NOTES

Public Policy and the Judicial Role

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Judges have always been involved with public policy. They have also been involved in the development of the law, whether in interpreting statutes or selectively applying precedents. After examining the traditional functions of judges in this light, the author concludes that the *Charter* has not changed anything in this regard.

Les juges ont toujours établi une politique judiciaire qui tienne compte de l'intérêt public. Ils participent au développement du droit que ce soit par l'interprétation qu'ils donnent au lois ou par la sélectivité dont ils font preuve dans le choix des précédents à suivre. Après avoir analysé les fonctions traditionnelles des juges, l'auteur conclut que la *Charte* ne change rien à ces fonctions.

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Judges have always been involved with public policy. And judges, in their role either in the interpretation of statutes or in the selective application of precedent, have always been involved in the development of law. Why then is there now an unfolding drama about the appropriate limits to judicial power and an intense curiosity about the backgrounds of the men and women who wield it?[1] The answer is, of course, the *Charter*.[2]

What the *Charter*'s Klieg lights did as they illuminated the long-running play called "The Judicial Role" was to spotlight a participant whose talents the audience had not previously appreciated. That participant was public policy.

For centuries, and at least from the time of Montesquieu, public policy had been in all three of the play's acts in English-speaking Western Democracies — in Act I, as Common Law; in Act 2, as Statutory Interpretation; and in Act 3, as Constitutional Review. But it rarely had a speaking part, and was almost always billed far below the star, judicial neutrality. But when the *Charter* was added to this country's Constitution, what came prominently into the nation's consciousness was the realization that public policy, far from playing a minor role in the judicial script, had in fact been a co-star all along.[3] With the *Charter*, the public wondered whether policy wasn't being given too pronounced a form of recognition. It is one thing, after all, for the courts to enunciate policy in tort law, and even to revolutionize it as the judges did in cases like *Rookes* v. *Barnard*;[4] however, what to the legal profession may have seemed like Copernican revolutions in contract or tort seemed largely inconsequential to the wider public. The attribution to unelected judges of the responsibility for the final determination of fundamental issues no less controversial and political than human rights — frequently and essentially the equitable distribution of scarce commodities

[1]In the United States and England, this generation in particular has spawned literature attempting to identify the relationship between the backgrounds and decision of judges. See, for example, M. Shapiro, *Law and Politics in the Supreme Court* (New York: Free Press of Glencoe, 1964) and R. Stevens, *Law and Politics: the House of Lords as a Judicial Body, 1800-1976* (Chapel Hill, N.C.: University of North Carolina Press, 1978). But the examination of the judicial role is neither a new preoccupation nor one fixated on constitutional issues. See O.W. Holmes, *The Common Law* (Boston: Little, Brown and Co., 1881) and B.N. Cardozo, *The Nature of the Judicial Process* (New Haven, Conn.: Yale University Press, 1921).

[2]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[3]P.H. Winfield, "Public Policy in the English Common Law" (1928) 42 Harv. L. Rev. 76 at 77.

[4][1964] A.C. 1129 (H.L.).

like opportunities[5] — brought upon us a tempest of inquiry into the judicial relationship with public policy. For some, the tempest revealed public policy as Caliban, a grotesque monster to be kept under control. For others, the tempest was a cathartic exegesis finally permitting public policy, like Prospero, to attain openly its proper status.

As the storm raged, two primary concerns swirled through the land: had the *Charter* compromised judicial neutrality by making public policy so conspicuously a partner in the determination of how rights and freedoms were to be allocated; and had the Charter compromised the historic jurisdictional division of lawmaking authority between the legislature and the courts? Once the tempest subsides, my own prognosis is that in the end it will be concluded that nothing has been inappropriately compromised with the *Charter*. The *Charter* has simply spotlighted, rather than created, a judicial role, and what we are seeing, because of the public nature of the *Charter*'s impact and issues, is a difference in degree in judicial decision-making and the role of public policy, and not in kind.[6]

I.

The first subject under review must necessarily be judicial neutrality, whose examination becomes vital if we are to prevent *Charter* adjudication from becoming an eternally frustrating Sisyphean task to lawyers and judges who may otherwise feel they are being made to present a different play than the one they rehearsed. The main fear, I think, is that an explicit judicial acknowledgement of the role public policy plays in decision-making invites accusations that the judiciary is usurping a political function reserved to the legislatures, namely, the requirement to consider public policy when formulating law. The term "public policy" radiates a political heat judges fear will smother the light of their neutrality and independence. It therefore becomes important to define "public policy" and "judicial neutrality" in order to understand why policy considerations (as well as moral considerations) are an integral part of law and therefore legal interpretation, and why judicial neutrality need not be, or need not be seen to be, or need not ever have been, impaired by the express or implied application of policy considerations to decision-making.

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[5]L.G. Scarman, "Human Rights in a Plural Society" in R. Dhavan, R. Sudarshan, & S. Kharshid, eds., *Judges and the Judicial Power* (London: Sweet and Maxwell, 1985; Bombay: N.M. Tripathi, 1985) at 107.

[6]L.L. Jaffe, *English and American Judges as Lawmakers* (Oxford: Clarendon Press, 1969) at 5.

"Public policy" is the philosophical blueprint for the systems and rules that regulate social and political conduct.[7] It is both a strategy and an objective; that is, at any given time it may be either hortatory or derivative, inspirational or reflective of what is perceived to be in a community's optimal self-interest. It is the compendium of directives under which communities, of which judges are members, evolve. It may or may not enjoy a consensus. It has an inherent fluidity and may change within generations, from generation to generation, or may not change for several generations. Ultimately it defines a society's character. Despite the fact that it can rarely be empirically tested, it forms the basis of law. It has been described as an "unruly horse",[8] though not a "Pegasus".[9] In its statutory incarnation, it may either represent a Faustian bargain between the legislature and the majority in exchange for continued electoral success where such a consensus is seen to exist; or it may represent a Kantian acappella refrain, seeking daringly to redefine the social contract without benefit of majority accompaniment where the consensus is nowhere to be seen. It is, in short, an imprecise yet crucial progenitor of the rules we choose to live by.

Above all, however, the concept of public policy is value-laden.[10] Any given public policy stands for certain values or a code of morality with which we intend or expect most of society to abide. The legislature's basic function, whether it does so consciously or unconsciously, is to determine which values will be translated into statutory law based on a perception of public interests, the importunings of constituents, the prevailing partisan ideology, collegial input, and perceived electoral risk.

In this legislative blender, the application of public policy is purely a political judgment. But this in no way detracts from its fundamental character as originating from values. It means, rather, that the values that originally inspired the statute are subject to political realities and may not emerge intact or unchanged. The final legislative product is still called public policy, but it is public policy as political compromise. It is political in the purest sense of the word: an accountable institution — the legislature — assesses how best to balance societal values with the prospect of re-election. Essentially the application of public policy is an exercise in the promulgation as law of selected perceived majority wishes.

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[7]R.S. Abella, "Public Policy and Canada's Judges: The Impact of the Charter of Rights and Freedoms" (1986) 20 L. Soc. Gaz. 217 at 227.

[8]Public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you": *Richardson* v. *Mellish* (1824), 2 Bing. 229, 130 E.R. 294 at 252 *per* Burrough J.

[9]Winfield, *supra*, note 3 at 91: "But none, at any rate in the present day, has looked upon it as a Pegasus that might soar beyond the momentary needs of the community."

[10]M. Schneiderman, "Toward a Public Policy Oriented Jurisprudence: 'Principles' as a Substitute for 'Rules' in the Legal Syllogism" (1969) 34 Sask. L. Rev. 314.

The courts, in their relationship with public policy, are also involved in an evaluative process. The process, however, is interpretive and not blatantly political. It is impervious to electoral judgment, unrestricted by the constraints of partisan ideologies, and relatively immune to the requirement of compromise. The public policy values the court is therefore free to evaluate are related to but independent from the political values which motivated the existence or absence of a statute. Parliament passes laws, courts decide what the laws mean,[11] and in so doing courts react, at least to some extent, either consciously or unconsciously, positively or negatively, to what they feel are the public policy values that underlie the statute. And if one feels that this interpretive role has the potential for interfering with the Parliamentary supremacy which emerged triumphant from the Glorious Revolution of 1688 overthrowing the obstructive Stuart Kings, it was ever thus.[12] The interpretive judicial function, whether of statute or common law, has always necessarily involved the sifting of normative considerations, not only because laws derive from and operate in a social system and culture of values,[13] but because judges are conditioned and operate in the same system.[14] Insofar as the sifting of legal choices is the sifting of policy values,[15] judges, in interpreting law, do consider and always have considered, in addition to logic and precedent, the values or policy implications their legal conclusions represent.[16] But because judges tended to be wary about appearing to make policy judgments which some thought were more acceptably made in a political forum,[17] they have historically used anodyne terminology to shield the exercise of policy choice from conspicuous view. Policy-laden words like "reasonable", "arbitrary", "due process", "good faith", "unjustified", or "discretion" are what Learned Hand called a "protective veil of adjectives"[18] for insulating judicial policy-making from censure for violating the accepted spheres of policy-making. When judges interpret terms of art like "best interests", "discrimination",[19] "unfair labour practice", or "re-

[11]"This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law": *Hurtado* v. *California*, 110 U.S. 516 at 530 (1884).

[12]E. McWhinney, in *Judicial Review*, 4th ed. (Toronto: University of Toronto Press, 1969) at 238 refers to the "dynamic process of legal evolution" which keeps pace with society.

[13]M. Shapiro, "Political Jurisprudence", (1964) 52 Ky L.J. 294.

[14]See for example *Sommersett's Case* (1772), Lofft (Easter Term, 3 Geo. 3) 1, 98 E.R. 499, where Lord Mansfield rejected a slave-owner's claim for the return of his slave on the grounds that slavery was repugnant to English ideas. See also R. Hiers, "Normative Analysis in Judicial Determinations of Public Policy" (1985) 3 J. Law and Religion 77.

[15]M.S. McDougal, *The Application of Constitutive Prescriptions* (New York: Association of the Bar of the City of New York, 1978).

[16]Hiers, *supra*, note 14 at 78.

[17]Winfield, *supra*, note 3 at 86.

[18]L. Hand, *The Bill of Rights* (Cambridge, Mass.: Harvard University Press, 1958) at 70.

[19]The results-oriented concept of "discrimination" sprang full-panoplied from judicial foreheads in *Griggs* v. *Duke Power*, 401 U.S. 424 (1971).

sponsibility for damage caused by his fault",[20] are they not making policy judgments? Do not the areas of family law,[21] especially custody and support, sentencing, damages in tort,[22] contractual interpretation,[23] and the entire history of common law[24] represent processes whereby judges evaluated which values or policies ought to be operational?

This is not mere reliance on semantics to distract the public from observing the judicial trespass on Parliament's property. Considering policy is a function of the court's legitimate role in legal interpretation, a role necessarily evaluative of policy. The *Charter*, therefore, has allowed public policy to come out of the judicial closet and more openly to participate in

[20]This article, Article 1053 of the *Civil Code of Lower Canada*, provides the only legislative guidance for the development of the Quebec law of delict or quasi-delict (analogous to tort in the common law).

[21]Consider the introduction, without benefit of statutory guidanee, of concepts like joint custody, constructive trusts, or legal representation for children. In *Besant & Wood* (1879), 12 Ch. 605 for example, a custody issue inspired the judge to observe, at 620, that it was "a branch of law which depends upon what is commonly called 'public policy'", which in turn was "a matter of individual opinion, because what one man, or one judge, and ... one woman ... might think against public policy, another might think altogether excellent public policy." In this case a mother lost custody because of the embarrassment she was causing her husband in using her married name to publish articles on "The Rights of Women".

[22]*Rylands* v. *Fletcher* (1868), 3 L.R.H.L. 330, 19 L.T. 220; *Rookes* v. *Barnard, supra*, note 4; *Overseas Tankship* v. *Morts Dock & Engineering Co.*, (The Wagon Mound); *Overseas Tankship* v. *Miller Steamship Co. Pty*, (Wagon Mound 2), [1961] A.C. 388; [1967] 1 A.C. 617; and *M'Alister (Donoghue)* v. *Stevenson*, [1932] A.C. 562. See also P.S. Atiyah, "From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law" (1980) 65 Iowa L. Rev. 1249 at 1254 and B.S. Markesinis, "Policy Faetors and the Law of Tort" in D. Mendes da Costa, ed., *The Cambridge Lectures* (Toronto: Butterworths, 1981) at 199.

[23]See *Davies* v. *Davies* (1887), 36 Ch.D. 359, dealing with covenants in restraint of trade. The Court at 364 noted that the "doctrine on this subject is founded on 'public policy'", and at 365 said, "it was considered public policy to assist *England* to become a nation of traders."

[24]J. Stone, *Precedent and Law: Dynamics of Commom Law Growth* (Sydney: Butterworths, 1985) at 31. "The common law is an example *par excellence* of this flexible choicemaking process". See also, *ibid.* at 112; and J. Bell, "Three Models of the Judicial Function" in Dhavan, Sudarshan & Kharshid, *supra* note 5 at 57. Lord Devlin in "Judges and Lawmakers" (1976) 39 Mod. L. Rev. 1 at 13, feels that Lord Halsbury's prohibition against self-reversal, which lasted from 1898 to 1966, prevented the House of Lords from moving with the times and was "utterly antagonistic to the spirit of the common law".

a policy partnership it has in reality been a part of for centuries.[25]

Moreover, I do not think the neutrality of judges is at risk, partly because it may be that true neutrality is a myth,[26] and partly because I am not sure what neutrality really means. The usual antonyms in a judicial context for neutral are conservative and liberal. But what, for example, is supposed to be the liberal view of *in vitro* fertilization, the conservative one of separate school funding, or the progressive one of *Wisconsin* v. *Yoder*?[27] We must define more clearly what we are talking about and move away from the unproductive exercise of "label-pasting".[28]

Neutrality and impartiality are the words most often used to describe the primary virtue a judicial temperament should reflect. The importance of the virtue is obvious — the entire purpose of judicial and quasi-judicial adjudication is to provide a peaceful and civilized method of dispute resolution where the law[29] or the application of certain facts to it,[30] as between individuals or as between individuals and the state, is in dispute. In this role, it is fundamental that the people who decide the outcome are free from inappropriate or undue influence, independent in fact and appearance, and intellectually willing and able to hear the evidence and arguments with an open mind. If this is what neutral or impartial means, then all adjudicators should be it.

But neutrality and impartiality do not and cannot mean that the judge has no prior conceptions, opinions or sensibilities about society's values. It only means that those pre-conceptions ought not close his or her mind to the evidence and arguments presented. All law is about values,[31] values are about public policy, and public policy and laws are about morality.[32] We cannot pretend that judges are prohibited from being influenced by them,

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[25]For a slightly different approach, see W.R. Lederman, "Democratic Parliaments, Independent Courts and the Canadian Charter of Rights and Freedoms" (1986) 11 Queens L.J. 1 at 24, where it is argued that the *Charter* has changed the equilibrium point between the main functions of the legislature (*i.e.* law-making) and the courts (*i.e.* law application). It is nevertheless implied that each has had a part in performing the function of the other before the advent of the *Charter*. Only the balance has been altered. In any case, Lederman asserts that the "courts and legislatures are partners and not rivals" in the delivery of justice under the Rule of Law.

[26]A.S. Miller & R.F. Howell, "The Myth of Neutrality in Constitutional Adjudication" in L.W. Levy, ed., *Judicial Review and the Supreme Court* (New York: Harper and Row, 1967) at 198.

[27]406 U.S. 205 (1972).

[28]Hiers, *supra*, note 14 at 82.

[29]Atiyah, *supra*, note 22 at 1249; Devlin, *supra*, note 24 at 3.

[30]Stone, *supra*, note 24 at 110.

[31]R.W.M. Dias, *Jurisprudence*, 5th ed. (London: Butterworths, 1985) at 196.

[32]H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

whether as "liberals" or "conservatives". Antonin Scalia admits that it is "foolish to deny the relevance of moral perceptions to law";[33] Lon Fuller talks about law's "inner morality";[34] Holmes implicitly ackowledges that values are the inarticulate major premise of judicial reasoning;[35] and Emmett Hall explains every decision as a "court's decision about how competing interests and values ought to be reconciled".[36] Lord MacMillan once said that "in almost every case, ... it would be possible to decide the issue either way with reasonable legal justification".[37] In the area of disputed law, in other words, there is no right answer.[38] The answer or interpretation we choose, therefore, will be based to some extent on extra-legal premises like values.[39]

Judicial precedent is, of course, the major interpretive guide, but a judge can always choose from among different *rationes decidendi* in any given precedent[40]. The outcome will depend on which *ratio* is selected. The same is true for the principle of *stare decisis.* In *stare decisis,* we draw legal conclusions by analogy,[41] not mimicry. Julius Stone has built an academic career on demonstrating compellingly that law is full of indeterminate categories,[42] that the application of *stare decisis* is selective, and that all adjudicators reflect in their decisions partly precedent, partly their experience[43] and partly their own notions of justice.[44]

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[33]A. Scalia, "Morality, Pragmatism and the Legal Order" (1986) 9 Harv. J. Law and Public Policy 123 at 123.

[34]See L.L. Fuller, *The Morality of Law* (New Haven, Conn.: Yale University Press, 1969) at 162, where Fuller equates the law's inner morality with dignity: "Every departure from Law's Inner Morality is an effront to man's dignity as a responsible agent."

[35]*Lochner* v. *New York,* 198 U.S. 45 at 74-76 (1905).

[36]E.M. Hall, "Law Reform and the Judiciary's Role" (1972) 10 Osgoodé Hall L.J. 399 at 405.

[37]Lord MacMillan, *Law and Custom* (Edinburgh: Thomas Nelson & Sons, 1949) at 48.

[38]Winfield, *supra,* note 3 at 88 observes that even in cases like *Egerton* v. *Brownlow* (1853), 4 H.L.C. 1, 10 E.R. 359, where public policy had to "fight for its life", two of the judges may agree that public policy was applicable, but they could still arrive at "opposite conclusions in applying it". More recently, see the range of interpretive possibilities evidenced by the different courts in *Chase* v. *R.* (1984), 40 C.R. (3d) 282 interpreting "sexual assault" in the *Criminal Code,* R.S.C. 1970, c. C-34; R.S.C. 1985, c. C-46.

[39]Stone, *supra,* note 24 at 29 and 109.

[40]Stone, *supra,* note 24 at 5.

[41]R. Cross, *Precedent in English Law,* 3rd ed. (Oxford: Clarendon Press, 1977) at 24.

[42]Stone, *supra,* note 24 at 113.

[43]See also Holmes, *supra,* note 1 at 1.

[44]J. Stone, *The Province and Function of Law* (Sydney: Associated General Publications, 1946); *Legal System and Lawyers' Reasonings* (Stanford: Stanford University Press, 1964); and *Precedent and Law: Dynamics of Common Law Growth, supra,* note 24.

An American judge in 1929 went so far as to write an article entitled "The Function of the 'Hunch' in Judicial Decision".[45] This public acknowledgement of judicial indebtedness to the role of instinct may be too cavalier, but it is hard to quarrel with Cardozo when he says that judges do not stand on "chill and distant heights" and that everyone, litigant or judge, is a complex of instincts, emotions, habits and convictions.[46] In other words, judges, like everyone else, receive information into intellectual baskets whose shape is partially formed by life-experience, by legal knowledge, by culture and by personal vision. Inevitably, the information tends to take the shape of the cerebral basket, perhaps not determinatively but arguably presumptively. There is, after all, a critical difference between an open mind and an empty one. As Jerome Frank pointed out, "a mind containing no preconceptions ... would be that of an utterly emotionless human being".[47]

Absolute justice, to paraphrase Bentham, may be unattainable — there is no absolute right or wrong answer in many cases[48] — but we can certainly attempt to reduce injustice by, among other things, acknowledging that judges have operational intellectual, moral, cultural and social perceptions which may guide, as opposed to dictate, their legal conclusions.[49] I consider this observation axiomatic and in no way derogatory of the judicial function, particularly when one appreciates that there are in any event, many theories of the role of the judge. Chief Justice Marshall in *Marbury* v. *Madison* said the duty of a judge is "to say what the law is".[50] Devlin urged them to "to do justice according to law", not to make law.[51] Jaffe said the function of the judge, at least in the minimum, is "the disinterested application of known law".[52] Mencken saw their role as being not to bring in the millenium, but to keep the peace.[53] Lords Denning, Wilberfore and Diplock thought judges should apply purposive analyses to statutory interpretation;[54] Viscount Simonds thought this teleological approach was a usurpation of the legislative function.[55] And Herbert Hoover said the business of the courts

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[45]J.C. Hutcheson, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision" (1927-28) 14 Cornell L.Q. 274.

[46]Cardozo, *supra*, note 1 at 167-8.

[47]*In re: J.P. Linahan*, 138 F. 2d 650 at 652 (1943).

[48]D. Pannick, "Judicial Discretion" in Dhavan, Sudarshan & Kharshid, *supra*, note 5 at 50.

[49]Lord Devlin, *supra*, note 24 at 3, argues that the "social service which the judge renders to the community is the removal of a sense of injustice".

[50]5 U.S. 49 at 70, 1 Cranch 137 (1803).

[51]Devlin, *supra*, note 24 at 11.

[52]Jaffe, *supra*, note 6 at 13.

[53]Cited in S. Mosk, "The Common Law and the Judicial Decision-making Process" (1988) 11 Harvard J. of Law and Public Policy 35 at 41.

[54]See for example Lord Diplock's comment in *Jones* v. *R*, [1972] A.C. 944 at 1005 where he seeks "to ascertain the social ends [the Act] was intended to achieve".

[55]*Magor and St. Mellons R.D.C.* v. *Newport Corporation*, [1952] A.C. 189.

is to look out for business.[56] In my view, Stone's theory is the most seductive: judges do their duty by doing their utmost to make the best choice among possible premises.[57]

At heart, this is a debate characterized as either the difference between legal positivists and legal realists, between black-letter lawyers and what Dworkin calls instrumentalists,[58] or between judicial activism and judicial restraint. The legal positivists, black-letter lawyers and those in favour of restraint, are known for their literal or strict adherence to the language of statutes or to *stare decisis* and tend to deny that there is any moral component to decision-making. Their critics argue that judges cannot be "ventriloquial puppets"[59] to statutes and that *stare decisis* cannot realistically be seen, like Rumpole's wife, as emanating from one who must be obeyed.[60] The legal realists, instrumentalists and activists feel courts are agents of society and cannot or should not function oblivious to social realities or the social consequences of their decisions. Their critics suggest that judges are not accountable, have no objective insight into the mind of the reasonable person, and therefore cannot permit their view of law to be determined by a subjective policy perspective. Moreover, multi-varied and interlocking questions — those Fuller refers to as "polycentric"[61] — are unfit for adjudication and best left to the legislative forum. Judicial activists like Denning believe that judges, as policy partners, should fill in legislative gaps; those like Devlin in favour of restraint feel judges may only interpret and not create law.

Essentially, the debate is between those who feel, like Cappelletti, that in a modern democracy unaccountable people like judges ought not to overrule the majority will,[62] and those like Stone who argue that the judicial function has always been, through the interpretative, evaluative process that judging represents, either to advance or block certain values.[63] In nineteenth-century England, for example, judges relying on a literal rule of interpretation which they felt required them to glean the meaning of the statute from the words alone, so routinely declawed social welfare and labour legislation in England that the Prime Minister, Lord Salisbury, felt sufficiently moved to rebuke Lord Halsbury with the warning: "The judicial salad re-

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[56]See Hiers, *supra*, note 14 at 110.

[57]Stone, *supra*, note 24 at 9.

[58]R.A. Dworkin, "'Natural' Law Revisited" (1982) 34 U. Fla. L. Rev. 165 at 181.

[59]Winfield, *supra*, note 3 at 89.

[60]Hiers, *supra*, note 14 at 91.

[61]L.L. Fuller, "Adjudication and the Rule of Law" (1960) 54 Proceedings of the Am. Soc. of Int'l L. 1 at 3.

[62]M. Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971) at 98.

[63]Stone, *supra*, note 24 at 8.

quires both legal oil and political vinegar, but disastrous effects will follow if due proportion is not observed".[64] We tend not to think of black-letter adjudicators as being activists, but their legal conclusions in this period were extremely interventionist.[65] In *refusing* to give the statute a "liberal" construction, these judges were being "activists" in creating conservative results. Simple labels, in other words, are meaningless. It is, in the end, the result that counts.

Nor are we even assisted by words like "progressive" or "traditional" in defining judicial approaches. Lord Denning, for example, who expansively developed the *Mareva* injunction,[66] is the same person who so restrictively interpreted labour legislation so as to prevent secondary picketing.[67] The same Privy Council which in 1929 chastized the Canadian Supreme Court for so narrowly interpreting the word "persons"[68] such that it excluded one of this country's two official genders, in 1902 overruled the Canadian Courts, and declared legal the B.C. Act depriving the franchise to Chinese, Japanese and Indians.[69]

II.

Since 1867, Canada has lived with the concept that the legislature, although supreme, is itself subject to the Constitution. This was particularely true with respect to the authority of respective legislatures according to the division of powers. The *Charter* does not therefore introduce the novel concept of Constitutional supremacy.[70] What it does, is add the concept of constitutionally entrenched human rights to the content of that supremacy. The *Charter* is about human rights, not about judicial versus legislative roles, nor about judicial activism versus restraint, nor about the politicization of the judiciary. The *Charter*, introduced after all by the accountable legislature, represents the willing subjugation by the legislature of its conduct

[64]Cited in G. Jones, "Should Judges be Politicians?: The English Experience" (1982) 57 Ind. L.J. 211 at 213. Voices as ideologically disparate as Harold Laski, Jeremy Bentham and William Gordon-Harrison, a distinguished parliamentary draftsman, blamed British "judicial conservatism" for blocking social progress: See Jones, *supra*, at 215.

[65]The pre-New Deal Supreme Court in the United States was similarly accused of "activism" for striking down industrial and social welfare legislation. It was only with the Warren Court in the 1950s that the "activist" label came to be associated with "progressive" policy choices. See the articles by E.V. Rostow and P.A. Freund in Levy, *supra*, note 26.

[66]*Mareva Compania Naviera SA* v. *International BulkCarriers SA*, [1975] 2 Lloyd's Rep. 509 (C.A.).

[67]*Express Newspapers Ltd* v. *McShane*, [1979] 1 W.L.R. 390; and *Duport Steels Ltd* v. *Sirs*, [1980] 1 W.L.R. 142. In both cases the House of Lords reversed Lord Denning.

[68]*Edwards* v. *A.G. of Canada*, [1930] A.C. 124 (P.C.).

[69]*Cunningham & A.G. for B.C.* v. *Tomey Homma & A-G. for Canada*, [1903] A.C. 151 (P.C.).

[70]*Lederman*, *supra*, note 25 at 1.

to the scrutiny and supremacy of certain principles of human rights — as interpreted by the judiciary. The morality of any law is now subject to the supreme morality of civil and human rights. The debate as to whether this is an appropriate role for the judiciary was held, and resolved in favour of the judiciary or, at the very least, in favour of the importance of declaring the reach of human rights and the values they represent to be beyond simple legislative grasp.

Judges have always reached legal conclusions based on their understanding of, sympathy, or antipathy for current social values. The *Charter* brings us nothing new in this regard. The judge who in 1873 said "the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother";[71] the judge who in 1915 thought admitting women to the legal profession would be a "manifest violation of the law of ... public decency";[72] the judge who said in 1905 that fault-based support laws were desirable because wives "ought to be preserved from imminent temptation";[73] the House of Lords who said in 1959 that privative clauses ousting the jurisdiction of the courts were to be disregarded;[74] the court that said in 1975 that property rights take precedence over peaceful picketing;[75] the courts that said in 1949 that sanctity of the contract and restrictive covenants took precedence over the rights of Jews to purchase property;[76] the court that said in 1939 that freedom of commerce took precedence over the rights of blacks to be served beer;[77] and the court that said in 1959 that Duplessis had overstepped the boundaries of permissible political behaviour,[78] were all invoking or articulating, long before the *Charter*, their view of what public policy either required, prevented or permitted.

So what are we really talking about when we discuss judicial activism versus restraint, the politicization or "Americanization" of the judiciary, or related concerns?[79] We are really talking about whether we agree with a

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[71]*Bradwell* v. *Illinois* (1873) 83 U.S. (16 Wall.) 130 at 141.

[72]*Langstaff* v. *Bar of the Province of Quebec* (1915), 47 S.C. 131 at 139 (C.A.) affirming (1915), 25 C.B.R. 11.

[73]*Squire* v. *Squire*, [1905] P. 4 at 8.

[74]*Anisminic Ltd* v. *Foreign Compensation Commission*, [1969] 2 A.C. 147.

[75]*Harrison* v. *Carswell*, [1975] 2 S.C.R. 200, 62 D.L.R. (3d) 68, reversing Chief Justice Freedman of the Manitoba Court of Appeal whose balancing list yielded the opposite result, as did Chief Justice Laskin's in his dissent.

[76]*Re Noble and Wolf* (1949), 4 D.L.R. 375.

[77]*Christie* v. *York*, [1940] S.C.R. 139.

[78]*Roncarelli* v. *Duplessis*, [1959] S.C.R 121.

[79]A. De Tocqueville, in *Democracy in America*, trans. H.Reeve, rev'd H. Bowen, ed. P. Bradley (New York: Alfred A. Knopf, 1945) at 290 said: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." See also the discussion, *ibid.* at 103-109. But Devlin, *supra*, note 24 at 6, suggests that the American Supreme Court, "like the vines of France is not for transplantation".

court's result and what to do about it if we do not. If we favour the court's result we tend to applaud the approach, whether it be called restrictive or expansive. If our notion of justice is offended by the result, we chastise what we consider either too narrow or too broad an interpretation, as being either an abdication of the judicial role or an invasion of the legislative one. And this leads us into the question of whether, since there is always someone who disagrees with a court's decision, it was wise to have the capacity of correction removed from the legislature by the universality of the *Charter* and by virtue of the fact that judges have always articulated public policy. Is the public not entitled to indulge in some nervous anticipation now that in the field of rights and freedoms the court's role has changed from a penultimate to an authoritative one?

This may be true, but considering that in the traditional triumvirate division of legislative, executive and judicial branches, judges alone need fear no political consequences for an unpopular decision, they may be best suited to decide the kinds of controversial issues that *Charter* disputes involve.

In response to the argument that it is antidemocratic for unaccountable persons to impose their will on the majority, is the belief that there should be an institution in society which can independently and fairly and without fear of consequences safeguard against what Lord Scarman called "the modern menace of unbridled majority power".[80] Human rights essentially concerns the protection of minority rights from arbitrary erosion or violation by the majority. The legislature which relies on majority support, cannot be expected routinely to risk political self-destruction by promulgating minority causes; on the other hand, the courts, who do not rely on any constituency, risk nothing in protecting them. What body can better attenuate the impact of majoritarian expectations when they may unfairly circumscribe minority ones, than one which does not depend for its survival on an appeal to popularity with the majority?

In a country as heterogeneous as Canada, it is in any event an illusory task to attempt to ascertain or define consensus;[81] but to the extent that this task is necessary, it is one the legislature must undertake in deciding whether to ignore, implement or redirect consensus statutorily. In interpreting human rights, the consensus may not only be ineffable, insofar as it represents a majority view, it also may also be irrelevant, involving as it may the protection of rights *from* the majority's views. As Lord Scarman observed, human rights may be so fundamental that civilized man cannot survive

[80]Scarman, *supra*, note 5 at 98.
[81]Bell, *supra*, note 24 at 62.

without them,[82] but they are "more conspicuous in the mouths of men than in their practice".[83] As concerned, therefore, as one might be about an individual judge's skill in this role of interpreting and allocating human rights, institutionally there is no better guarantee that human rights will not be unduly compromised than by entrusting their protection to the "unaccountable" judiciary. The legislature has always, in any case, been subject to the jurisdiction of the Constitution, and as Chief Justice Hughes once boldly said, "the Constitution is what the judges say it is".[84] In Chief Justice Dickson's words, the "judiciary is the guardian of the constitution".[85]

By pointing out that the *Charter* represents neither a new nor an undesirable variable into the judicial or political system, I do not mean to minimize the difficulty of the challenge. Definitive judicial Constitutional interpretation of human rights issues is certainly different in degree from the responsibility for definitive judicial Constitutional interpretation of the division of powers. Issues of language, education, religion, equality, expression, association or liberty involve the most complex of legal assessments. They are core justice issues and will be affected by what judges read, know, experience, believe, understand, and above all, value. They are also supremely policy-oriented issues and require rigour in the acquisition and application not only of knowledge, but of greater empathy as well.

III.

The *Charter* has been like a divining rod, attracting the attention of the public to the microscope judges themselves routinely use to examine their function and its appropriate execution. And members of the public, perhaps somewhat surprised by the impact of the *Charter* and feeling jolted from their historic inattention to the policy aspect of the judicial process, are beginning to put the role and composition of the judiciary on the defensive through persistent questioning and demands for accountability.[86]

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[82]Scarman, *supra*, note 5 at 98.

[83]*Ibid.*

[84]*Ibid.* at 96.

[85]*Hunter* v. *Southam*, [1984] 2 S.C.R. 145 at 155.

[86]Gareth Jones, *supra*, note 65, advocating an entrenched Bill of Rights for England, nonetheless sees the main problem as being the judges: "[T]he English barrister, from whose ranks judges are chosen, is a professional, an expert in black-letter law, drawn ... from the middle classes, apolitical, conservative and traditionalist. Not every supporter of a Bill of Rights will find that picture a comforting prospect." On the other hand, at 233, he observes that the "lawyer in the United States has always played a different, and more varied, role in society; floating in and out of law schools, Wall Strcet, and the Administration, he brings to constitutional adjudication a breadth of experience and ... a vision which a professional lawycr can never enjoy." His words are gently echoed by Lord Devlin in his acknowledgment that judges "like

This in turn has come as somewhat of a surprise to the judiciary who, on the whole, had assumed that the *Charter* represented a more public version of a role they had always undertaken to the best of their ability.[87] Everyone, in short, has become sensitized, and the exercise has been a healthy one. The *Charter* has raised public consciousness about a number of things: who the judges are and the importance of what they do; political consciousness about territoriality, the policy partnership and the limits it imposes; and judicial self-consciousness about publicly declaring that the Emperor has no clothes.

The analysis of proper roles and casting will be an ongoing one. But whatever history judges to be its ultimate impact, the *Charter*'s high road over the public interest is certain to be a well-travelled one. It is a journey the judges, with their suitcases full of books and policy, are making with increasing ease and confidence. There have been no fatalities or serious injuries to date either to their neutrality, independence or credibility. As long as the task is clearly understood and undertaken, it need never be otherwise.

The *Charter*'s odyssey is destined to enhance everyone's understanding of what the Judicial Play is all about and why it has enjoyed such a long run. There will be some critical reviews, as there always have been, but there will be glowing ones as well. As long as the play is performed honestly and with respect for the pluralistic audience, then the public and public policy, the judiciary and the judiciary's role, will be history's fortunate beneficiaries.

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any other body of elderly men who have lived on the whole unadventurous lives, tend to be old-fashioned in their ideas. This is a fact of nature which reformers must accept". This, plus his view that statutes are "not philosophical treatises and the philosophy behind them, if there is one, is often half-baked" forms a large part of his reasoned resistance to "purposive" or "creative" lawmaking: *Supra*, note 24 at 14.

[87]Stone observes that "the features common to constitutional review and to appellate determination of questions of disputed law generally are more important than the differences" in Stone, *supra*, note 24 at 8.