Dalhousie Law Journal

Volume 10 | Issue 1 Article 3

6-1-1956

"Appropriate and Just": Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy

W A. Bogart
University of Windsor

W. A. Bogart*

"Appropriate and Just": Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy**

I. *Introduction*

At the heart of procedural law lie questions concerning the role of courts in a liberal democratic state. What is the essence of their function? What is the proper relationship between the judiciary and other governmental institutions? What is the well-spring for values with which courts can make law?

The questions are perennials and will be asked so long as there is interest in the workings and malfunctions of all aspects of government. Courts, like all institutions of government, are continually being assessed on their own terms and in relation to other branches. In Canada this examination has received a new impetus. The recently proclaimed *Charter of Rights and Freedoms*[1] adorns the courts with new status. They have now been given an explicit role in determining the ambit of government power. Their review of legislation and legislative actions is no longer limited, as it previously was, to refereeing between levels of government in this federal state. The courts can now invalidate statutes and strike at governmental actions based on invasion of certain proclaimed fundamental rights and freedoms. They stand now as a bulwark between citizen and state.

But what do such lofty words mean? How are courts to reconcile this power with the fact that they are unelected, unrepresentative, and answerable to no one. Independent and aloof, how can they presume to draw lines in sensitive areas, to make difficult choices when they cannot be held responsible for consequences? Beyond these questions are ones concerning the process courts should use in making such decisions. Should they rely on the traditional adversarial model with its deference

*Professor, Faculty of Law, University of Windsor.

**This paper is a revised version of one prepared for the 12th International Congress of Comparative Law, Australia August 1986. My thanks to Jeff Berryman, L. L. Bertoldi, C. Wydrzynski and William Vanveen for their helpful comments on a draft. Travel to the Conference supported by the Social Sciences and Humanities Research Council of Canada.

1. *Canadian Charter of Rights and Freedoms,* Constitution Act, 1982, as enacted by Canada Act 1982 (U.K.), 1982, c. 11.

to party choice and its emphasis on the resolution of disputes between individuals? Or do such enhanced powers call for modifications of these procedures? If the judge cannot be held directly responsible for the consequences of her decisions, does she not at least have to consider methods for making these decisions which are more likely to alert her to those consequences, to educate her about the range of possibilities and the likely ramifications of each?

When a statute or some governmental action is found invalid, what is a court to do? Courts establish their domain not only — perhaps not even principally — through the declaration of right but through the fashioning and policing of remedies. It is the remedy which gives substance to the right taking it from the realm of intellectual proclamation into the world of dollars and cents, sheriff's orders, contempt citations, and all other enforcement aspects which signal palpable redress, which convince the plaintiff who succeeds that the harm done can be rectified, that there really is an institution which will respond even in the face of the power of the defendant and even despite the powerlessness of those injured.

It is the remedial power of the courts under the *Charter of Rights and Freedoms* which I wish to comment upon in this paper. The *Charter* is explicit in its directive to the courts about what they should do once a violation is found. The courts must, as s. 24 stipulates, grant the remedy which is "appropriate and just in the circumstances."[2] Thus it is clear that courts have to do something about infringement but how precisely are they to react in a particular instance? Damages, declarations and injunctions to act constitutionally are easy candidates for the remedial array.[3] Should the courts go further and how? Will the nature of some violations force them into more complex forms of relief? I wish to focus here upon these questions concerning the phenomenon of constitutional remedies. I hope that in doing so I will, in addition, raise important questions concerning procedural law and the role of courts and judges.

Moreover, I believe there is a pressing need to discuss these issues. The possibility of courts engaging in such activity is not remote and vague despite the Charter's infancy and particularly the fact that s. 15 dealing with equality rights — a major candidate for complex remedies — only came into effect in the spring of 1985. In a recent New

---

2. For a discussion of the origins of s. 24 see: Fairley *Enforcing the Charter: Some thoughts on an Appropriate and Just Standard for Judicial Review* (1982), 4 Supreme Court L. R. 218.
3. For a first look at what the territory might look like regarding damages see: Pilkington, *Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms* (1984), 62 Can. Bar. Rev. 517.

Brunswick case[4] the trial judge, after striking down parts of a language immersion program, kept jurisdiction of the case in order to ensure that the school board would bring its program into compliance with the decision — the first murmurings of ongoing court supervision.

Far more dramatically, the Supreme Court of Canada has invalidated the Province of Manitoba's English-only statutory laws as offending against the constitutional requirement of bilingualism in that province.[5] The enormity of this ruling is awesome since all English-only statutes which have been enacted by Manitoba back to the nineteenth century were struck down. However, to avoid what the Court termed "legal chaos",[6] it proceeded to deem that all legislation was temporarily valid in order to allow for a "minimum"[7] period to allow the statutes to be translated and enacted in French and to "uphold the rule of law".[8] The Court "as presently equipped"[9] was unable to determine the period during which it would be possible for the Manitoba legislature to comply with its constitutional duty. Therefore, it required that within one hundred and twenty days the Attorney General of Canada or of Manitoba had to request a special hearing at which the Court would accept submissions from them and intervenors concerning the logistics of bringing the legislation into constitutional conformity.[10] The Court subsequently issued a detailed order providing for a schedule for translating the laws in stages reaching to 1990 and providing for reapplication by any of the parties to ensure the orders are carried out.[11]

In the face of such a task, what the Court is about makes the workings of United States courts pale. Here is the Supreme Court itself directly confronting not an organ of the province but the legislature itself. The lines have been drawn. Should the Province not see to it the Court will be drawn slowly but inexorably into not just supervising the translation, re-enactment, printing and publishing of legislation but also ordering the

---

4. See *Société des Acadiens du Nouveau-Brunswick Inc. et al.* v. *Minority Language School Board No. 50 (defendant) and Association of Parents for Fairness in Education, Grand Falls District 50 Branch (intended intervenor)* (1984), 54 N.B.R. (2d) 198 at 201-02.
5. *In the matter of a Reference by the Governor-in-Council Concerning Certain Language Rights Under Section 23 of the Manitoba Act, 1870* (1985) unreported.
6. *Id.* at 31. Because of the substantive posture of the case the Court did not draw upon its powers under s. 24. But it dealt with remedial issues that are strikingly like those that could arise under that section.
7. *Id.* at 65.
8. *Id.* at 49.
9. *Id.* at, 67.
10. *Id.* at 67-68. And for an indication of the furor that the decision has caused among Manitoba judges, see: Cramer, *Manitoba judges joust over Supreme Court ruling* (1985), Vol. 5, No. 13, Ontario Lawyers Weekly 1.
11. See Order of Court, 30 October 1985.

financing of the lengthy and expensive process as well. Potentially — a dramatic initiation into institutional litigation.

And, at least, Chief Justice Dickson of the Supreme Court of Canada has contemplated, in a public address, the possibility of analogous remedies to those provided by institutional litigation in the United States:[12]

> The outer limits of s. 24 have yet to be tested but American experience teaches us that remedial aspects of constitutional rights litigation will often be the most difficult and most important. In a very real sense the 1954 decision by the United States Supreme Court in *Brown* v. *Board of Education of Topeka* that racially segregated schools were a denial of equal protection of the laws was the easy part. About thirty years later problems of how to enforce desegregation are still being sorted out. Similarly, American judges have been expected to run railroads and preside over state prison systems. Where the vindication of constitutional rights simply involves the nullification of past wrongs, the remedial options are quite straightforward. But where positive action is needed to correct the denial of constitutional rights, the remedial questions become more vexing. The protection of equality rights is especially amenable to such complexities, so that the coming into force of s. 15 of the *Charter* in 1985 may provide further perplexity in the fashioning of remedies.

In academia initial forays into the field have produced mixed reviews. One commentator, drawing on his extensive knowledge of remedial law, gives support to invoking such remedies when legislators and administrators fail to act.[13] Another is not enthusiastic, dismissing the United States experience as "without conspicuous success".[14]

II. *The Evolution of Litigation and the Charter*

The vision of litigation in Canada is refocussing. The classic concept of the lawsuit is challenged as a number of forces assault its premises and demand that it adjust to a more complex, less individualized, world. The most drastic calls for modification may result from Charter lawsuits but several kinds of litigation already question the suitability of the conventional paradigm.

The common law focussed on the lawsuit as a mode of dispute resolution centred upon the determination of rights and remedies on an individual basis.[15] In this traditional model, the lawsuit was a claim of

12. Dickson, *The Public Responsibility of Lawyers* (1983), 13 Man. L. J. 175 at 187.

13. Sharpe, *Injunctions and the Charter* (1984), 22 O.H.L.J. 473 at 485 ("To remain faithful to the text and spirit of the Charter and to the Canadian tradition of remedial flexibility, the courts will have to act").

14. Pilkington, "Charter Remedies: An Update" in *Equality: Section 15 and Charter Procedures* (Department of Education, L.S.U.C. 1985), K-14.

15. Chayes, *The Role of the Judge in Public Law Litigation* (1976), 89 Harv. L. Rev. 1281 at 1285 (hereafter Chayes (1976)). For an extensive, earlier attempt to trace the evolution in

entitlement on the part of a plaintiff and an assertion of a defence in reply heard by an aloof, passive judge (or a jury) finding relevant facts and applying the applicable rule. If the plaintiff prevailed the remedy was simple and straightforward — usually a monetary payment or sometimes a directive to return something or to do a clearly defined act. If the plaintiff lost he was to slink away. In either case the court's involvement was contained and minimal and the lawsuit was a sealed, episodic event.

In certain ways litigation is changing even within the classical paradigm simply because it is often more complex. Commercial litigation is frequently more complicated because of the highly technical issues in the dispute and the large number of documents generated through intricate corporate transactions. These complexities result in lawsuits which are more elaborate and difficult (and more expensive) but cause only limited departures from the traditional model.[16] More significant cleavages begin to occur in this area when interests absent from the litigation are directly affected by it. For instance, in derivative suits a shareholder sues to redress wrong done to a corporation but the interests of all shareholders and others are directly affected by the litigation. Thus statutory provisions[17] have commonly responded to the need to take account of these other interests by providing protective devices such as requiring the court's permission to initiate or settle the action, allowing it to provide notice, make broad orders for the conduct of the litigation and by tentative acknowledgement and redress of the inequality in resources with which various parties might litigate.[18]

The class action, the "*ad hoc* collectivity which organizes its members for a specific purpose and limited time"[19] has been the focus of stormy controversy in Canada in the last decade. The Supreme Court of Canada in *Naken* v. *General Motors of Canada Ltd.*[20] has rejected calls for judicial reform of procedures to broaden its scope while simultaneously pointing to the legislature as the proper body to bring about the overhaul.

---

litigation in Canada and compare it with the United States' experience see: Wildsmith, *An American Enforcement Model of Civil Process in a Canadian Landscape* (1980-81), 6 Dal. L. J. 71 contrasting the "dispute settlement" model and the "enforcement" model of litigation in the Canadian and American context.

16. Bogart, *Naken, The Supreme Court and What Are Our Courts For?* (1984), 9 C.B.L.J. 280.

17. For example, the *Business Corporations Act,* S.O. 1982, c. 4, s. 245. For a discussion of the derivative suit see: Baxter, *The Derivative Action Under the Ontario Business Corporations Act: A Review of Section 97* (1982), 27 McGill L. J. 453.

18. For a discussion of costs in derivative suits, see Wilson, *Attorney Fees And The Decision To Commence Litigation: Analysis, Comparison And An Application To The Shareholders' Derivative Action* (1985), 5 Windsor Yearbook of Access to Justice (forthcoming).

19. Bogart, *supra,* note 16 at 308.

20. (1983), 144 D.L.R. (3d) 385; 46, N.R. 139; [1983] 1 S.C.R. 72.

This decision has been excoriated[21] and at least some lower courts have signalled that they will obey the letter but not the spirit of the decision, reading the judgement down so as to avoid it if possible.[22] Meanwhile, the Ontario Law Reform Commission has issued its three volume report,[23] calling for fundamental overhaul of the law of class actions and related procedures, to generally enthusiastic reviews.[24] And since 1980, the Province of Quebec has had legislation providing for class actions of broad scope — a defined target for supporters[25] and critics[26] alike.

With the class action there is a substantial departure from the classic mode of litigation.[27] The assertion of rights based on mass harms, the representation of members of the class whose interests may indeed vary, the assessment and distribution of monetary relief by new methods, and the tailoring of other remedies — on occasion based on divergent viewpoints even within the class — and the procedural aspects of the class action, such as the motion for certification, all mark it as a substantial break from the traditional approach to litigation.

Yet another strand which has attenuated the bounds of the conventional paradigm has been litigation involving challenges to the plaintiff's standing to sue.[28] Historically, standing has largely been a tale of how our society has recognized and protected traditional and established rights compatible with the vision of litigation as a process for those concerned exclusively with their own self-interest. Thus, a party's entitlement to litigate was deeply rooted in basic ideas of the adversarial system. If you were harmed in the sense that a traditional legal interest — a pecuniary, proprietary or economic right — was invaded you could

---

21. See Bankier, *The Future of Class Actions in Canada: Cases, Courts and Confusion* (1984), 9 C.B.L.J. 260; Bogart, *supra,* note 16; Fox, *Naken* v. *General Motors of Canada Ltd.: Class Actions Deferred* (1984), 6 Supreme Court L. Rev. 335; Prichard, *Class Actions Reform: Some General Comments* (1984), 9 C.B.L.J. 309. For a long treatment of the evolution of class actions up to and including *Naken,* see: Bankier, *Class Actions for Monetary Relief in Canada: Formalism or Function?* (1984), 4 Windsor Yearbook of Access to Justice 229.

22. See, for example, *Ranjoy Sales and Leasing Ltd. et al.* v. *Deloitte, Haskins and Sells,* [1985] 2 W.W.R. 534 (Man. C.A.).

23. (1982).

24. See, for instance, DuVal (1983), 3 Windsor Yearbook of Access to Justice 411 and Prichard, *supra,* note 21 but compare Macdonald and Rowley, *Ontario Class Action Reform: Business and Justice System Impacts — A Comment* (1984), 9 C.B.L.J. 351 and for a review which praises the Report but questions some of its premises see Cromwell, *An Examination of the Ontario Law Reform Commission Report on Class Actions* (1983), 15 Ott. L. Rev. 587.

25. See, for example, Lauzon, *Le Recours Collectif Quebecois: Description et Bilan* (1984), 9 C.B.L.J. 324.

26. See Glenn, *Class Actions in Ontario and Quebec* (1984), 62 Can. Bar Rev. 247.

27. Bogart, *supra,* note 16 at 303.

28. The most eloquent treatment of the standing terrain must surely be Vining, *Legal Identity: The Coming of Age of Public Law* (1978).

choose to seek compensation or not as a function of your own self-interest. But absent such harm, any other impugned conduct was simply none of your business. Whether it was phrased in terms of cause of action or standing the failure to demonstrate such an interest barred a plaintiff from the courtroom door.

But this equation of traditional legal interests with entitlement to sue is under heavy fire.[29] In the last decade the Supreme Court of Canada has visited the question of standing to sue in constitutional litigation three times and each time it has weakened the domain of economic interests as the predicate of standing.[30] Though the decisions are vague and untidy in many ways, they tilt heavily in favour of recognition of non-traditional interests as candidates for the law's protection. And here again law reform commissions have had their role, with the British Columbia Law Reform Commission calling for enhanced recognition of "public" interests.[31] It is no coincidence that most standing suits have involved government or some governmental entity as a defendant. For it is government and other large entities such as corporations and trade unions which set policies and carry out actions with broad-ranging and massive impact which can affect individuals concerned only in diffuse and non-particularized ways, ways not easily related to by courts so accustomed to thinking in terms of individualized rights heavily skewed in the direction of economic and proprietary interests.

Standing issues do more than challenge us to rethink what interests we should recognize and protect (though in just that they perform a vital function). They remind us that many (most?) important legal issues today concern not a demand for relief which is immediately identifiable with a particular individual plaintiff but rather involve challenges to a policy or carrying out of a policy on the part of large aggregates of power.[32] In such cases it is hard for courts to pretend that all they do is resolve disputes only occasionally generating some rule of broad-based applicability and then as a mere by-product. When the plaintiff comes asking nothing directly for himself but instead for a response from the court about the correctness of some conduct or action the court's role in the working out

---

29. The standing literature is voluminous. A search of the periodical literature reveals some thirty articles in Canadian periodicals in the last ten years: see Bogart, *Developments in the Canadian Law of Standing* (1984), 3 Civil Justice Quarterly 339 at 346, note 44.

30. See *Thorson* v. *Attorney General of Canada* (1974), 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors* v *McNeil* (1975), 55 D.L.R. (3d) 632; *The Minister of Justice of Canada et al.* v. *Borowski* (1982), 130 D.L.R. (3d) 588.

31. *Report on Civil Litigation in the Public Interest* (1980) and for a review both praising and criticising, see Bogart (1981), 59 Can. Bar Rev. 868 and Wildsmith (1982-83), 7 Dal. L. J. 463.

32. Chayes 1976, *supra,* note 15 at 1304.

and framing of public values is impossible to deny. There *is* a dispute but at its centre lies a discussion of how a bureaucraticized and entity-dominated society is to govern itself.

With the *Charter* comes not only a changing role but a new starting point. Judges are no longer the poor relation of the legislatures in terms of authority, at least in explicit terms, but can now command legal relationships within particular spheres. There are areas of life into which no government or its emanations may intrude with the court nominated to declare which activities should be thus forbidden.

The *Charter* entrenches fundamental rights and applies both to provincial and federal governmental activity. It enumerates a conglomeration of freedoms: from democratic,[33] mobility,[34] and legal rights[35] to equality,[36] language,[37] and minority education[38] rights. These are subject only "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"[39] and the fact that, in certain instances, the federal Parliament or a provincial legislature may expressly declare in a statute that it or some of its provisions will operate notwithstanding the provisions of the *Charter.*[40] And when Charter rights have been violated, s. 24 is explicit in empowering courts to frame appropriate remedies:

> Anyone whose rights or freedoms as guaranteed by this *Charter,* have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

A generous (but not overly) reading of this remedial section will lead the courts down paths again at odds with traditional concepts of litigation. Experience in the United States, turned to in a moment, suggests that some kinds of constitutional infringement are not put right by a once and for all proclamation of the court. They are so pervasive and systemic — institutionalized — that the court must maintain supervision of the remedial process over an extended period. It must also sometimes actively use its resources and authority to bend the will of recalcitrant authorities convinced that they will win if they can only stall and wear down. In these remedial dramas called "structural"[41] or

---

33. Sections 3, 4, and 5.
34. Section 6.
35. Sections 7-14.
36. Section 15. By virtue of s. 32(2), s. 15 did not come into effect until April 1985.
37. Sections 16-22.
38. Section 23.
39. Section 1.
40. Section 33.
41. Fiss, *The Civil Rights Injunction* (1978).

"complex"[42] injunctions, "orders in institutional litigation"[43] or simply "decrees"[44] — the focal point is not the individual plaintiff or even a class of plaintiffs but the unyielding institution or bureaucracy which must be reshaped and redirected towards constitutional conformity.

Again the role of the court, as in the other instances just described, will be at odds with the classic concept of the lawsuit as the resolver of disputes, with the judge as impassive arbiter reacting only to the acts and manoeuvrings of the parties. Here the court will be active, will take greater control of the litigation and will look beyond the rights and obligations of the immediate parties to the impact and consequences of the orders that it will make.[45]

If the foregoing is more or less accurate, it still is only a roadmap of how litigation is altering, drastically altering some would say. It says little about whether this should occur. At a normative level are we witnessing the dawning of a more significant and relevant era for the courts or are we seeing storm warnings alerting us that courts are straying into dangerous waters, keeling towards the shoals of illegitimacy? What is to be said about this altered vision which seems to displace resolution of individual disputes as the centerpiece with a focus on public values and their effectuation? To answer that question two others need to be asked. How great, in fact, is the gap between the traditional model and the new one? And what precisely are the challenges to the new model's legitimacy and how well can they be answered? I will respond to these questions within the specific context of s. 24 of the *Charter* but in doing so I believe some interesting points of reference will emerge concerning a more general evaluation of the appropriate role of judges and courts.

III. *Institutional Injunctions in the United States*

It is not every injunction issued for a constitutional violation in the United States which requires the far-reaching involvement of the courts. Many bear a family resemblance to those ordered in litigation adhering closely to the traditional model. Thus many times the court will simply issue a preventative injunction forbidding parties from committing certain acts held to have infringed a constitutional right.[46] Or, more intrusive but still easily recognizable within established concepts, is a

42. Note, *Complex Enforcement: Unconstitutional Prison Conditions* (1981), 94 Harv. L. Rev. 626.

43. Eisenberg and Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation* (1980), 93 Harv. L. Rev. 465 (hereafter Eisenberg and Yeazell).

44. Chayes, 1976, *supra*, note 15.

45. *Id.* at 1302.

46. The description of the three types of injunction is heavily dependant upon Fiss, *supra*, note 41.

reparative order by the court requiring the defendant to effect defined actions to redress past wrongs or to discharge some obligation held to be owing. Such injunctions are often found in cases of social discrimination where the harm of the past is sought to be eradicated.

It is the decree which is said to be the remedial form marked off as new, defined by characteristics with no counterpart in the traditional model of litigation. Traced by some to origins in the courts' reorganization of railroads and divestiture proceedings in antitrust in the earlier part of the century, the core of its uniqueness lies in acknowledgement by the courts that they must become much more involved in the supervision of the offending entity in order to reshape it to conformity with the constitution.[47] In doing so courts are not lead inexorably to any one set of solutions dictated by the infringement of the rights of any one individual or even class of individuals, but rather fashion a range of orders to redirect the entire course of the institution. This disassociation of right and remedy remains one of the most controversial aspects of the decree:[48] "[I]t [is] impossible to identify a unique remedial regime that follows ineluctably from and is measured by the determination of substantive liability. Control of remedial discretion is therefore an insistent problem . . ."

The target of these orders is overwhelmingly some institution such as a prison, hospital, school system or other government bureaucracy or even the legislature itself in the case of challenges to electoral boundaries. But the details of the relief ordered can vary enormously. In school cases where social discrimination has been found, orders have consisted of some mix of redrawn district boundaries, magnet schools, remedial education, consolidation, busing, etc. Here the combination ordered by any particular court has not been dictated by the proven infringements. Rather it has emerged after considering such factors as the resources available, the operation of the school system and the preferences of the parties:[49] "factors . . . quite distinct from and even irrelevant to the liability determination." Similarly, a decree which deals with unconstitutional conditions in a prison or mental institution will be directed at a number of issues which are not necessarily related to a particular violation: staffing ratios, space availability, health, recreation, job training, sanitation, nutrition requirements and so on. And as with school cases, habitual critics of the decree have tried to contain or even

47. Fiss, (*id.* at 9) says that a structural injunction amounts to "a declaration that henceforth the court will *direct* or *manage* the reconstruction of the social institution, in order to bring it into conformity with the constitution."

48. Chayes, *The Supreme Court, 1981 Term-Foreword: Public Law Litigation and The Burger Court* (1982), 96 Harv. L. Rev. 4 at 46 (hereafter Chayes (1982)).

49. *Id.* at 47.

eliminate them by insisting upon a return to tight and inexorable linking of right and remedy.[50]

The decree as something apart from the injunction of the traditional model can be traced to *Brown* v. *Board of Education*[51] and the efforts by the courts in the years after the Supreme Court's rejection of "separate but equal" in law to eradicate it in fact. Attempts at the time to justify the courts remedial innovations were not elaborate. The need to end racial inequality was the wellspring of legitimacy which staved off the critics. But even so the establishment of the decree on the judicial landscape was not as dramatic as some would suggest. The image of judges becoming "hell-bent on remaking society"[52] has been and is contested.

Supporters emphasize how extraordinary it is for such relief to even be claimed, let alone granted.[53] Overwhelmingly, most cases in the courts make a simple claim for some sort of monetary relief. Moreover, in the small number of cases where decrees are granted, they are sometimes little more than negotiated settlements given court approval. In other cases courts have allowed periods of time for the parties to study varying alternatives which could be realized by decree. In still others, courts have staged the implementation of the decree to allow the institution to adjust to the ordered changes.[54] Thus, a court order can start out looking like a classic preventative or reparative injunction and be transformed into a decree with varying levels of intrusion only after milder forms have been tried and found wanting.

IV. *The Question of Legitimacy*

Such pervasive activity by American courts has, of course, been controversial. Some assaults amount to no more than a smear of "judicial activism",[55] ill-disguised attacks on the results. More responsible voices decry the confusion of roles of the different branches of government. Thus, some criticism maintains that administration of institutions is an executive function and it must remain so if the integrity of government is to be preserved.[56] Another line of criticism fears that judges will enforce their decrees by requiring — indirectly or directly — the spending of

50. *Id.* at 51.
51. 347 U.S. 483, (1954).
52. Eisenberg and Yeazell, *supra,* note 43 at 493.
53. Galanter, *Reading the Landscape of Disputes: What we know and don't know (and think we know) about our allegedly contentious and litigious society* (1983), 31 UCLA Law Review 71.
54. Eisenberg and Yeazell, *supra,* note 43 at 493.
55. Frug, *The Judicial Power of the Purse* (1978), 126 U. Pa. L. Rev. 715-716.
56. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies* (1978), 30 Stan. L. Rev. 661 at 662.

public funds thus arrogating to themselves difficult choices about public expenditures.[57] Similar criticisms and the responses they have evoked will be elaborated upon in a moment.[58] But a fundamental issue which has emerged is how new is the form of litigation, how much of a departure is the decree from the remedial phase of traditional litigation? Faced with assaults on the legitimacy of the courts' activity, defenders have launched a counter attack questioning the neatness and well-ordered workings of litigation's golden age to which critics would return.

Eisenberg and Yeazell have isolated two aspects of "normal" litigation which tend to show that it and litigation involving elaborate remedies may not be nearly so divergent as they first appear.[59] First, traditional litigation may be much more intrusive than comparisons, which put intrusiveness exclusively on the decree side of the ledger, might suggest. Such aspects as default judgements[60] and long-arm provisions,[61] execution before trial — prejudgement remedies,[62] and levy and execution[63] routinely ordered when no constitutional or public value is at stake — all of which have counterparts in Canadian law, demonstrate how active and persistent courts have been in traditional litigation in bringing to heel recalcitrant parties. Thus the proper comparison may not be between the judgement debtor who immediately satisfies a judgement and a court determined to run every detail of a prison according to its vision of constitutional conformity but rather a less divergent one where, in the one model, courts routinely order prejudgement attachment, enter default judgements, attempt to locate hidden assets and so on and, in the other, courts move to a greater level of specificity concerning constitutional non-compliance only after trying a number of less active, less intrusive alternatives.[64]

---

57. Frug, *supra,* note 55 at 733; Mishkin, *Federal Courts as State Reformers* (1978), 35 Wash. & Lee L. Rev. 949 at 959, 965, 969.

58. A further point in the American context, but not developed here because of lack of a parallel, are allegations that such orders defy principles of federalism as the federal judiciary intrudes upon state institutions from which the federal government generally has kept clear: Frug, *supra,* note 55 at 743-49; Mishkin, *supra,* note 57, 965 at 967-71.

59. Eisenberg and Yeazell, *supra,* note 43 at 475 *et seq.*

60. See, for example, Ontario Rules of Practice, Rule 19.

61. See, for example, Ontario Rules of Practice, Rule 17.

62. For a discussion of the development of Anton Pillar Orders and a critique raising concerns about intrusiveness see Berryman, *Anton Pillar Orders: A Canadian Common Law Approach* (1984), 34 U.T.L.J. 1 and a companion article Paciocco, *Anton Pillar Orders: Facing The Threat of the Privilege Against Self-Incrimination* (1984), 34 U.T.L.J. 26. For a broad assessment of prejudgement remedies, again addressing concerns about intrusiveness, see: Gertner, *Prejudgement Remedies: A Need for Rationalization* (1981), 19 O.H.L.J. 503; see also Rogers and Hately, *Getting the Pre-Trial Injunction* (1982), 60 Can. Bar. Rev. 1.

63. Problems associated with this process are analyzed in the Ontario Law Reform Commission's *Report on the Enforcement of Judgement Debts and Related Matters* (1981).

64. Eisenberg and Yeazell, *supra,* note 43 at 481.

Second, traditional litigation has engaged in much more complex supervisory tasks than the starkness of the contrasting paradigms has acknowledged.[65] Thus in probate cases courts have engaged in ongoing supervision as a routine matter.[66] Judges and legislatures have created a series of rules and procedures for a wide range of tasks supervised by the court: satisfying claims of creditors and taxing authorities, preserving the deceased's assets, distributing assets to beneficiaries, etc. If the supervision lasts for years and if along the way the court has to oversee the running of a business or the completion of a commercial transaction, so be it. Similarly, trusts frequently require courts to supervise substantial and diversified assets on a continuing basis, to evaluate the faithfulness of the trustee, the wisdom of investments and the appropriateness of dealings in which trustees have an interest even while alleging benefit to the trust.[67]

Further, bankruptcy and receivership provide many instances in which courts have stepped in to supervise assets of debtors either in an attempt to put them back on a sound footing or to see to their orderly liquidation and distribution.[68] In such instances the courts have been caught up in many complex and difficult business transactions and decisions.[69] While criticisms have been voiced about particular orders or decisions of courts in specific cases, there have been few serious challenges to the courts engaging in such tasks.[70]

But if it is the case that the difference between the old and new is not as great as first thought, there are still differences. Though there may be a more defined and sure continuum than contrasting paradigms would

65. *Id.* at 481 *et seq.*

66. See Ontario Law Reform Commission *Report on the Law of Trusts* (1984) for a discussion of some of these issues and see, in particular, Draft Act, Part VII, "Further Powers of the Court".

67. Such issues are reviewed in Waters, *Law of Trusts* (1984, 2d ed.).

68. One of the most famous examples of a court running a large company is provided by the receivership of Abitibi Power and Paper Company Limited, a large pulp and paper company which was in receivership for fourteen years during the 1930's and 40's. Through that period the company continued to operate but various significant organizational steps were undertaken under court supervision: see Johnston, "Receivers" in *Remedies* (1961, Special Lectures of the Law Society of Upper Canada) 101, 125.

69. *Id.* at 125.

70. See Sharpe, *Injunctions and Specific Performance* (1983), 23. Sharpe suggests that there are many circumstances in a wide variety of lawsuits where the courts engage in "regulation and management of the litigant's affairs":

> In family law, custody and access orders are subject to ongoing review. Maintenance orders involve not only the imposition on the defendant of an ongoing obligation of indefinite duration, but also the reservation of the power to alter the nature of that obligation should circumstances change. In the commercial area, orders appointing receivers directly involve the court in the management of the most complex business arrangements. Similarly, the jurisdiction to protect infants and the mentally incompetent often involves repeated application to the court for directions, as does the more familiar jurisdiction concerning the administration of estates and trusts.

indicate, nevertheless, at one end there are judges presiding over busing and classroom sizes for school children and meals and showers for inmates. Why are such procedures attacked as illegitimate and why are they supported as "stirring, the deep and durable demand for justice in our society"?[71]

The core of the criticisms concerning decrees is the extent to which they and the lawsuits which generate them depart from the function of courts in resolving disputes between private parties on a one-on-one basis. It is no coincidence that those who have reservations about such elaborate remedies under s. 24 re likely to have similar reservations about other forms of litigation such as class actions or suits in which standing is claimed for a non-traditional legal interest which also challenges the traditional model. It is this claim of the traditional one to a pre-emptive normative role which feeds doubts concerning structural injunctions.[72]

The first line of criticism looks directly to success or failure of these orders. At bottom the argument, typified by Horowitz, is that courts should resolve bi-polar disputes because that is what courts do best and, conversely, when they attempt to reform institutions through decrees, there is a significant possibility of error both in defining what the rights are in this context and in bringing obstinate entities to heel and there is the fear that courts will become mired in the attempt.[73] These critics point to a set of characteristics of adjudication which make it well-suited to the protection of the individual and his personal rights and ill-suited to other tasks involving broad and prospective orders.[74]

Defenders, notably Fiss, respond to this by asserting that although the complexity of structural litigation may increase the likelihood of error, a proper evaluation must also weigh the positive impact when it succeeds.[75]

---

71. Chayes 1976, *supra,* note 15 at 1316.

72. Fiss, *The Supreme Court 1978 Term — Foreword: The Forms of Justice* (1979), 93 Harv. L. Rev. 1 (hereafter Fiss 1979), 36:

> What has changed is social structure, the emergence of a society dominated by the operation of large-scale organizations, and it is these changes in social structure that account for the changes over time in adjudicatory *forms.* Such changes should hardly be a cause for concern. What would, in fact, provoke a genuine crisis of legitimacy would be to insist on procedural modes shaped in a different social setting, to assume that adjudicatory forms created centuries ago should control today.

See also Wildsmith, *supra,* note 15.

73. David Horowitz, *The Courts and Social Policy* (1977).

74. *Id.* see particularly Ch. Two "Attributes of Adjudication." And for a protest against class actions in Canada striking the same note see: Glenn, *supra,* note 26 at 270 ("The judiciary thus is requested to act on behalf of people who have not requested judicial intervention, to give judgement in the absence of proof of the requisite elements of each class member's claim, to thereby *presume* commonality in the sense of general though unproved characteristics").

75. Fiss, *supra,* note 72 at 32.

Because of its breadth, a decree, if only partially successful, may tower above a string of individual suits and may eliminate the need for them altogether. Moreover, defenders point to the fact that there is no other institution which can perform the tasks of the courts in this area. Suggestions for using some hybrid of administrative agencies are dismissed.[76] Their closeness to government brands them as ill-suited for the enterprise. It is the very independence and obligation of judges to publicly respond to a claim of constitutional entitlement which makes them best suited to engage in the perilous enterprise, one which most defenders would have them undertake only after all other avenues have been tried by both plaintiffs and the court.[77]

A second tack lies in the threat decrees pose to the power of the purse. In institutional cases the relief ordered by its nature is often more costly than any remedy that would be granted on a one-on-one basis. Some courts refuse to order defendants in these cases to raise funds to comply[78] but others reject lack of money as excusing violation of constitutional standards thus forcing allocations of public money.[79] A mild form of the argument, which does not seek to invalidate all decrees on this ground but to simply sound a note of caution, would have courts consider the financial ramifications when choosing among the remedial array available to them in any particular case.[80] More drastic is the variant which argues that the scope of decrees should be severely circumscribed by a fundamental precept that the raising and spending of money is exclusively for the legislature.[81]

That attack is rebuffed by the fact that virtually every court order directly or indirectly affects allocation of private or public resources.[82] While it is true that ordering busing, or requiring fewer inmates in a cell may more obviously cause expenditures so too will damage awards sometimes on a scale more threatening than any decree. Even when orders are made for non-monetary relief, they can cause substantial allocative shifts.

76. *Id.* 33.
77. Chayes 1976, *supra,* note 15 at 1307-09.
78. For example, *Jones* v. *Wittenberg,* 323 F. Supp. 93 (N. D. Ohio 1971); 330 F. Supp. 707, 712 (N. D. Ohio 1971) *aff'd sub nom Jones* v. *Metzger,* 456 F. 2d 854 (6th Cir. 1972); *Hamilton* v. *Love,* 328 F. Supp. 1182, 1194 (E. D. Ark. 1971). But compare *Griffin* v. *County School Bd.* 377 U.S. 218, 233 (1963); *Virginia* v. *West Virginia* 246 U.S. 565 (1918); *Reed* v. *Rhodes,* 455 F. Supp. 569, 606 (N. D. Ohio 1978); *Evans* v. *Buchanan,* 447 F. Supp. 982, 1026-35 (D. Del.), *aff'd* 582 F. 2d 750 (3d Cir. 1978) (en banc).
79. For example, *Finney* v. *Arkansas Bd. of Correction* 505 F. 2d 194, 201 (8th Cir. 1974); *Lora* v. *Board of Education* 456 F. Supp. 1211, 1292-93 (E.D.N.Y. 1978) *Vest* v. *Lubbock County Comm.'s Court,* 444 F. Supp. 824, 834 (N. D. Tex 1977).
80. Frug, *supra,* note 55 at 773-84.
81. *Id.* 788; Mishkin, *supra,* note 57 at 970-71.
82. Eisenberg and Yeazell, *supra,* note 43 at 507.

Consider, in the Canadian context, the fashioning of the doctrine of fairness and the extent to which it increased the range of circumstances requiring public officials to provide opportunities to reply to official action.[83] This has imposed a burden on administrative agencies which has surely caused a significant displacement of resources. But because invocation of the fairness doctrine takes place within the determination of the rights of individuals, courts and observers are much less aware of such fiscal consequences or can simply turn a blind eye. Thus supporters of institutional litigation do not deny that the cost of a decree should be taken into account when fashioning it or pursuing its enforcement. They simply maintain that the fact that public funds are spent in consequence of such an order does not create a clear distinction between structural injunctions and any other relief and is not grounds for their invalidation.

A third line of criticism points to the lack of consent of the people.[84] Historically, consent was given to courts to solve disputes between individual parties but the governed have never consented to institutional litigation.[85] Thus such litigation strikes at the pact by which we order ourselves, taking courts into realms not agreed to in our system of government.[86]

To this there have been a number of responses. First, as outlined earlier, Eisenberg and Yeazell have challenged the accuracy of the claim that all that courts did historically was consistent with the traditional paradigm.[87] Thus early trust, receivership, antitrust and bankruptcy cases

---

83. Its introduction into Canada took place in *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* (1979), 88 D. L. R. (3d) 671 (S.C.C.). The fairness literature is vast: see, for example, MacDonald *Judicial Review and Procedural Fairness in Administrative Law* (1979/80), 25 McGill L.J. 520 and (1981), 26 McGill L. J. I.

84. See Shapiro, *Courts A Comparative and Political Analysis* (1981) for an elaboration of how pervasive is consent for the dispute resolution function of courts regardless of the society.

85. For a description of the contrasts between the traditional form of litigation and the new model, see Scott, *Two Models of the Civil Process* (1975), 27 Stan. L. Rev. 937 and Wildsmith, *supra,* note 15 at 72 ("[T]he rational student of civil process must pay heed to American developments".)

86. For an eloquent protest, in the context of standing, against judges overriding the traditional model of litigation dedicated to vindicating individual and concrete rights and thereby engaging in paternalism, see: Brilmayer, *The Jurisprudence of Article III: Perspectives on the 'Case or Controversy' Requirement* (1979), 93 Harv. L. Rev. 297. For a reply see: Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer* (1980), 93 Harv. L. Rev. 1698. And for a rejoinder see: Brilmayer, *A Reply* (1980), 93 Harv. L. Rev. 1727.

87. Eisenberg and Yeazell, *supra,* note 43 and see Shapiro *supra,* note 84 at 1:

> Students of courts have generally employed an ideal type, or really a prototype, of courts involving (1) an independent judge applying (2) pre-existing legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong. The growth of political jurisprudence has been characterized largely by the discovery and emphasis of deviations from the prototype found in the behaviour of particular courts, showing how uncourtlike courts are or how much they are like other political actors.

might all suggest antecedents to structural litigation. Second, Chayes has argued that consent to this form of litigation, if it has not been given, can be earned. Thus, it should be given an experimental period to operate. As it is successful it will merit a claim to legitimacy.[88]

Third, Fiss has questioned the consent theory itself.[89] One aspect of this challenge is to ask what consent to the dispute resolution model means in this context. Have the people consented to the form or the function or certain substantive results? The consent theory has never elaborated upon any of these questions but merely relies upon the existence of dispute resolution at the earliest stages of government to give that form a prior normative claim.[90]

The most fundamental question is whether consent — clearly necessary for the legitimacy of the totality of democratic government — is always vital for the legitimacy of particular parts. Fiss has argued that courts' legitimacy depends not on implied or explicit consent of the people but rather on their competence — "the special contribution they make to the quality of our social life."[91] Thus, while some institutions like legislatures, city councils, or school boards have a more direct connection to consent — they are controlled by the power of the ballot — no such direct connection can be insisted upon for the courts. The people may approve or disapprove of what the courts do but they can be permitted no more immediate control than that. Otherwise the independence of the judiciary in interpreting and carrying out the constitution would be destroyed.[92]

A fourth challenge focusses upon the necessity of according the individual an opportunity to participate in any decision which affects him or her directly. This need for individual participation was celebrated most prominently by Fuller.[93] Structural litigation offends this basic premise not because it denies representation but because it shifts the focus of that representation from individuals to groups and organizations. It is also objectionable because it would require a judge to engage in polycentric tasks — something, Fuller proclaimed, courts could not do or, in any event, do well.

While Fuller never offered a clear definition of polycentrism, it seems to refer to an issue which is many faceted — he used the image of a

88. Chayes 1976, *supra,* note 15.
89. Fiss 1979, *supra,* note 72 at 36.
90. *Id.*
91. *Id.* at 38.
92. *Id.* at 31 ("[The judge is] empowered by the political agencies to enforce and create society-wide norms, and perhaps even to restructure institutions, as a way, I suggest, of giving meaning to our public values").
93. Fuller, *The Forms and Limits of Adjudication* (1978), 92 Harv. L. R. 353.

spider's web — so that any solution of one aspect must have ramifications for all others.[94] And running any institution — welfare agency, hospital, school — could be seen, in that sense, as polycentric since the task is not to focus upon any individual violations but to restore the entire entity to constitutional conformity. Related concerns have been raised by Glenn in his attack upon class actions in Canada.[95] Ours is a system "tolerant of uncompromising struggle" between "true adversaries".[96] Thus for Glenn, its resources should be dedicated only to individuals who have actually elected to sue to vindicate their rights and should be denied to forms which attempt to deviate from this central task.

These criticisms are responded to at several levels. While Fuller is seen as right in celebrating the connection between reason and adjudication, the relationship between adjudication and participation of the individual as an axiom is challenged. Fiss suggests that taken to its full implications, polycentrism would exclude all adjudication which created rules of law — public norms — whether constitutional or otherwise.[97] Most of the important rules of law — fellow-servant, doctrine of fairness, contributory negligence, hearsay rule and exceptions — have come from a process that is polycentric, that is, these doctrines have been formulated from an array of possible solutions. Such doctrines affect all who are subject to them and yet were formulated without an opportunity for all related interests to participate. But because there was a "live" plaintiff and a "live" defendant, the courts could simply turn a blind eye to the direct and immediate impact on so many others not before them.

Moreover, allowing the need for individual participation its full head would result in the triumph of form over substance. While seeming to exalt the individual, it leaves him victim to entities not organized around the single person but dedicated to mass power. Thus, the predicate of individual participation buttressed by polycentrism, while formally celebrating the value of each one of us, forbids access to courts on a basis — perhaps the only effective basis — on which institutions which threaten that individuality can be challenged.[98]

V. *Conclusion: Are Arguments About Legitimacy Legitimate?*

The arguments about institutional litigation have a distinctive point/counterpoint ring to them as detractors and supporters play off of each

94. *Id.* at 395.
95. Glenn, *supra,* note 26.
96. *Id.* at 264. ("The judiciary (particularly the elitist one of the common law tradition) is thus not a force of police, and the entire corpus of civil or private law is revealed, through the nature of its enforcement mechanism, as an optional device for acute conflict resolution").
97. Fiss 1979, *supra,* note 72 at 43.
98. *Id.* at 44.

other's debating marks: give them a chance, their effectiveness will earn them credit — they should not be used, the probability of error is too great; they are devoid of consent — their validity depends not on specified consent but on their unique competence; they offend against division of powers because they re-order public spending — when they do so, they are not significantly different than any order against government which always has allocative consequences. On both sides the arguments are eloquent and vigorous. Both have combed the case law searching for that which is supportive and for that which weakens if not explained. Both have drawn on larger sets of social, political, and historical arguments with which to embroider and bolster their positions. So how are we to know who sees clearly and who is myopic?

At a first level one is struck by an element largely missing on both sides despite the elaborateness and force of each. Scarcely any of the commentators refer to or call for evaluative and follow up studies of courts' actual performances. I do not suggest that empirical studies can settle all normative debates but they can often narrow the range of differences by unearthing and testing the factual allegations embedded in opposing arguments.[99] Chayes' plea for a trial period in order to allow decrees an opportunity to validate their existence and Horowitz' opposition based on the probability of error are basically premised on factual components — really diametrically opposed allegations. Similarly, arguments concerning institutional remedies as disruptive of the public fisc again turn, at least partially, on unexplored factual contentions. There is little known, in any event as has surfaced in the legal literature on legitimacy, about how much these orders cost, whether some are more financially demanding than others, how often they have caused a substantial shift in public spending programs and the consequences when they have done so.

There are few comprehensive evaluative studies of these decrees.[100] In the end, have courts brought prisons into constitutional conformity? Has discrimination ended in schools subject to the orders and when it has, at what costs?[101] Has the blight of discrimination been eradicated at the

---

99. Debate about the utility of empiricism in the study of law and legal institutions is lively, particularly, within the law and society movement. See, for example, Macaulay, *Law and the Behavioral Sciences: Is There Any There?* (1984), 6 Law & Policy 149; Trubeck, *Where the Action Is: Critical Legal Studies and Empiricism* (1984), 36 Stan L. Rev. 575; Bogart, *Empirical Studies and Procedural Law: The Law, In Fact* (1985), paper presented to the Canadian Law and Society Association — unpublished.

100. For one brief attempt, see Schuck, *Suing Government — Citizens Remedies for Official Wrongs* (1983), 154 *et seq.*

101. I have not conducted a comprehensive search in the social sciences literature. One of the points I am making here is that to the extent that evaluative studies exist at all they have not figured prominently or even peripherally in the bulk of the legitimacy literature. For attempts

price of quality?[102] When the decrees have worked and been successful (having decided the measure of success), what has made them so?[103] When they have failed (calling for a similar definitional exercise) are there common aspects to the failure? Is their success noticeably different when compared with success or failure of courts' orders in traditional litigation? Could it be that such careful and inclusive examination would reveal patterns, that effectiveness or its absence depend on a mix of factors not solely — or even principally — determined by the personality and vision of the judge.[104]

But there is another — I think a deeper — level at which arguments over legitimacy ought to be examined. Institutional litigation and its remedies are not some legal satellite orbitting on its own. However convincing historical arguments about continuity and comparisons with other procedural forms that challenge the classical paradigm, there is at least enough there to show that it belongs to a world of law which has been undergoing a continuing shift away from a focus centered upon a concept of individuals ordering their lives in relation to other individuals viewing each largely in terms of economic and property rights, towards one where large aggregates of power exercise their domain and where individuals — even the strongest of us — are a weak voice. It is no coincidence that institutional litigation does not focus on the protection of property rights, the task long held sacred to the law. Thus, the controversy over institutional decrees cannot be confined to a debate about the compass of remedial law. It spreads, as it must, to a broader

---

to discuss what might be involved in assessing decrees from a psychological perspective, see: Miller and Brewer (eds.) *Groups in Contact: The Psychology of Desegregation* (1984) and Cook *Experimenting in Social Issues — The Case of School Desegregation* (1985), 40 American Psychologist 452.

102. In the context of school cases, two recent newspaper accounts have evaluated — positively — two desegregation decrees in Buffalo and Boston respectively, see: Winerip, "School Integration in Buffalo is Hailed as a Model for U.S." *New York Times* Monday, May 13, 1985, 1 and Wald, "Judge in Bias Case is Ceding Control Over Boston Schools" *New York Times* Thursday, August 22, 1985, 1.

103. A recent article argues that one of the most important factors in a desegregation remedy is the "white flight" phenomenon and contends that element must be taken into account when fashioning a remedy in the first place: Gewirtz, *Remedies and Resistance* (1983), 92 Yale Law Journal 585 at 660 ("Although grappling with imperfection may be difficult, it is part of the difficulty of the remedial problem, of translating ideals into something real that makes the world somewhat better for at least some people. To reject the imperfect may preserve the horrible").

104. The best single attempt of which I am aware to draw together the empirical studies in school desegregation plans is Rossell, *Applied Social Science Research: What Does It Say About the Effectiveness of School Desegregation Plans* (1983), 12 J. of Leg. Studies 69 in which she concludes that the costs of desegregation do not overshadow possible benefits. What she does emphasize (69) is how few and limited are the studies and the inaccessibility of those that do exist.

discussion of how far the courts should go in recognizing and protecting new interests many — but not all — of which will be constitutional. Therefore, we must debate the extent to which courts should umpire — even if not exclusively — the interlock of the person and the institution.

I do not believe I have a romantic notion of Canadian judges. They have been conservative — even reactionary; they have been superficial — even inept. I was no compaigner for the *Charter* as the path towards a sun-drenched order with judges our hearty trailblazers. But the presence or absence of the Charter would not have altered the incontrovertible presence of large institutions in Canadian daily life and the power which they exercise.

The *Charter* is here and suggestions that it will somehow shrivel away are the meanderings of the desperate. What may be romantic on my part is the belief that courts will be legitimated if they use this power to protect the weakest and frail among us — that they shift even as society has. Of course, this marks me as a supporter of broad remedial orders when, after all else, they must be resorted to. And that is a position that is just a corner of what will, and must be, part of a large and ongoing controversy about the *Charter.* But as we fight about the role of the court and the scope of its remedial authority, we should face the fact that at its core the debate is about power and the way it can be shifted by courts and not about some fixed and predetermined essence concerning judges.[105]

It is not coincidence that some critics on both the right and the left have little enthusiasm for judicial power. The right fears judicial power as the great equalizer, the giver of a voice to those shut out of other processes where power and influence take a commanding lead.[106] The left sees the authority of judges identified with the established order allowing just enough change, just enough recognition of the most extreme injustices to shore up the system and allow it to continue on its way.[107]

Those are stark descriptions but in a sense both are right. To litigate is to act conservatively. When people sue they acknowledge the system but also register faith in it and its capacity to do justice. To sue is not to challenge the established order but it is to voice one's expectations about it. And where individuals sue who have been excluded from other governmental processes, expectations about the system and its capacity to turn itself around are likely at their highest. It should not be surprising, therefore, that questions concerning the need for courts to place themselves between the individual and large aggregates of power should

---

105. Eisenberg and Yeazell, *supra,* note 43 at 514.
106. See, for example, Glenn, *supra,* note 26.
107. See, for example, Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine* (1978), 62 Minnesota Law Review 1049.

be among the most controversial that we can discuss. What is amazing is that there is a continual attempt to disguise and mask such questions behind a fog of legal doctrine or, more immediately, to suggest that arguments about the remedial role of courts must be driven by a debate about what constitutes the inherent nature of judges.

Controversy about courts and their remedial role should flourish. But it should do so as part of a larger discussion about what rights and values our society should recognize and protect. To what extent law does and can transform us — altering as values assert themselves and gain recognition but also imposing its own order and expectations of our conduct and relations. And the debate should be one not skewed by a vision of what courts did — or what we thought they did — in some distant and different past.[108]

---

108. Gewirtz, *supra,* note 103 at 680 ("Law can be adequately understood only by recognizing how the ideal and the real influence it simultaneously").