⁶ The charge of a lack of coherence is suspect, since it is an assessment made from a male perspective. Indeed, any of my comments in respect to feminist theory should be carefully scrutinized, as I am a neophyte in this area. I do not propose to present a comprehensive or ordered view of feminism, but rather to suggest some of the perspectives from this school of thought and how they could impinge on judging and equality. My observations are impressionistic, but rather than ignore a significant new force in legal thought I shall set them forth.

One problem with dealing with feminism at a theoretical level is that it tends to be more specific and issue oriented. Approaching the world from the perspectives of theory and abstractions is more typical of a male approach, and Carol Gilligan informs us that this is not the highest stage of moral development for women.¹⁵⁷ She postulates that women are more sensitive to the facts of a particular situation and less inclined to abstract them to the level of grandiose principles. The validity of stealing a loaf of bread would be considered in the context of the specific facts and not on the basis of the broader social structure. Not all feminists are women, but since the majority are, I assume the experience of women is more relevant to defining feminism than that of men.

This issue specific focus of feminists can lead to an *ad hoc* approach to the world. In respect to the *Charter*, it may mean interpreting the various sections of the document in quite different ways to produce outcomes that are favourable to women. In some respects this is similar to the approach of Justice Pashman, articulated by Singer.¹⁵⁸ As with C.L.S., this introduces a degree of subjectivity and unpredictability that makes me uncomfortable. This may be a simple consequence of my liberal, male roots. In any event, an *ad hoc*, what is best for women, approach is really an argument against theory. If such an approach were adopted, it would leave open the questions of who defines what is best for women and on what basis.

On the question of sources, I think the feminist perspective can be quite helpful. While I do not claim to understand the methodology of feminism, there is a concern about grounding conclusions in empir-

156 MacKinnon, *supra*, note 2, is at least working towards a theory of feminism related to law.

157 C. Gilligan, *In a Different Voice* (Cambridge: Harv. Univ. Press, 1982).

158 *Supra*, note 154.

ical reality rather than abstractions. This is reflected in reservations about judicial definitions of equality. As indicated by Professors Boyle and Noonan in their article on prostitution and pornography in this volume, very different approaches to equality are needed to improve the lot of women in these two settings. Just solutions are found not in over-arching theories but in assessing the effects of different policies on the factual situation.

It is also important that this empirical reality reflect the experiences of women and that it not be gender blind. Discriminations can be subtle in form and the real test is in actual outcomes. This is the thrust of the following passage from the report of the Charter of Rights Educational Fund:

[d]iscrimination can be subtle; it can be an unconscious or unintended by-product of otherwise beneficial legislation. . . . The discrimination may be expressly set out in the wording of the statute; it may be implicit rather than overtly stated. Discrimination may result from the application of seemingly neutral provisions; even failure to legislate in a particular area may have a disparate impact.¹⁵⁹

Having proclaimed the value of theory as a means to giving coherence to *Charter* jurisprudence, I think it is also important that the value of rights be assessed in relation to the real needs of those who are disadvantaged in society. This perspective is not unique to feminism but is an echo of the call for social facts to inform the courts, as stated by the sociological school, the realists and C.L.S. All these theories coalesce to make a strong case for functionalism as opposed to formalism, as the more likely route to an egalitarian society.

The dangers of a static theory of equality are also emphasized by the changing definitions of equality and liberation within the feminist movement itself. It is not enough that women be treated exactly like men. Indeed, such an approach could accentuate inequality. There is a growing awareness of the "specificity" of women, and this necessitates different treatment. Parallel to this is the recognition that traditional female values should be accentuated and allowed to flourish, rather than sacrificed in pursuit of equality with men. These aspects of integrative feminism have been developed by Angela Miles, and it

159 C.R.E.F., *Report on the Statute Audit Project* (Toronto: C.R.E.F., 1985), p. 1.4.

would be an important perspective for judges to consider when dealing with equality issues related to women.¹⁶⁰ Miles would argue that just considering feminism as one other perspective in the liberal mix is not enough. It must be seen as part of the immanent critique of the established society.¹⁶¹ It is thus properly categorized as radical functionalism.

A practical *Charter* question of great significance to women is the extension of the *Charter* to the private sector. This issue is explored by Hester Lessard's article in this volume and has been raised by other feminist thinkers.¹⁶² The false dichotomy between the public and the private is also one of the categories of formalism attacked by the members of C.L.S. This is another sense in which the two forms of radical functionalism converge. The two groups would also agree on the political nature of judicial choices, but disagree on who were the major victims of such choices.

As a final observation on feminism, its adherents voice legitimate concern about having the *Charter* interpreted by a predominantly male judiciary. This is slowly changing but until there are more feminist women on the Bench, feminists will have to educate the existing judges.¹⁶³ There has been little speculation about what a feminist judge would do with the law generally or the *Charter* in particular. It may be some time before Canada has a practising example.¹⁶⁴

160 A Miles, "Ideological Hegemony in Political Discourse: Women's Specificity and Equality," in *Feminism in Canada: From Pressure to Politics*, G. Finn and A. Miles, eds. (Montreal: Black Rose Books, 1982); "The Integrative Feminine Principle in North American Feminist Radicalism: Value Basis of a New Feminism" (1981), 4 *Women's Studies Int'l. Q.* 481, and "Feminism, Equality and Liberation" (1985), 1 *Can. J. of Women and the Law* 42.

161 A. Miles, "Feminist Radicalism in the 1980's" (1985), 9 *Can. J. of Pol. and Soc. Theory* 16 and "Integrative Feminism" (1984), 19 *Fireweed* 55.

162 K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicholson, 1985). From a less committed perspective the application issue is also explored by Y. de Montigny, "Section 32 and Equality Rights," in *Equality Rights and the Canadian Charter of Rights and Freedoms*, A.F. Bayesfsky and M. Eberts, eds. (Toronto: Carswell, 1985).

163 This is presumably one of the aims of a conference entitled, *Socialization of Judges to Equality Issues*, organized for Banff, Alberta on May 22-24, 1986.

164 C. Boyle, in "Sexual Assault and the Feminist Judge" (1985), 1 *Can. J. of Women and the Law* 93, speculates on what a feminist judge might do in one particular area. More recently, Professor Boyle has co-authored a *Status of Women* study on a feminist analysis of criminal law, which has implications for judging.

(d) The Limits of the Rights Paradigm and Legal Discourse

There is a massive discrepancy between the world as imagined and depicted by lawyers and the actual conditions of social life. This naivety is evidenced by Dworkin's belief that the courts can act as the crucial public institutional forum in which a community can meet "the challenge of making the standards that govern our collective life articulate, coherent and effective". Yet there is ample evidence to demonstrate that this is nothing more than a ritualistic reaffirmation of our vague commitment to justice and fairness. Moreover, it is an elite ceremony, administered and controlled by the initiated few. Legal change does not amount to social change. Canadians' experience with the introduction of the *Charter of Rights* illustrates this weakness. Established through a profoundly undemocratic process, it is hailed as a watershed in the life of each and every Canadian. With the strength of the *Charter* around them, Canadians are now said to be fuller and freer individuals. But the actual impact on the quality and standard of life is marginal and peripheral. It has had no effect upon the vast disparity of wealth and power within our society. Any changes are merely rhetorical. Its greatest impact has been to change our culture of legal and political argument. Where was the *Charter* when B. C. workers were being arbitrarily dismissed from their government posts? What help has the *Charter* been to the record number of homeless on the streets of our large cities? What assistance has the *Charter* offered to the millions who are unemployed and socially frustrated? Valuable energy and attention will now be deflected into *Charter* arguments and litigations.¹⁶⁵ [footnotes omitted]

It is a basic tenet of the C.L.S. movement that there are greater dangers in the legalization of politics than there are in the politicization of the law. There is the concern identified by Hutchinson in the above quotation that valuable reform energies will be directed into legal battles rather than more meaningful political ones. Another basic concern is that unfair political action will be legitimated under such doctrines as the rule of law.¹⁶⁶ Law can be used to add moral authority and the appearance of objectivity to what would otherwise be seen as a naked exercise of power by the state.¹⁶⁷ Even casting an issue in the form of

165 *Supra*, note 120 at pp. 285-86.

166 M. Mandel, "The Rule of Law and the Legalization of Politics in Canada" (1985), 13 *Int'l. J. of the Sociology of Law* 273. I owe a general debt in this section to my colleague, David Fraser, who gave me access to his unpublished book review entitled, "Democracy or the Rule of Law? Some Thoughts on the Rights Debate."

167 P. Gabel, "Reification in Legal Reasoning" (1980), 3 *Res. in Law and Sociology* 25.

legal rights can limit the dialogue and in some cases determine the results. The real struggle for reform is diverted into a legal forum, where a victory for the established order is pre-ordained.¹⁶⁸

The effect of casting a value dispute in legal form can be to make the claim less radical. It may, however, in its modest form, have some chance of success. Unless there is going to be a real revolution in society, changes outside accepted institutional channels will be limited. It is important to recognize that charters of rights do not, in themselves, solve problems and that serious reform must be pursued on all fronts. Courts cannot do everything, but I do not accept that judges and charters are a negative influence, in all cases. Sometimes the *Charter* will be used in positive ways, some times in negative. At other times its impact will be neutral. The trick is not to expect too much and to assess at the end of the day whether the lot of the disadvantaged is better or worse.

Outside C.L.S., Robert Samek also recognized that law reform, as contrasted with social law reform, was inherently limited.¹⁶⁹ Because legal discourse is itself limited, the kind of reform that emerges from it will be similarly restricted. He seemed to be optimistic that the legal discourse could be opened-up and thus promote more meaningful reform.

Samek also recognized the dangers of confusing ends and means.¹⁷⁰ At best, the *Charter*, as Canada's version of rights, is a means to change and not a guarantee of that result. It is only the beginning and not the end of a process of change. The *Charter* provides a framework or mode of analysis for what are basic value disputes. It is far from ideal, but it has some potential for change. There are limits on the rights paradigm as an approach to equality, but since it is likely to be around for some time,¹⁷¹ lawyers and judges should attempt to make creative use of it.

168 *Supra*, note 74.

169 R. Samek, "A Case For Social Law Reform" (1977), 55 Can. Bar R. 409.

170 R. Samek, *The Meta Phenomenon* (New York: Philosophical Library, 1981). In this he identifies the ends and means confusion as one of the crucial obstacles to change in society.

171 The rights paradigm is an integral part of the liberal state. This is not so with C.L.S. The feminist position is less clear, but women may be more inclined to a model of negotiation and accommodation than one of conflict. See Gilligan, *supra*, note 157.

(e) Concluding Thoughts on Theory, Judging and the Charter

I shall not by way of conclusion repeat the observations made throughout this section connecting the various theories with the concepts of judging, the *Charter* and equality. Some major themes will be highlighted. There is value in both legal and political theory for resolving practical judicial questions, such as, what voices should be heard, what sources consulted and what interpretive strategy adopted in respect to the *Charter*. Recognizing both the strengths and limitations of theory in the liberal state helps to put judging in a broader context.

Formalism should be abandoned in favour of a functional approach to law. This means a surrender of extravagant claims to objectivity in both the *Charter* and the judging process. Whatever functional theory is adopted (and it may vary from case to case), there is a clear need for courts to be informed from extra-legal sources as well as legal. Even the radical variants of functionalism should not be rejected out of hand but accepted for the insights they can offer and the value of doctrines that challenge established assumptions.

Theory should assist judges in developing a reasonable role for themselves in using the *Charter* to promote equality. This role should not be so modest as to shirk the new constitutional role of the courts, or be so extravagant as to raise false expectations. There are limits on what judges can do in a liberal state. Finally, we should all be reminded that theory must be grounded in practice and *Charter* rights defined in relation to those who are really in need.

5. JUDGING: INSTITUTIONAL LIMITATIONS AND HUMAN DIMENSIONS

One of the lessons of judicial and political theory is that there are limits on what judges can do with the *Charter*. How many limits depend upon which theory is operable. In a more pragmatic sense, there are also institutional and human limitations on judging. It is also the human and personal side of judging that offers the greatest hope for equality.

(a) Institutional Limitations

The nature of the institution of judging puts limits on what indi-

vidual judges can do. This is a fact of life recognized by most Canadian judges, and in notable written form by the late Chief Justice Laskin and the present Chief Justice of Canada.¹⁷² Constraints on judges is also a common topic for judicial speeches whether in the form of comments on broad concepts, such as the rule of law and judicial independence,¹⁷³ or the limits implicit in the role of judging.¹⁷⁴ Credibility and trust are the main sources of judicial power, and judges are concerned that if they step too far beyond traditional judicial bounds their rulings will lose legitimacy. Courts are conservative institutions and unlikely breeding grounds for radicals. This should condition what we can reasonably expect from courts under the *Charter*.

There are also a number of practical limitations on courts. Judges cannot initiate cases, but must resolve actual disputes brought by lawyers on behalf of their clients. Significant financial barriers to litigation exist, as discussed earlier in this article. Moreover, the traditional devices for informing the court are inadequate and these inadequacies will be accentuated by the *Charter*. These limitations have led some commentators to despair about the courts as dispensers of equality.

Canada's judges are less well prepared for their new policy-making role under section 15 than they are for their additional responsibilities in relation to criminal justice policy. Most will lack familiarity with the social and economic programs that are likely to be challenged on section 15 grounds. The adjudicative process as it is now conducted in Canada is not well designed to enable judges to obtain a good understanding of the factual setting in which their decisions take place. But even if our judges produce policy results which coincide with our political preferences, I worry about what this judicialization of the resolution of equality issues will do to the quality of our political life. Deciding questions of distributive justice is an essential responsibility of political man. Political life, as Aristotle taught, rises above the organization of animal herds when it is

172 B. Laskin, *The Institutional Character of the Judge* (London: Oxford Press, 1972) and B. Dickson, "The Judiciary—Law Interpreters or Law Makers" (1982), 12 Man. L.J. 1, are two examples.

173 B. Dickson, "The Rule of Law: Judicial Independence and the Separation of Powers," an address to the Canadian Bar Association delivered in Halifax, Nova Scotia, August 21, 1985, is one example.

174 B. Wilson, "Decision Making in the Supreme Court: Goodman Lecture No. 1," an address given at the University of Toronto as part of the Goodman Lecture Series, November 26, 1985.

characterized by man's distinctive capacity of expressing and exchanging ideas about right and wrong.¹⁷⁵ [footnotes omitted]

It is important to remember that courts are part of a larger government structure with legislative and administrative branches, as well as a judicial one. All are charged with promoting the rights guaranteed by the *Charter*, including equality.¹⁷⁶ The question is which of the various agencies will be the best promoter of equality? The answer will depend upon the facts of a particular situation. In some cases, legislators will be the best protectors of equality because they have the scope and resources to pursue affirmative programs. Legislators would not have been a good choice in Duplessis' Quebec.

Administrative boards such as human rights commissions are important agents for the promotion of equality. Boards are often more accessible than courts, and their more informal procedures and structure may be better suited to the resolution of some complex rights disputes. Of course, the nature of the individual board is important in assessing the extent to which courts should be deferential to boards on *Charter* issues. Such deference should not be based on the judicial nature of the board but its comparative competence to deal with the issue. David Mullan expresses concern that one of the spin-off effects of the *Charter* could be an unhealthy revival of judicial activism in reviewing boards.¹⁷⁷ Because boards are likely to consider rights in their social context, they may be more inviting for realists, members of C.L.S. and feminists who emphasize social context. Other boards may use their broad discretion in a discriminatory fashion, and the *Charter* as a means of judicial review will be beneficial.

Perhaps the most significant institutional limit on judges is the appointment process by which judges are selected. The process is under revision and there have been advances. A special committee of the Canadian Bar Association recommends the elimination of patronage based judicial appointments, in favour of a full merit system. The only attempt at setting criteria by which to define merit results in this list of characteristics for the judge:

175 P. Russell, "The effect of a Charter of Rights on the policy-making role of Canadian courts" (1982), 25 Can. Pub. Admin. 1 at 25-26.

176 W. Mackay and C. Beckton, "Institutional and Constitutional Arrangements: An Overview," in *Recurring Issues in Canadian Federalism*, C. Beckton and W. MacKay, eds. (Toronto: Univ. of Toronto Press, 1986), pp. 54-55.

177 D. Mullan, "Judicial Deference to Administrative Decision-Making in the Age of the Charter," an address delivered as the inaugural Heald Lecture in Administrative Law at the University of Saskatoon, on November 5, 1985.

- high moral character;
- human qualities; sympathy, generosity, charity and patience;
- experience in law;
- intellectual and judgment ability;
- good health and good work habits;
- bilingualism, if required by the nature of the post.

The pursuit of merit appointments is laudable, but the above criteria are quite vague. They are unlikely to change the character of the judiciary, as a white, male elite. While a judge need not experience disadvantage to appreciate the plight of those who have, a variety of perspectives and experiences would enhance the chances of change through the *Charter*.¹⁷⁸ As the interpretivist school demonstrates, the judge as the interpreter of the constitutional text constructs meaning out of the *Charter*. A more diverse and mixed judiciary would be more likely to promote an egalitarian society.

(b) Human Dimensions

It is no longer sensible, if it ever was, to seek to depersonalize the judicial role by saying that the Judge owes fidelity only to the LAW, that the judge is merely the instrument that brings forth the law, as if the judicial function consists in pulling the right levers or pushing the relevant buttons.¹⁷⁹

The term dimensions, rather than limitations, is used because the human elements of judging are more positive than negative. It is now generally accepted that there is a significant element of personal choice in adjudication. What influences a judge in making a choice, where he or she is not bound by some rule? This question is more important when one notes that there are very few rules that can bind an innovative judge. Choices are more often the result of a balancing of competing values, and that is what the *Charter* invites. It is less clear where these values will come from—society at large, established society,

178 W. Mackay and R. Bauman, "The Supreme Court of Canada: Reform Implications for an Emerging National Institution," in *The Courts and the Charter*, C. Beckton and W. MacKay, eds. (Toronto: University of Toronto Press, 1985). A more diversified court is the thrust of the reform proposals.

179 Réaume, *supra*, note 133 at p. 442, citing B. Laskin, "A Judge and his Constituencies" (1976), 7 Man. L.J. 1 at 2.

legal society or the individual judge.¹⁸⁰ The choice of what values to balance and what sources to consult is personal. These value choices will determine the shape of equality in Canada.¹⁸¹

A judge's social background has an influence on his or her choices, and also on the role of the judge. The particular experiences of a judge can even affect his or her view about the appropriate forum for raising an equality issue. Laskin's experiences as a labour arbitrator and student of the sociological school of jurisprudence may explain his preference for resolving issues of social and economic equality outside the courts.¹⁸² Cardozo recognized these background influences but did not decry them.

All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James' phrase of 'the total push and pressure of the cosmos', which, when reasons are nicely balanced, must determine where choice shall fall.¹⁸³

Changing the present composition of the Bench will be slow, so reformers should focus on the education of the existing judges to meet the new challenges of the *Charter* and equality. Many judges recognize that the *Charter* requires not just new substantive knowledge but a broader way of approaching issues.¹⁸⁴ Chief Justice Dickson calls for a multi-disciplinary approach in the law schools to broaden the horizons of future lawyers.¹⁸⁵ Throughout this article I have stressed the opening-up of legal dialogue and the value of legal and judicial theory for judges.

180 D. Danelski, "Values as Variables in Judicial Decision-Making" (1966), 19 *Vanderbilt L.R.* 721.

181 S. Shetret, "On Assessing the Role of the Court in Society" (1980), 10 *Man. L.J.* 355 and J. Grossman, "Social Backgrounds and Judicial Decision-Making" (1966), 79 *Harv. L. Rev.* 1551.

182 R.J. Sharpe, "Bora Laskin and Civil Liberties" (1985), 35 *U. of T. L.J.* 632 and H. Janisch, "Bora Laskin and administrative law: An unfinished journey" (1985), 35 *U. of T. L.J.* 557.

183 *Supra*, note 132 at p. 12. Members of the functionalist schools of thought would argue that reason is rarely balanced so as to restrict choice.

184 B. Wilson, "Decision-making in the Supreme Court—Goodman Lecture No. 2," an address given at the University of Toronto as part of the Goodman Lecture Series, November 27, 1985.

185 B. Dickson, "Closing Dinner Speech," delivered at the Conference of Legal Education in Winnipeg, Manitoba, October 26, 1985, pp. 9–10.

Legal education too often destroys emotion and feeling in the name of promoting rationality and lawyer-like thinking. While law schools have been effective on the rational level, they have neglected the importance of teaching values in a humanist tradition.¹⁸⁶ Good legal arguments about, and judicial opinions on, equality will require a sensitivity to the human condition as well as a rational understanding of the law. Law schools must be engaged in moral education, and not just law in a narrower sense. Indeed, they are engaged in moral education by being silent on broader moral issues. Equality is an ideal vehicle for discussions on moral issues.

6. THE SUPREME COURT TRACK RECORD ON THE CHARTER

Space does not allow a full analysis of the early *Charter* cases within the broader framework set out in this article. Such a detailed analysis does appear in the papers of Professors Monahan and Petter.¹⁸⁷ For present purposes, I shall highlight the early trends in the Supreme Court followed by brief comments on a few selected cases.

(a) Early Trends in Charter Cases

It may be presumptuous to even talk of trends after only four years of *Charter* cases, but that is what I will attempt to do. In assessing the performance of the Supreme Court of Canada the cases were considered in two groups. Those cases in which the Court spoke broadly about its role under the *Charter*¹⁸⁸ received the closest atten-

186 W. MacKay, "The Social Costs of Incompetence: An Educator's View" (1982), 7 Dal. L.J. 160.

187 *Supra*, note 22. It should be noted, however, that the number of Supreme Court cases on the *Charter* doubled from the time that the Monahan and Petter papers were completed to the completion of this one.

188 *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, 53 N.R. 169, 11 C.C.C. (3d) 481, 3 O.A.C. 321 (S.C.C.); *Hunter v. Southam*, [1984] 2 S.C.R. 145, 33 Alta. L.R. (2d) 193, [1984] 6 W.W.R. 577, 27 B.L.R. 297, 11 D.L.R. (4th) 641, 55 N.R. 241, 14 C.C.C. (3d) 97 (S.C.C.); *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 17 D.L.R. (4th) 422, 58 N.R. 1 (S.C.C.); *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 18 D.L.R. (4th) 321, 58 N.R. 81 (S.C.C.); *Operation Dismantle v. R.*, [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 18 D.L.R. (4th) 481, 59 N.R. 1 (S.C.C.); *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (S.C.C.); and *R. v. Oakes* (1986), 50 C.R. (3d) 1 (S.C.C.).

tion, while a supporting cast of cases, which either followed earlier cases or dealt with more specific rights,¹⁸⁹ received less. Comments about the cases are organized under the themes identified and are suggestive rather than comprehensive.

(i) *The Attempt to Develop a Coherent Pattern of Cases Grounded in the Basic Principles of a Free and Democratic Society*

This attempt to create a coherent pattern of cases is most obvious in the judgments of Chief Justice Dickson. There is less consistency in the concurring and dissenting opinions of the other justices. In *R. v. Oakes*,¹⁹⁰ the Chief Justice clearly articulates that a particular *Charter* issue must be examined in the context of a general commitment to uphold rights under the *Charter* and in the context of the principles of a "free and democratic society." Included in these principles are "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of groups and individuals in society."¹⁹¹ This is a pluralistic statement of values in the classic liberal tradition but does demonstrate a sensitivity to collective as well as individual rights.

The other aspect of *Oakes* that is also reflected in many of the earlier judgments of the Chief Justice is an overt attempt to link the present case to those that have gone before. In both *Oakes* and *Re*

189 *A.G. Que. v. Que. Assoc. of Protestant School Boards*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321, 54 N.R. 196 (S.C.C.); *Plantation Indoor Plants Ltd. v. A.G. Alta.*, [1985] 1 S.C.R. 366, [1985] 3 W.W.R. 539, 58 N.R. 228 (S.C.C.); *Staranchuk v. R.*, [1985] 1 S.C.R. 439, [1985] 4 W.W.R. 544 (S.C.C.); *R. v. Therens*, [1985] 1 S.C.R. 613, [1985] 4 W.W.R. 286, 18 D.L.R. (4th) 655 (S.C.C.); *Trask v. R.*, [1985] 1 S.C.R. 655, 19 D.L.R. (4th) 123, 59 N.R. 145 (S.C.C.); *Rahn v. R.*, [1985] 1 S.C.R. 659, 19 D.L.R. (4th) 126, 59 N.R. 144 (S.C.C.); *Dubois v. R.*, [1985] 2 S.C.R. 350, [1986] 1 W.W.R. 193, 41 Alta. L.R. (2d) 97, 48 C.R. (3d) 193 (S.C.C.); *Spencer v. R.*, [1985] 2 S.C.R. 278 (S.C.C.); *Valente v. R.* (1985), 9 W.C.B. 350 (S.C.C.); and *R. v. Krug*, [1985] 2 S.C.R. 255, 48 C.R. (3d) 97, 21 C.C.C. (3d) 193, 62 N.R. 263 (S.C.C.).

190 *Supra*, note 188.

191 *Ibid.*, p. 37. D. Klink, in "The Quest for Meaning in *Charter* Adjudication: Comment on *R. v. Therens*" (1985), 31 McGill L.J. 104, argues that such broad concepts provide little real guidance for the courts and that, as a result, the early *Charter* cases lack any real coherence and direction.

B.C. Motor Vehicle Act there is an emphasis on the "dignity and worth of the human person" (borrowed from the preamble to the *Canadian Bill of Rights*) and the "rule of law" (borrowed from the preamble to the *Charter*). The attempt is to set the individual cases in the context of the broader principles of the liberal Canadian state, which produced the *Charter*. Defining these principles in more concrete form and resolving disputes between competing principles will be the real test of the Court's coherence.

(ii) *The Break with the Canadian Bill of Rights in Favour of a Broader Judicial Mandate.*

Early *Charter* pundits made gloomy predictions about the Court being haunted by the dismal judicial performance on the *Bill of Rights*.¹⁹² There is no sign of this in the early *Charter* cases. In *R. v. Big M Drug Mart*¹⁹³ and *R. v. Therens*¹⁹⁴ the Supreme Court expressly adopted different conclusions under the *Charter* than it had on the same issues under the *Bill of Rights*. There is a clear statement in many of the early cases that judicial review under the *Charter* is of a different order from what had preceded it. The only notable throw-back to a *Bill of Rights* analysis was the opinion of Beetz J. in *Singh v. M.E.I.*,¹⁹⁵ and even there the conclusion was the same as that of his majority colleagues, who resolved the issue under the *Charter*. Perhaps the boldest break with the past is the adoption of elements of substantive due process review in *Re B.C. Motor Vehicle Act*.

(iii) *The Emergence of a Broad Reading of Individual Liberty from the Early Charter Cases, Tempered by Some Sensitivity to Collective Rights*

Many of the early judgments take an expansive approach to liberty and go to great lengths to proclaim the value of liberty in Canadian society. This focus is partly explained by the predominance of cases in the criminal law context, but it also reflects a classic liberal view of rights. Wilson J., in *Re B.C. Motor Vehicle Act*, speaks of the

192 B. Hovius and R. Martin, "The Legacy of The Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the *Charter*" (1982), 28 McGill L.J. 32.

193 *Supra*, note 188.

194 *Supra*, note 189.

195 *Supra*, note 188.

violation of liberty following an absolute liability offence as "inhumane". The language seems excessive when one considers the many more pressing examples of inhumanity in modern society. Liberty as an abstract value is primarily what has motivated the Court.

One of the broadest statements on the liberty interest comes from Chief Justice Dickson in *R. v. Big M Drug Mart*. To his credit, he defines it in both a negative and positive sense.

Freedom can primarily be characterized by the absence of coercion or constraint Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that . . . no one is to be forced to act in a way contrary to his beliefs or his conscience.¹⁹⁶

The Supreme Court has shown more sensitivity to collective rights than the lower courts discussed earlier. Also in *Big M Drug Mart*, Dickson C.J. indicates that Sunday observance laws are not consistent with the principles of multi-culturalism proclaimed in section 27 of the *Charter*. The Chief Justice also makes the important point that a "free society is one which aims at equality with respect to the enjoyment of fundamental freedoms."¹⁹⁷ He emphasizes that this statement does not rely on section 15 of the *Charter* (which was not yet in effect), and this raises the question of whether the Sunday observance issue could have been an equality issue. It is important to remember that liberty and equality are not always in competition.

There is also some awareness of collective interests in *Operation Dismantle v. R.* and *R. v. Singh*.¹⁹⁸ In the latter, Wilson J. read security of the person broadly enough to encompass threats from outside countries. Dickson C.J. was not so disposed in *Operation Dismantle* or *La Forest J. in Spencer v. R.*¹⁹⁹ Furthermore, the result of the ruling in *R. v. Singh* may be a sacrificing of the collective rights of those seeking citizenship to the principle of fair hearings. The cost and time consumption of such hearings may inhibit the delivery of substantive justice. Principles prevail over social facts.

196 *Supra*, note 188 at p. 354 (D.L.R.).

197 *Big M Drug Mart*, *supra*, note 188 at p. 353 (D.L.R.).

198 *Supra*, note 188.

199 *Supra*, notes 188 and 189, respectively.

(iv) *The Charter Has Opened Up the Court to New Sources of Information, but There Is Still a Need for More Social Facts*

Lawyers more than judges can be blamed for the articulation of *Charter* principles without a full social fact context. The Court has consistently called for hard social fact evidence, especially in relation to reasonable limits arguments under section 1 of the *Charter*, but such evidence has rarely been delivered. Many cases, of which *R. v. Oakes* is one notable example, have considered comparative rights in the United States at the international level and under the European Convention. These comparisons have not been used to diminish the uniqueness of the Canadian situation, but to provide a broader frame of reference. *Re B.C. Motor Vehicle Act* also liberates the *Charter* from the intentions of its drafters. These intentions were considered admissible but given little weight. Committee reports and Royal Commissions on drugs were considered as part of the section 1 analysis in *R. v. Oakes*. The Court's record is not an unblemished one, however, as Dickson C.J., in *R. v. Big M Drug Mart*, seems more concerned with the historical purposes of the *Lord's Day Act* than its present effects, and Estey J. resolves the *Skapinker*²⁰⁰ case on the basis of legal headings.

(v) *The Adoption by the Court of a Functional Approach to the Charter, Despite Lapses into Formalism*

Since its first ruling in *Law Society of Upper Canada v. Skapinker*, the Court has proclaimed a broad and purposive approach to the *Charter*. This has been reinforced in many cases—most notably the judgments of the Chief Justice in *Southam*, *Big M Drug Mart* and *Oakes*. Even if the goals of the *Charter* are defined in rather traditional liberal terms, the emphasis on law as a means to social justice is laudable.

There are, however, at least two notable lapses into formalism. It is concerning that these lapses occur in the face of broader social claims to a right to a livelihood and security in the nuclear age. Estey J. in *Skapinker* not only rejected the claim that section 6 of the *Charter* guaranteed a right to earn a livelihood, but also that it guaranteed mobility within a single province. Whatever the merits of these conclusions, my quarrel is with the formalistic way in which they were

200 *Supra*, note 188.

reached. After declaring that the *Charter* must be approached in an expansive way, Estey J. relies on headings and statutory analysis to resolve the case. This is hardly an open balancing of competing policies.

Chief Justice Dickson, who in other cases has been quite functional in his approach to the *Charter*, retreats into legal formalism in his judgment in *Operation Dismantle*. While the viability of the statement of claim cannot be ignored, there were underlying policy issues which deserved greater play. Wilson J. does make more of an effort to come to grips with these policy issues in her *Operation Dismantle* ruling, but her analysis lacks a good philosophical base in spite of her references to Rawls and Dworkin. It is sobering, with respect to the Court's performance on equality, that the formalistic retreat came in the face of the broadest collective claims. The Court is willing to be purposive and expansive in relation to individual rights and abstract principles, but will this approach be extended to the real problems of equality?

(vi) *Companies as Early Beneficiaries of the Charter; Extension of Similar Rights to Private Individuals and Companies*

Given the costs of taking a case to the Supreme Court of Canada, it is not surprising that many of the early litigants outside the criminal law cases are corporate. Whether these corporate litigants will be given the same rights as human individuals under section 15 of the *Charter* is significant. While the term "individual" in section 15 may exclude companies, that is not free from dispute.²⁰¹ The early Court trend in respect to other rights has been to extend rights to companies. Petter regards this as a negative sign and sees the extension of privacy rights to Southam Inc., in *Hunter v. Southam*,²⁰² as a conferral of property rights.²⁰³ He feels that the empirical result of giving privacy rights to companies is not to treat them equally, but to put them in a privileged class. I agree, but this is not a sign of a corporate bias on

201 P. Hogg, *Canada Act, 1982 Annotated* (Toronto: Carswell, 1982), p. 50. A contrary view of the application of section 15 to companies is expressed by G.D. Chipecur, "Section 15 of the Charter Protects People and Corporations" (1986), 11 Can. Bus. L.J. 304.

202 *Supra*, note 188.

203 *Supra*, note 22 at pp. 20-25.

the part of the Court, so much as an elevation of abstract principle above social fact.

This same elevation can be seen in *Big M Drug Mart*, where, in the name of the important principle of freedom of religion, rights are extended to a company that is more concerned about the pursuit of profits than matters of conscience. In real terms, the beneficiaries of stores being open on Sunday are large companies, while the losers include small businesses, consumers and workers.²⁰⁴ To be fair to Chief Justice Dickson, he did support his ruling on the historical religious roots of the *Lord's Day Act*, rather than its present effects. Thus he has left the door open to validating more secular laws aimed at providing a day of rest.²⁰⁵ The principle may ultimately be vindicated without producing social dislocation. This victory for large companies may be short-lived.

(vii) *The Imposition by the Court of High Standards for the Application of Reasonable Limits in section 1 to Restrict Rights*

The Court has pursued a cautious course in relation to section 1 of the *Charter* and avoided using it as the major vehicle for resolving *Charter* disputes. This is in contrast with the pattern in the lower courts. In *A.G. Que. v. Que. Assoc. of Protestant School Boards*,²⁰⁶ the court avoided the section 1 issue by drawing a formalistic line between denials and limitations of rights. It is possible that the Court preferred to have more cases behind it before ruling on section 1, but Monahan suggests that the avoidance of section 1 was the result of a desire to avoid an open balancing of competing values.²⁰⁷ This analysis is weakened by the extensive analysis of section 1 in *R. v. Oakes*, which was rendered after Monahan's draft paper.

Charter analysis is articulated as a two stage analysis in *Oakes*. The first stage concerns a violation of rights and the second the reasonable limits under section 1. This approach had been suggested in earlier cases such as *Re B.C. Motor Vehicle Act*. In one brief section 7 case,

204 J. Eleen, "An Open Sunday: strains workers, harms home life," *Globe and Mail*, February 25, 1986.

205 This issue has already been argued in the Supreme Court, although no decision had been reached at the time of writing. M. Strauss, "Top court to begin hearing Sunday shopping appeals," *Globe and Mail*, March 3, 1986.

206 *Supra*, note 189.

207 *Supra*, note 22.

R. v. Krug, La Forest J. does appear to collapse the two stages into one.

That this aggravated form of robbery exposes the victim to serious injury or death and that there has been a proliferation of such firearm-related offences in recent years scarcely needs demonstration. Under these circumstances, the creation of such an offence does not, in my view, constitute a departure from fundamental justice.²⁰⁸

The two stage analysis does allow for a clearer articulation of the issues.

The fullest statement of the Court on section 1 appears in *R. v. Oakes*, where there is a balancing of the presumption of innocence against broader societal claims to drug enforcement. The Chief Justice left no doubt that the individual's right to be presumed innocent was an important one.

It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.²⁰⁹

This classic statement of liberalism and individual rights is followed later in the judgment by a recognition that even such basic rights may have to be limited if their exercise is "inimical to the realization of collective goals of fundamental importance."²¹⁰ This acceptance that individual rights can be trumped by social goals or policies would be refuted by Dworkin's more abstract statement of the liberal model of rights.²¹¹ Dickson C.J. in *Oakes* then concludes that the object of the limitation must be pressing and substantial in a free and democratic society, and the means to that objective, proportional, rationally linked and least restrictive of rights. This coupled with the fact that the state has the burden of proof makes the use of section 1 difficult.²¹²

²⁰⁸ *Supra*, note 189 at p. 277.

²⁰⁹ *Oakes*, *supra*, note 188 at p. 15.

²¹⁰ *Ibid.*, p. 28.

²¹¹ *Supra*, note 14. Dworkin argues that policies, however important, cannot defeat matters of principle. Dickson C.J. may be wise to avoid this policy and principle dichotomy, which is far from clear.

²¹² As early as *Hunter v. Southam* the Court declared that the burden of proof under section 1 is on the state.

(viii) *The Court's Insistence on a Clear Distinction Between Law and Politics, as Well as Its Recognition of a Values Component to Charter Adjudication.*

The Court is still not ready to surrender the traditional doctrines of supremacy of parliament in respect to the wisdom of the legislation. Consistently, the judges have emphasized that there is a distinction between deciding whether a government action violated the *Charter* (a matter of law) and whether a government action is unwise (a matter of politics). This proposition is most directly stated by Wilson J. in *Operation Dismantle* but is also echoed by Dickson C.J. in that and other cases. Wilson J. also espoused this position in *Singh*. In *Re B.C. Motor Vehicle Act*, Lamer J. juxtaposed statements about reviewing laws on substantive principles with declarations that the courts will not inquire into the wisdom of legislation. The line between substantive evaluation under the *Charter* and assessing the wisdom of legislation eludes me. It appears to be a classic formalistic use of a false dichotomy to obscure the real political choices that are being made.

While I do not accept the C.L.S. argument that judging is just another form of politics, there is an important element of choice in *Charter* adjudication that should not be obscured. Courts should not assess the wisdom of the legislation on a purely subjective basis, but they must assess its wisdom in relation to the standards of the *Charter*. If we accept the view that there are as many versions of the constitution as there are of Hamlet, the *Charter* may not add much in the way of objective criteria.²¹³ Without going that far, the Court should acknowledge that the *Charter* does take it into the political realm of measuring the wisdom of a law. This is the most significant low grade on an otherwise impressive report card.

(b) Quo Vadis on Equality

The performance of the Supreme Court on the *Charter* to date has surprised many and turned some *Charter* skeptics into true believers. Rumours that the *Charter* would not be a marked departure from the anemic *Canadian Bill of Rights* have now been scotched. Indeed, commentators who think that the *Charter* is a bad thing argue that the Court has gone too far in changing the rules of the constitutional

213 *Supra*, note 129.

game.²¹⁴ Far from shirking its new role, the Court has gone out of its way, in some cases, to declare the lofty motives and principles of the *Charter*.

Where will the Court go with section 15 of the *Charter*? I would predict that the Court will not be as bullish on broad based equality claims as they have been on the liberty-style rights claimed to date. When face to face with a policy-making role in areas such as abortion, homosexual rights and redesigning pensions and social assistance structures, the Court will adopt a more restrained and formalistic role. Restraint may be appropriate in some of these areas, but it would be better if formalism were abandoned for an open balancing of the interests. Petter argues that the Court will only deal with equality on a superficial level and, in areas such as mandatory retirement, produce regressive results.²¹⁵ It is difficult to predict, because the Court has yet to confront the really difficult cases. At the risk of losing my *Charter* skeptic status, I predict that the Supreme Court will advance equality and not impede it. The advances will be slow and small but the present Court will rise to the challenge. At lower court levels, I am inclined to agree with Andrew Petter that the results will be at best neutral and possibly regressive.

7. CONCLUDING THOUGHTS ON EQUALITY AND JUDGING

The transcendent nature of man is reflected in the transcendent claims made for law. As long as law wears the mantle of justice, it cannot be locked into a computable set of rules, or predictions about judicial behavior.²¹⁶

One of the transcendent claims made for law is the creation of a more egalitarian society. This claim must be pursued by judges who have both the strengths and the weaknesses of their humanity. For all our claims about logic, rationality and consistency it is an appeal to the more emotive side of judges that may offer the best hope for equality. The feminists advocate a rediscovery of people's human side and

214 A. Hutchinson, "High Court Changes the Constitutional Game: Will a Judicial Whirlwind Blow Itself Right Out?" *Toronto Star*, February 8, 1986, and K. Makin "Charter Ruling Worries Legal Experts," *Globe and Mail*, February 24, 1986.

215 *Supra*, note 22 at pp. 40-43.

216 R. Samek, "Language, Communication, Computers and the Law" (1985), 9 Dal. L.J. 196 at 227.

an end to subordination of compassion to reason. While they have no monopoly on this view, they are on the right track. C.L.S., although it has often been criticized for its intellectual elitism, does have leading proponents, such as Duncan Kennedy, who elevate intuition above scientific method. There are crucial elements of reform in radical functionalism, but they require a significant transformation in human nature.²¹⁷

If this transformation is to occur, it will be a slow process, and efforts at reform should be aimed not just at judges but all segments of society. As Jeremy Bentham observed, "law is not made by judge alone but by judge and company."²¹⁸ While judging is important for the pursuit of equality, an egalitarian society must be pursued on all fronts. If our expectations of what judges can do are more realistic, we can diminish the illusion of rights that block real change. It may not be fair to expect more compassion from judges than from the rest of society. What we can hope for is a rational articulation of the competing values. To say this does not mean we should expect that the reasons given will be logically conclusive—that would be going to the other extreme of formalism and objectivism. Between the extremes of complete arbitrariness and naive objectivism there are better and worse arguments—there are degrees of thoroughness and cogency. We want good, well thought out, clearly reasoned argument—it will of course be value laden; it all is. We just want a clear articulation of the courts' reasons for why the values chosen should prevail. Judicial argument can be persuasive, without being logically conclusive.

As lawyers we can advocate creative approaches to the *Charter* that will promote real equality, and prevent the courts from blocking progressive initiatives from the other organs of the state. In this effort the *Charter* is an important new tool, which can be used for good or evil. It will be put to both uses but we can all attempt to create a better legal system, in which equality will be the norm rather than the exception. Lawyers must walk the fine line between progressive *Charter* arguments and the raising of false hopes. We must all be radical in our own way—some within the liberal structure and some without it. The bell tolls for us all.

217 P.E. Johnson, "Do You Sincerely Want to be Radical" (1984), 36 Stanford L.R. 247. This is a significant aspect of a general critique of the C.L.S. movement. While I do not accept Johnson's rather pessimistic view of human nature, I do agree that a transformation of peoples' views and beliefs is unlikely.

218 J. Bentham, as quoted in H.E. Dean, *Judicial Review and Democracy* (New York: Random House, 1966), p. 72. Dean does not footnote the quotation.

