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Constitutional Remedies as "Constitutional Hints": A Comment on *R.* v. *Schachter*

Nitya Duclos* **& Kent Roach****

Recent *Canadian Charter of Rights and Freedoms* cases including *R.* v. *Schachter*, *A.G. Nova Scotia* v. *Phillips*, *R.* v. *Hebb* and *R.* v. *Morgentaler* in which courts have made controversial remedial choices are examined. The authors argue that the choice of whether to extend or nullify an unconstitutionally underinclusive statute cannot be deduced either from the conclusion that the statute is underinclusive or from constitutional provisions such as sections 24(1) and 26 of the *Charter* and 52(1) of the *Constitution Act, 1982*. In these and other difficult remedial cases, courts must exercise remedial discretion. Three current approaches include: courts always striking out underinclusive legislation, courts ordering the remedy the legislature would have wanted and courts ordering the least disruptive remedy. The authors reject the first approach because it erroneously dictates invalidation as the only remedial choice when that conclusion cannot be defended on textual, functional or procedural grounds. They reject the latter two approaches because they force courts to speculate on matters best left to legislatures. The authors suggest that any satisfactory approach to the exercise of remedial discretion should attempt to avoid regressive outcomes and not to supplant the political process. One such approach, they argue, is to have courts look to the values and purposes that they see in the *Constitution* for "hints" about how to exercise remedial discretion. Parts of the *Constitution* that protect the disadvantaged, such as s. 15 of the *Charter*, are important sources for progressive "constitutional hints." The "constitutional hints" approach allows the courts to defend one remedial choice over another as preferred, but not necessarily required, by their interpretation of the *Constitution*. In turn, legislatures may opt not to "take the hint" and move to amend the court's remedy.

Plusieurs jugements controversés en matière de la *Charte canadienne des droits et libertés* ont été rendu rècemment, notamment *R.* c. *Schacter*, *A.G. Nova Scotia* c. *Phillips*, *R.* c. *Hebb* et *R.* c. *Morgentaler*. Les auteurs considèrent que dans le cas d'une loi qui s'applique à une classe de personnes trop restreinte pour satisfaire aux critères de la *Charte*, ni l'analyse des articles 24(1), 26 de la *Charte*, ou l'article 52(1) de la *Loi constitutionnelle de 1982*, ni la nature de la défectuosité dans la loi ne peut dicter une réponse quant à la réparation appropriée à savoir : soit, de déclarer la loi invalide, ou d'étendre son domaine d'application. Dans ces cas difficiles, les tribunaux sont appelés à exercer leur discrétion. Les tribunaux ont adoptés trois approches : invalider la loi (ou la clause), octroyer la réparation qu'aurait voulue le législateur ou celle qui crée le moins de perturbations. La première approche est rejetée parce qu'elle dicte un résultat qui ne découle d'aucune interprétation de la *Charte*, qu'elle soit textuelle, fonctionnelle ou procédurale. Les auteurs rejettent aussi les deux autres approches car elles obligent la cour à se prononcer sur des sujets qui relèvent du législateur. Les auteurs proposent que tout principe de réparation, pour être satisfaisant, doit éviter les résultats régressifs ou qui usurpent la fonction législative. Ils suggèrent que les juges s'inspirent des objectifs et valeurs consacrés par la *Charte* en tant qu'indices pour l'exercice de leur discrétion. Les articles de la *Charte* qui protègent les minorités, tel l'article 15, seraient entre autres une source importante d'indices. Cette approche permet aux tribunaux de défendre leur choix de la réparation octroyée sans exiger qu'elle résulte de leur interprétation constitutionnelle. Ceci n'empêche pas le législateur d'ignorer ces « indices » et de varier le résultat.

* Visiting Assistant Professor, University of British Columbia, Faculty of Law.

** Assistant Professor, University of Toronto, Faculty of Law.

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Synopsis

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Introduction

In a recent case, the Nova Scotia Supreme Court found that a male single parent's equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms*[1] were infringed by a Nova Scotia law which provided to female single parents and disabled male single parents a social welfare allowance.[2] To remedy this *Charter* violation, the Court declared the law invalid.[3] Not only did Mr. Phillips not get any money from his "win" in court, but the economic oppression of an already impoverished group was seriously exacerbated by this application of the *Charter*.[4] Indeed this case is one example of a too frequent pattern

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[1]*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*].

[2]*A.G. Nova Scotia* v. *Phillips* (1987), 34 D.L.R. (4th) 633 (N.S.S.C. A.D.) [hereinafter *Phillips*].

[3]The Nova Scotia legislature limited the damage of this decision by quickly re-enacting the legislation in a gender-neutral form but this does not mitigate the fact that the use of the *Charter* in this case inflicted, rather than ameliorated, suffering.

[4]See the respective analyses of the *Phillips* case in J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of *Charter* Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485 at 516ff; R. Hasson, "What's Your Favourite Right? The *Charter*

whereby *Charter* "victories" translate into devastating losses for people who are already struggling to survive.[5] In these cases, the good that the legislation provides (which is why the litigant seeks its extension), somehow gets left behind when it comes to designing a remedy, a sad reminder that courts do not necessarily share the perspective of litigants.[6] From the litigant's perspective, the remedy is usually the point of the case. As courts decide more and more *Charter* cases, the remedies they devise increasingly affect the lives of Canadians. Those who have little voice in the judicial and political processes, such as the women and men whose benefits were taken away by the decision in *Phillips*, are increasingly at risk.[7] We believe that it is vital to try to reduce that risk.

The main difficulty, at least on the face of judgments like *Phillips*, seems to be that courts feel constrained to invalidate legislation which infringes the *Charter*, regardless of the nature of the constitutional defect. We believe that this and other common constraints upon which courts rely are unjustified limits on remedial discretion. In this paper we will articulate an approach to *Charter* remedies which we believe provides courts with the opportunity to respond in a less damaging way to *Charter* violations. We believe that it is important that courts at least perceive that harmful remedies like those in *Phillips* are not the only option available to them.

Our approach to constitutional remedies is guided by our desire to ensure both that *Charter* litigation does not supplant the political process and that actual outcomes of cases are not regressive.[8] To that end, we will first argue that

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and Income Maintenance Legislation" (1989) 5 J.L. & Social Pol'y 1 at 12ff; M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989) at 265-66; H.J. Glasbeek, "A No Frills Look at the Charter of Rights and Freedoms or How Politicians and Lawyers Hide Reality" (1989) 9 Windsor Y.B. Access Just. 293 at 347.

[5]For example, see the surveys of s. 15 litigation showing that more equality litigation is done by men with adverse outcomes for women than to improve the disadvantaged position of women in G. Brodsky & S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989). See also J. Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (nor What You Need)" (1991) 70 Can. Bar Rev. [forthcoming]; Hasson, *ibid.*; Glasbeek, *ibid.* (critiques results of *Charter* litigation for the poor).

[6]Nor do the courts share the perspective of non-litigants such as single female parents in *Phillips*, who bear the brunt of the harmful consequences of the remedy.

[7]For example one of the arguments against the injunction issued in *Tremblay* v. *Daigle*, [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634 at 648 was that it was an inappropriate constitutional remedy which infringed constitutional rights of women. Although recognizing this argument as "deserving of serious consideration" the Supreme Court decided the case on the basis that the substantive rights upon which the injunction was based did not exist.

[8]In general, by a "regressive" outcome we mean a decision which exacerbates the oppression of an already disadvantaged group. An outcome is "progressive" to the extent that it avoids such consequences. Of course, what is regressive or progressive varies with one's perspective (a decision may be regressive from one group's perspective and progressive from another's) and with the time frame within which the case is evaluated (a progressive decision might appear less progressive

current approaches to remedies do not meet these objectives. Second, we will suggest that a remedial approach which infuses values and purposes articulated by courts when discussing *Charter* rights into their remedial choices can both complement the political process and improve the outcomes reached by the judicial process. Throughout our discussion, we will refer to the recent decision in the much publicized "remedies case" of *R.* v. *Schachter*[9] since it illustrates both the pitfalls and the potential of *Charter* remedies.

I. The Problem of Remedial Discretion

Before discussing current approaches to *Charter* remedies, it is useful to consider what is involved in choosing a remedy for a *Charter* violation and why judges and commentators often find remedial choices problematic.

According to traditional constitutional analysis, a constitution such as the *Constitution Act, 1982*[10] sets the boundaries of permitted legislative action, which the courts patrol. Once the perimeter is established, legislatures are free to act within it. The court, whose authority is tied to the constitution, guards the periphery but may not trespass within the legislative domain and substitute its opinion for that of the legislature. Courts should limit themselves to ordering remedies mandated by their analysis of where the constitution sets its boundaries. Because the constitution is thought to be designed to keep governments in their legitimate space, the remedies ordered tend to be negative in orientation.[11]

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if it precipitates a harsh legislative response). *Phillips* appears obviously regressive from the perspective of all needy single parents. *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler* cited to D.L.R.] was progressive, in our view, because making no abortions criminal advanced the position of women as a disadvantaged group more than other remedial alternatives. Even the new federal legislation is some (albeit painfully little) improvement over the therapeutic abortion committee system in s. 287 of the *Criminal Code*, R.S.C. 1985, c. C-46 (originally s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34) [hereinafter *Criminal Code*].

By our use of the terms "progressive" and "regressive" we do not mean to obscure the complex enquiry that lies behind the labels, nor to suggest that judges can determine with precision what is the most progressive remedy in any case. We do suggest that, despite its difficulties and uncertainty, the process of assessing the progressive potential of various remedies in light of the political and socioeconomic context of the case has much to recommend it because it requires judges to be conscious of (and to take responsibility for) the consequences of their decisions for groups they identify as disadvantaged.

[9](1988), 52 D.L.R. (4th) 525, 18 F.T.R. 199 (F.C.T.D.) aff'd (1990), 66 D.L.R. (4th) 635, 29 C.C.E.L. 113 (F.C.A.) [hereinafter *Schachter*]. Leave to appeal to the Supreme Court of Canada has been granted (15 November 1990).

[10]*Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution*].

[11]A year after the *Charter* was enacted, Justice Brian Dickson noted that where remedies involved the nullification of governmental action "the remedial options are quite straightforward" but where *Charter* remedies would require positive actions they were "more vexing." See B. Dickson, "The Public Responsibilities of Lawyers" (1983) 13 Man. L.J. 175 at 187.

In a federal system, constitutional remedies are designed to stop one level of government from jumping the boundaries the court finds set out in the division of powers.[12] In the *Charter* context, the remedies can nullify state action which is thought to invade the new boundaries which protect the individual from the state.[13] In all cases the remedial process simply follows the court's interpretation of the *Constitution*; the division of powers is its own self-executing remedy and *Charter* remedies are fused to the underlying rights so that, as in the common law tradition, where there is a right, there is always (in theory) a single remedy.[14]

This traditional approach appeared appropriate in some early *Charter* cases. For example in *R.* v. *Big M Drug Mart*,[15] once the *Lord's Day Act*[16] was found to have an unconstitutional purpose, the necessary remedial result was to declare the entire statute to be of no force and effect. Where all of the challenged provision is unconstitutional, the only remedy which is consistent with the reasoning that led to the finding of a *Charter* violation is invalidation.[17] Likewise, in determining the appropriate remedy for a violation of the right to

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Judges who adhere to traditional constitutional analysis often believe that they lack the power to enact positive remedies. For example in *Dixon* v. *A.G. British Columbia* (1989), 60 D.L.R. (4th) 445 at 448, 37 B.C.L.R. (2d) 231 (S.C.) Meredith J. stated that a judicial reapportionment order "would be to effectively legislate. That must be beyond the remedial powers that are reposed in the court." Likewise in *R.* v. *Van Vliet* (1988), 45 C.C.C. (3d) 481 at 519-21, 38 C.C.R. 133 (B.C.C.A.) [hereinafter *Van Vliet*], Southin J.A. refused to take remedial action which would have given effect to unproclaimed sections of the *Criminal Code*, so that accused persons in British Columbia would have equal opportunities to obtain curative treatment discharges for drunk driving. She stated: "To amend is to legislate. To legislate is to usurp the function of Parliament. The *Charter* has not conferred the powers of ss. 91-92 [of the *Constitution Act*] upon the courts but has conferred only the power to strike down legislation...The power to amend and repeal could have been given to the courts. It was not."

[12]In general, courts have struck down the totality of statutes found to violate the division of powers. See P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 326.

[13]*Morgentaler*, *supra*, note 8 at 482, Wilson J.

[14]*Marbury* v. *Madison* 5 U.S. (1 Cranch) 49 at 59 quoting Blackstone 3 *Commentaries* at 109: "it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."; A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 10th ed. (London: MacMillan, 1959) at 199: "There runs through the English *Constitution* that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation." See generally D. Kennedy "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo L. Rev. 205 at 238ff.

[15][1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M Drug Mart* cited to S.C.R.].

[16]R.S.C. 1970, c. L-13.

[17]In important early *Charter* cases such as *Hunter* v. *Southam*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 and *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, the Supreme Court struck down the legislation in its entirety. It is now clear that the Court is facing tougher second generation problems in which judges are finding the remedy of total invalidity less appropriate. See *Edwards Books and Art* v. *R.*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1 (argument for use of constitutional exemption and use of s. 1); *Thomson Newspapers Ltd.* v. *A.G. Canada* (Dir. of Inv. and Res.), [1990] 1 S.C.R. 425, 54 C.C.C. (3d) 417 (regulation of derivative evidence).

a trial in a reasonable time, the majority of the Supreme Court has determined that a stay of proceedings is the appropriate and just remedy.[18] In these and other cases, remedial discretion is not seen as a problem because the remedy simply follows the court's interpretation of the *Constitution* and the nature of the right violated is thought to dictate the remedial result.[19] Thus, this conception of the remedial process is most consistent with the courts' traditional perception of their institutional role as guardians of the constitutional perimeter.

However, in many cases, it is much less clear which remedy will cure the constitutional defect. No single remedy seems to follow inexorably from the court's interpretation of the *Constitution* and the dilemma of how to exercise remedial discretion emerges. An example of this occurs when a law confers a benefit on some people but not others. This was the problem that arose in *Schachter*. In that case, one adoptive parent of either sex could obtain up to 15 weeks of benefits under the *Unemployment Insurance Act*[20] with respect to the care of a newly adopted child. Biological[21] parents had no similar provisions; expectant mothers were entitled to 15 weeks of maternity benefits which could commence before birth[22] and biological fathers could qualify for parental leave benefits

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[18]*R.* v. *Rahey*, [1987] 1 S.C.R. 588 at 614-15, 33 C.C.C. (3d) 289, Lamer J. See also Le Dain J. at 617-18, Wilson J. at 619. But see La Forest J. at 648.

[19] In the Supreme Court's first case deciding if evidence should be excluded under s. 24(2) of the *Charter*, Estey J. excluded evidence in what can be seen as an attempt to justify the remedy as demanded by the nature of the constitutional right that was violated. *R.* v. *Therens*, [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655. On this rights protection approach see K. Roach, "Constitutionalizing Disrepute: Exclusion of Evidence After Therens" (1986) 44 U.T. Fac. L. Rev. 209.

Since the landmark case of *R.* v. *Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1, the Court has come close to having the remedy of exclusion of evidence follow from the violation of the right to a fair trial. Other cases, however, have made it clear that the court's analysis of the right does not always determine the remedy. See *R.* v. *Tremblay*, [1987] 2 S.C.R. 435, 37 C.C.C. (3d) 565; *R.* v. *Mohl*, [1989] 1 S.C.R. 1389, 47 C.C.C. (3d) 575 (admission of evidence because of accused's conduct); *R.* v. *Genest*, [1989] 1 S.C.R. 59, 45 C.C.C. (3d) 385; *R.* v. *Greffe*, [1990] 1 S.C.R. 755, 55 C.C.C. (3d) 161 (exclusion of evidence because of flagrant police improprieties).

[20]S.C. 1970-71-72, c. 48, ss. 22(3), 30, 32, 32.1, (as amended, now R.S.C. 1985, c. U-1) [hereinafter *Unemployment Insurance Act* cited to R.S.C. 1970-71-72 c. 48].

Section 30 provided up to 15 weeks of benefits for maternity leave which may be chosen within a period 8 weeks before the week of the expected birth and up to 17 weeks after the week of birth. Section 32 provided benefits for one adoptive parent starting in the week of the placement and within 17 weeks of the placement if she/he proves it is reasonable to remain at home by reason of the placement of the child with the claimant for purposes of adoption. Section 32.1 provides for biological fathers to receive similar benefits to adoptive parents where it is reasonable for them to stay home by reason of the death of the mother or a disability rendering her incapable of caring for the child. Section 22(3) limits benefits under any of the above to 15 weeks.

[21]We use the adjective "biological" rather than the value laden term "natural" to denote the status of those parents in which the female partner gives birth to a child who is biologically related to both partners.

[22]These benefits were (at least in part) intended to respond to the physiological stresses of birth and so were not equivalent to the parental leave provided to adoptive parents. See *Schachter*, *supra*, note 9 at 551, Strayer J.

similar to adoptive parents only if the mother had died or was unable to care for the newborn child. In *Schachter* the courts concluded that it was the uneven distribution of benefits by legislation that violated s. 15. Their analysis did not require that the parental leave benefit be given or withheld. From the judges' reading of the *Constitution*, either extending the benefit to all parents or denying it to them would cure the constitutional defect of uneven distribution. However, either remedy necessarily went beyond the court's interpretation of what the *Constitution* required, and entered what has traditionally been understood as the legislative sphere. Remedies like that in *Schachter* are problematic because there is no way for the court to cure the constitutional violation without stepping off the constitutional perimeter it sets for itself.[23]

Cases like *Schachter* are also problematic because even if a court was to set aside traditional constraints on its institutional role and adopt a principle of avoiding regressive outcomes in ordering *Charter* remedies, it would have a hard time determining what to do to avoid being "regressive." At first glance, it may appear that extending parental leave benefits to all parents is a progressive outcome and striking down the adoptive parents' benefits is a regressive outcome. But this conclusion may neglect the social and economic framework within which the unemployment insurance benefit scheme now operates: who the money comes from, who it goes to, and the positions of these various groups in society.[24] For example, if those parents eligible for the benefits (or those who actually use them) as a result of *Schachter* are wealthier, on average, than those who pay for them, then the decision to extend the benefits would look regressive.

The remedial discretion problem in *Schachter* is not confined to s. 15 cases but actually arises quite often. For example, in *Morgentaler*, according to Dickson C.J., the constitutional infirmity in the former s. 251 of the *Criminal Code* was not that it infringed women's constitutional rights to abortion, but that the

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[23]R. Ginsburg, "Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation" (1979) 28 Clev. St. L. Rev. 301 at 317.

[24]A brief consideration of Bill C-21, *An Act to Amend the Unemployment Insurance Act and the Employment and Immigration Department and Commission Act*, 2d Sess., 34th Parl., 1989 [hereinafter Bill C-21], the federal government's new unemployment insurance package, is illustrative. The Bill terminates all federal government funding of unemployment insurance (a net loss of between $775 million and $1.2 billion per annum) so that the total amount of funds is smaller. The scheme will now be financed entirely through employer and employee premiums, already a regressive form of taxation, since all employees pay 2.25% of their earnings in premiums, regardless of income. The losses associated with the cutback on government funding and the extension of benefits required by *Schachter* (and to those over 65 who were previously not entitled to UI benefits) will be recouped through increasing the eligibility requirements, which disproportionately disqualifies low-income workers; a group which, in turn, is disproportionately populated by women (particularly single parents). Thus, to the extent that Bill C-21 was precipitated by *Schachter*, the effect of this *Charter* "equality" case may well be to hurt some of the groups the *Charter* (and especially s. 15) ostensibly was most meant to protect. But see *infra*, note 100.

exemption clause in s. 251(4) was defective in light of the procedural protections of s. 7 of the *Charter*.[25] On his reasoning, the *Charter* permitted a remedial choice as to whether to strike down only the defective procedural sections or to invalidate the entire section.[26] In deciding to invalidate all of s. 251, therefore, Dickson C.J., was not carrying out any perceived constitutional directive but exercising remedial discretion.[27]

Even in the criminal justice context where traditional remedial approaches might be thought most appropriate, problems of remedial choice arise. In *R. v. Smith*,[28] a mandatory seven year prison sentence for importing narcotics was held to be cruel and unusual punishment contrary to s. 12 of the *Charter*, on the basis that,

> [a] judge who would sentence to seven years in a penitentiary a young person who while driving back into Canada from a winter break in the USA, is caught with only one, indeed, let's postulate, his or her first 'joint of grass,' would be considered by most Canadians to be a cruel and, all would hope, a very unusual judge.[29]

Although the Court struck down the section, its interpretation of *Charter* rights did not mandate this result in the sense that it required invalidation of the statute in *Big M Drug Mart*. A sentence of seven years incarceration might be appropriate for people such as Smith who imported large quantities of drugs for profit, and would be harsh but less than "cruel and unusual" in a larger group of cases. In ordering the remedy it did, the Court again stepped off its self-imposed constitutional perimeter.[30]

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[25]*Supra*, note 8 at 399.

[26]What the *Charter* prohibited was the defective procedure in granting exemptions. Absent a finding, such as made by Wilson J., of a *Charter* right to abortion or a fetal right to prohibit abortion, the *Constitution* would permit either striking down all of the former s. 251, making all abortions legal or striking down only the procedurally defective exemption clause, making all abortions illegal.

[27]None of the judges considered exercising their remedial discretion to fashion a remedy which would guarantee women access to abortions or, even more unlikely, one which socialized the costs of reproduction. See Bakan, *supra*, note 5 at 11-12.

[28][1987] 1 S.C.R. 1045, (1987) 5 W.W.R. 1 [hereinafter *Smith*].

[29]*Ibid.* at 1053, Lamer J.

[30]In other words the Court was faced with a remedial choice between striking the law down under s. 52(1) or relying on s. 24(1) to fashion relief in individual cases where the penalty would be cruel and unusual. Only Le Dain J. provided a justification for the choice of the former. He stated that the appellant, even though not directly affected by the mandatory minimum penalty, did have an "interest in having the sentence considered without regards to a constitutionally invalid mandatory minimum sentence provision." (*ibid.* at 1113). McIntyre J. in dissent objected to the remedial choice made by the court and argued that the court should wait for a case where the accused was directly affected by the minimum penalty. See generally K. Roach, "Smith and the Supreme Court: Implications For Sentencing Policy and Reform" (1989) 11 Sup. Ct L. Rev. 433 at n. 20.

In *R.* v. *Hamilton*[31] the Ontario Court of Appeal found that three people accused of drunk driving in Ontario were denied equal protection and benefit of the law because of Ontario's refusal to proclaim in force curative treatment discharge provisions for those convicted of drunk driving offences under the *Criminal Code*. On the Court's reasoning, it was the provision of this benefit in some provinces but not Ontario that violated s. 15 of the *Charter*. Nothing in the Court's opinion indicated that, absent Parliament's decision to allow each province to choose to provide such a sentencing option, an accused would have a constitutional right to be considered for a curative treatment discharge. The Court decided that the appropriate and just remedy was to make the benefit available for qualified drivers in Ontario. However, the uneven distribution of benefits could also have been cured by striking down the availability of this benefit in other provinces. The remedy in this case once again went beyond the Court's own interpretation of the *Constitution* so that the Court was exercising remedial discretion.

There are many kinds of cases in which a court confronts a situation where a *Charter* violation must be cured, but the various remedial options all seem to do more than what the court has held that the *Constitution* requires. These include cases dealing with statutes that may be only partially invalid. For example, laws may be seen as having the potential to infringe *Charter* rights on some occasions because of overbreadth or vagueness in their drafting. The courts will be faced with choices such as striking the entire law down as was done in *Smith*, placing a narrowing interpretation on the law, or waiting for a case in which the law is thought to violate the *Constitution* and then fashioning a constitutional exemption. Likewise, courts dealing with laws lacking in procedural protections or providing benefits in an underinclusive fashion are faced with the dilemma of striking the law down in its entirety or devising a remedy which "reads in" the constitutional deficiency they perceive. The differences between these cases can be important in some contexts,[32] but it is equally important to remember that courts are faced with decisions about what remedy to order when their analysis of the *Constitution* does not direct a single outcome *all of the time*. Indeed, the terms of s. 24(1) of the *Charter* acknowledge the pervasiveness of remedial discretion.[33] The pressure to find some justificatory principles to guide these

[31](1986), 30 C.C.C. (3d) 257 (Ont. C.A.) [hereinafter *Hamilton*]. When the British Columbia Court of Appeal dealt with the same issue, it refused to decide if s. 15 was violated on the basis that the remedy requested, making the curative treatment provisions operative in British Columbia, was a legislative act that the Court could not perform. See *Van Vliet*.

[32]In this comment we will focus primarily on problems surrounding underinclusive legislation, which *Schachter* exemplifies. The remedial choices stemming from vague and overbroad statutes are discussed in C. Rogerson, "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987).

[33]*Mills* v. *R.*, [1986] 1 S.C.R. 863 at 965-66, 52 C.R. (3d) 1.

choices and to legitimate the institutional competence of courts to order remedies is therefore very great.[34] The pressure is augmented, as we have noted, by the fact that remedies are the part of *Charter* litigation that most directly affect the lives of the disadvantaged.[35] It is the outcome, not the reasoning, that has the most drastic effect on the real world. These concerns compel us to assess current judicial approaches to remedies and to try to suggest better alternatives.

II. Current Approaches to Remedies

There are three main approaches to the remedial problems raised by underinclusive legislation. First, it has been argued that courts lack jurisdiction and competence to do anything other than declare such legislation invalid under s. 52(1) of the *Constitution*. Second, some courts have been attracted to justifying their exercise of remedial discretion with reference to legislative intent. Third, courts may try to select the remedy that seems least disruptive of the *status quo*, usually by selecting the least expensive option. In our view, none of these three approaches adequately avoids regressive outcomes or creates a constructive relationship between courts and legislatures.

A. The Section 52 Approach: Always Striking Out

This approach has the allure of conceptual simplicity. It attempts to make the difficulty of remedial choice disappear by making all cases analogous to traditional ones in which the remedy of invalidation is perceived as unproblematic. The court's interpretation of the *Constitution* will always have provided a complete justification for its remedy of striking out legislation.

1. Textual Approaches to Striking Out

The Crown's central argument in *Schachter* was that courts lack jurisdiction to invoke remedial discretion under s. 24(1) of the *Charter* whenever the case involves a challenge to legislation.[36] The only remedy available is to strike down legislation in violation of the *Charter*. Mahoney J.A. in his dissent agreed

[34]Kovacic, writing in the American context, argues that the absence of a coherent, consistent remedial approach not only makes the outcome of litigation a gamble, but can result in a pattern of decisions whereby courts perpetuate discrimination through their remedial orders. In the United States, in cases where benefits are conferred on women but not on men, courts tend to invalidate the benefit, whereas in cases where the benefit complained of is not conferred on women alone, the judicial tendency is to extend it. See C. Kovacic, "Remedying Underinclusive Statutes" (1986) 33 Wayne State L.R. 39 at 53.

[35]The legal realists, writing in the U.S. in the 1930s and 40s had a similar perspective. For example, they reversed the traditional contract law syllabus, teaching remedies first instead of last, an order that was (and is) popular in Canada.

[36]*Schachter*, *supra*, note 9, at 127.

with the Crown and denied that he had any remedial choice to make. In his view:

> Having found that s. 32 of the *Unemployment Insurance Act, 1971* was inconsistent with a provision of the Constitution of Canada, the learned trial judge was bound to find it to be of no force and effect. Had that finding been made, the absence of any conflict between ss. 24(1) and 52(1) would be apparent. There is no offending legislation and, therefore, no s. 24(1) remedy called for.
>
> In my opinion, s. 52(1) does not provide a "remedy" in any real sense of the word. It states a constitutional fact which no court can ignore when it is invoked in a proceeding and found to apply.[37]

The majority of the Federal Court of Appeal rejected this argument and held that it could exercise remedial discretion under s. 24(1). Heald J.A. stated that in cases where the *Charter* violation arises from the underinclusiveness of the legislation, the problem is actually one of "insufficiency," not "inconsistency." Thus, in his view, s. 52(1), which governs laws *inconsistent* with the *Charter*, "is not engaged" and "cannot apply."[38] Further, he found no textual support for the proposition that s. 52(1) precluded the operation of s. 24(1) and indicated that, in the context of s. 15, where a desired result cannot be achieved by striking out because of the way the law was drafted, s. 24(1) should be used.[39]

Dale Gibson has made another textual argument to extend underinclusive legislation rather than to nullify it under s. 52(1).[40] He argues that invalidating legislation which is underinclusive in its provision of a benefit is a "destructive" remedy and that this remedial route is foreclosed by s. 26 of the *Charter* which provides that "[t]he guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada."[41] In Gibson's view, courts cannot invalidate legislation when to do so would take away existing benefits that are not in themselves unconstitutional.

In our view, the various textual arguments for and against always invalidating are not in themselves compelling. The directive in s. 52(1) of the *Constitution* that "any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect" can fairly be interpreted to include or exclude the problem of insufficiency that arises in cases of underinclusive legislation. Mahoney J.A.'s dissent obscures the ambiguity of the phrases "inconsistent" and "to the extent of the inconsistency" by not focussing

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[37]*Ibid.* at 142-43.

[38]*Ibid.* at 128.

[39]*Ibid.* at 129-33.

[40]D. Gibson, "Non-Destructive *Charter* Responses to Legislative Inequalities" (1989) 27 Alta. L. Rev. 181 at 182.

[41]Section 26 of the *Charter*.

on the limited sense in which the underinclusive legislation is thought to be inconsistent with the *Charter*. In short, he attempts to assimilate *Schachter* to simpler cases such as *Big M Drug Mart* where invalidation follows inexorably from a finding of unconstitutional purpose. Even when the remedy is devised under s. 52(1), the remedial process will in many cases not be as simple or as self-executing as Mahoney J.A. suggests. There will often remain a choice between striking the entire legislation down or determining that the extent of the inconsistency requires less than total invalidation.

With respect to the majority of the Court of Appeal, Heald J.A.'s categorical statement that s. 52(1) "is not engaged" and "cannot apply" because the constitutional defect arises from "insufficiency" as opposed to "inconsistency" also obscures the ambiguity of the reference in s. 52(1) to striking out legislation "to the extent of the inconsistency." Even if the remedial decision is made under s. 24(1) of the *Charter*, the majority should offer persuasive reasons why extending the benefit rather than nullifying it is appropriate and just in the circumstances. The difficulties of remedial choice that both the majority and minority of the Federal Court of Appeal seek to avoid through their textual interpretations that s. 52 either is not engaged or dictates total invalidation cannot be avoided. Remedies, in our view, cannot be deduced from the indeterminate language of either s. 52(1) or s. 24(1).

The primary difficulty with Gibson's textual argument is that it proves too much. On his view of s. 26 of the *Charter*, a court would always be bound to extend legislation in order to preserve existing statutory rights and freedoms, a result which is at odds with the discretionary nature of remedial power under s. 24(1).[42] It may also not always be clear that underinclusive statutory provisions provide "rights and freedoms" which should be preserved and extended or if they prescribe burdens which should be struck down.[43] Given the wide range of contexts in which these types of remedial problems emerge, it is difficult to imagine arguments based on a general interpretive provision such as s. 26 satisfactorily resolving difficult and contextual problems of remedial choice.

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[42]*Mills* v. *R.*, *supra*, note 33 at 965-66, McIntyre J.:

> It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt [sic] or cut down this wide discretion...the circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances.

[43]For Gibson, s. 26 will not resolve problems of remedial choice when dealing with underinclusive burdens. He suggests that an underinclusive burden, such as a law that prohibits "gross indecency" by male persons should be extended to all persons as this would "display as much deference to the legislative will as possible in the circumstances" (Gibson, *supra*, note 40 at 186). As will be discussed subsequently, we do not believe that resort to the fiction of legislative intent is any more satisfactory an approach to remedial choice.

2. Functional Approaches to Striking Out

If the text of the *Constitution* cannot provide the answer, what about functional considerations of institutional legitimacy and competence? One animating force behind the argument that striking out underinclusive legislation is the only solution is a concern that courts should not legislate. Although it is difficult to be confident about stark divisions between legislative and judicial functions, we do not think that this concern can be dismissed out of hand. For reasons of comparative competency and legitimacy, courts should be wary about enacting remedies that parallel what traditionally have been considered legislative and administrative functions. Nevertheless when courts are faced with underinclusive legislation in cases such as *Schachter*, it is just not possible to select a remedy that will keep the court on its self-defined constitutional perimeter and away from what has been understood as the domain of legislative choice.

Extending legislation, especially if it requires the government to spend money in a visible fashion, is easily seen as "legislating." This clearly troubled Mahoney J.A. in his *Schachter* dissent and led him to strike out the benefits to adoptive parents.[44] But the problem here is that Justice Mahoney's remedy of invalidating legislation which is not entirely unconstitutional is also "legislating." Striking down the adoptive parents' benefits in s. 32 of the *Unemployment Insurance Act* would have solved the problem of discriminatory distribution (at least as between adoptive and biological parents), but the remedy would have gone beyond Strayer J.'s analysis of s. 15 in the sense that his analysis did not require that no benefits be provided. It would have intruded in the traditional sphere of legislative choice by taking away from adoptive parents a benefit Parliament clearly intended them to have. We agree with Andrew Petter that striking down legislation in this situation is no less a political act than preserving it in some modified form.[45] At the least, Mahoney J.A. should have provided persuasive reasons why striking out these benefits achieved a better result than their extension.

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[44]Mahoney J.A. accepted the argument made in *Van Vliet*, that it is illegitimate under our constitutional system for the courts to legislate. He added to this an argument that the judicial appropriation of funds which would be required to implement the remedy of extension would also he illegitimate. See *Schachter*, *supra*, note 9 at 133-36. But see note 49, *infra*.

[45]A. Petter, "Canada's *Charter* Flight: Soaring Backwards into the Future" (1989) 16 J.L. & Soc. 151 at 160. Heald J.A. for the majority in *Schachter*, *supra*, note 9 at 135 recognized that:

> a declaration of invalidity pursuant to s. 52(1) will... [like the remedy of extension] impact upon the public purse in that such a result would save the Government of Canada monies heretofore payable as child care benefits under section 32 to adoptive parents. If a positive result is constitutionally invalid for this reason, then surely a negative result would, likewise be impermissible.

Although invalidation in some cases may be regressive in the sense of striking down social welfare benefits, this will not always be so. What outcomes can be achieved by striking out statutory provisions depends on the fortuitous exercise of how legislation is drafted. Invalidation may well effectively extend a benefit or state service if the statute is appropriately drafted. Thus the cases which become "difficult" remedies cases in which the court is perceived to extend government activity are quite serendipitous. As Heald J.A. indicated, with slightly different drafting, *Schachter* itself may not have become so famous:

> For example, had s. 32 of the *Unemployment Insurance Act* been drafted in the reverse, i.e., by providing that child care benefits were available to all parents excepting those who were natural parents, appropriate relief could have been given by striking out the exception under s. 32...[46]

As Heald J.A. noted, fortuitously drafted statutes in the *Andrews* and *Blainey*[47] cases allowed the courts to effectively *extend* benefits (the right to be called to the Bar and the right to be free from gender discrimination, respectively) by striking down legislative provisions. Limiting courts to the remedy of striking out cannot guarantee that they will not in effect extend the activity of the state. In these cases, form does not determine function.

It might be argued that *Schachter* can be distinguished from cases such as *Andrews* and *Blainey*[48] since the remedies in the latter cases do not involve the "appropriation" of funds from the legislature, and that while extension remedies may be fitting in some cases, courts cannot grant relief which "represents an invasion of the fiscal preserve of Parliament."[49] Like the argument that striking out what the *Constitution* does not prohibit is somehow not legislating, this argument rests on the equally fallacious premise that preventing the government from spending money the way it wishes does not intrude on the state's budgetary and spending domain. Moreover, this premise carries with it an ideological bias against social welfare benefits. When a court finds a law conferring fiscal

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[46]*Ibid.* at 132.

[47]*Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, 91 N.R. 255 [hereinafter *Andrews* cited to S.C.R.]; *Re Blainey and O.H.A.* (1986), 54 O.R. (2d) 513, 24 D.L.R. (4th) 728 (C.A.) [hereinafter *Blainey*].

[48]It should not be assumed that extension in these circumstanees is without costs. The extension of procedural protections and the scope of human rights protections may require the government to spend more money on enforcement and implementation. Nevertheless courts have shown little reluctance to extend procedural protections in the criminal context. See *R.* v. *Hebb* (1989), 69 C.R. (3d) 1 (N.S.S.C.T.D.) [hereinafter *Hebb*] and *Hamilton* (extension of benefits and protections in the criminal justice context). Extending social welfare benefits that would have visibly required the government to spend more money has been much more problematic.

[49]*Schachter*, *supra*, note 9 at 135, Heald J.A. Mahoney J.A., *supra* at 141-42, criticizes the remedy in *Schachter* on this ground. It should also be noted that the "appropriation" problem is illusory in the context of *Schachter*, at least, since under the new legislation, the federal government will no longer be spending any money on unemployment insurance; *supra*, note 24.

benefits to be underinclusive and unconstitutional, there is simply no way to grant relief without affecting the state's budget. Invalidating the benefit is not so much "saving money" as telling a legislature it cannot spend the public's money as it chooses. Given that the legislature has, as in *Schachter*, indicated that it wishes to spend its money on parental leave benefits for adoptive parents or, as in *Phillips*, allowances for single mothers, ending the benefit means that the court is preventing the legislature from spending funds on a benefit which, in itself, is constitutionally permissible. We would hope that if the *Charter* is examined in its context of Canadian democracy, there is little reason to think that saving governments money by curbing their legitimate activity is a remedial constraint favoured by the *Constitution*.[50]

Thus, the "always strike" solution does not solve the problem at all. Choices about what to invalidate raise the same textual and functional problems as choices about invalidation versus extension. Depending on the happenstance of statutory drafting, nullification can either effectively extend state activity or curb it. Neither extension nor nullification excludes the court from the legislative and budgetary realm and there is little reason to think that nullification of benefits is any less of an intrusion on legislative prerogatives than their extension. There is no remedy in these kinds of cases which keeps intact the traditional boundaries between judicial and legislative spheres.

3. Procedural Approaches to Striking Out

In cases such as *Schachter*, we would suggest that there may be a number of procedural reasons[51] to prefer extension over invalidation. First, invalidation creates a significant disincentive to litigate since someone complaining about his or her exclusion from a government benefit will not get the benefit even if she/he wins the case.[52] Second, it is likely easier for a legislature to repeal a judi-

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[50]If anything, the *Charter* can often be read as favouring state activity. The *Charter* is permeated with sections which suggest a legitimate role for state activity promoting the interests of the disadvantaged. For example s. 15(1) makes reference to the protections and benefits of laws and s. 15(2) provides for positive activity to ameliorate the conditions of the disadvantaged. The delay in the implementation of s. 15 suggests a need for governments to take positive measures to ensure compliance with it. For the social welfare context in which the *Charter* was introduced see M. Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20 Ottawa L. Rev. 257.

Even the most traditional *Charter* rights such as those which protect individuals from state intrusions require the government to spend money. The seemingly negative right not to suffer cruel and unusual punishment requires the state to spend money on facilities and programs for those who it imprisons. See *Creating Choices: The Report of the Task Force on Federally Sentenced Women* by B. Diamond *et al.* (Ottawa: Correctional Services of Canada, April 1990).

[51]We will examine various reasons for extending legislation that may be found in the substance of the *Constitution* in part III of this paper.

[52]To suggest that extension and invalidation are "equal" remedial options in cases like *Schachter* clearly overlooks the perspective of the complainant. Mr. Schachter was not saying "give parental leave benefits to every parent or to no parents," he was saying, "give parental leave benefits to me."

cially extended statute than to re-draft and re-enact a judicially invalidated law. This is especially so if the judicial act of nullification casts a constitutional pall over the very existence of the legislation.[53] Finally and most importantly, in our view, the group most directly affected by invalidation will, as was the case with adoptive parents in *Schachter* and the low-income single mothers and disabled fathers in *Phillips*, often not have appeared before the court and thus not have had an opportunity to speak before being deprived of a benefit. This seems contrary to basic principles of procedural fairness, particularly when it is remembered that the benefits in these cases will often be conferred on disadvantaged groups whose ability to influence either judicial or political processes is poor.[54]

While these are strong procedural reasons to prefer extension over invalidation in cases such as *Phillips* and *Schachter*, we do not mean to replace the "always strike" solution which we have criticized with the equally blunt counterpart of "always extend." Procedural objections to nullification could be met in several ways. Complainants that raised a legitimate consitutional issue, but did not get the remedy they wanted could at least be awarded costs or public interest funding. Courts that decided to invalidate underinclusive legislation could temporarily delay implementation of their remedy for a set period in order to encourage legislatures quickly to consider whether the law should be saved by an amendment. Moreover, those potentially affected by the remedy should be given notice and broad rights of intervention.

There are far too many different types of statutes and different ways in which they may infringe the *Constitution* for us to be sanguine about simple solutions. For example "benefits" should not be preserved and extended if they would, even in an extended form, work to the detriment of disadvantaged groups (as they may in the case of *Schachter*).[55] The same may be said of burdens which are thought to impinge on other constitutional interests such as freedom of expression or privacy. No single remedy can, in all cases, avoid all

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Plaintiffs in *Charter* cases are certainly not neutral about the remedy; from their perspective the remedy is likely more important than the reasoning which leads to it.

[53]In the current climate of economic restraint and legalized politics, there is a substantial risk that benefits nullified by courts will not be re-enacted.

[54]See R. Gold, "From Right to Remedy: Putting Equality to Work" (1989) 14 Queen's L.J. 213 at 236; C. Kovacic, *supra*, note 34 at 44-46, 86-89. Kovacic lists some of the benefits which could have been lost if American courts had not adopted extension as the preferred remedy in cases of underinclusive beneficial legislation. They include parental support, social security, welfare, medical care benefits, child care benefits, widows' benefits, education benefits, worker's compensation, and death benefits, all of which were vulnerable on grounds of discrimination such as gender, age, legitimacy, marital status, military/civilian status, and residency.

We do not mean to imply that every group of recipients of state benefits is a socioeconomically disadvantaged group. There is a world of difference between the adoptive parents considered in *Schachter*, and the single parents whose benefits were removed in *Phillips*.

[55]See text accompanying note 24. See also notes 70, 74 and text accompanying note 102.

regressive outcomes or promote a constructive relationship between courts and legislatures. Any "always" answer is just not going to work.

B. The Remedy the Legislature Would Have Wanted: Second Guessing

In deciding whether to extend or nullify legislation, courts might try to justify their exercise of remedial discretion with reference to legislative intent. Because the *Constitution* is not thought to mandate the choice between remedial options, it seems quite appealing to resort to the principle of legislative supremacy. American courts have generally taken this route and justified decisions to extend underinclusive legislation on the grounds that extension best supports the legislative intent in providing the benefits in the first place.[56] The professed fidelity to legislative intent has encouraged American legislatures to enact explicit severability clauses when devising benefits that might be unconstitutionally underinclusive and the United States Supreme Court has accepted such legislative directions to their remedial discretion.[57]

While a severability clause might provide the court with clear information about the legislature's intention in the event of a provision being found unconstitutional, these clauses are virtually unknown in Canada. Without such a clause, recourse to legislative intent to determine remedies quickly becomes absurd. At the outset, it is unclear to which legislature a court should look in ascertaining the elusive intention. Should it conduct an historical enquiry into what the enacting legislature would have intended or should it second guess what the current legislature would do if it responded to this new problem?[58] Given that the legislation that the enacting legislature in fact intended is unconstitutional, it is impossible to know what the legislature's intentions would have been if this had been realized. In *Morgentaler*, Dickson C.J. justified his decision to invalidate the whole of the former s. 251 of the *Criminal Code* rather than only the exculpatory provisions on the basis that Parliament intended s. 251 to be a "comprehensive code"[59] to govern abortions and that if one part was invalidated by the *Constitution* then the whole must go. But the intention of the Parliament that enacted s. 251 in 1969 was only to produce the legislation that had been found defective. If that Parliament had been aware that the therapeutic

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[56]*E.g. Califano* v. *Westcott* 443 U.S. 76 (1979), but see the recognition of Justice Harlan in *Welsh* v. *U.S.* 398 U.S. 333 at 366-67 (1969) that extension of an underinclusive exemption for religious objectors to all conscientious objectors was not "a reflection of congressional statutory intent but [a] ... patchwork of judicial making that cures the defect of underinclusion."

[57]*Heckler* v. *Mathews* 465 U.S. 728 (1984) (following legislative provision that should a gender specific benefit be found unconstitutional, the benefit be nullified and not extended on a gender neutral basis). For a criticism see B. Miller, "Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of Heckler v. Mathews" (1985) 20 Harv C.R. & C.L. L. Rev. 79.

[58]In *Big M Drug Mart*, Dickson C.J. rejected the American doctrine of "shifting purpose" in determining Parliament's reason in enacting the *Lord's Day Act*. Instead, he decided that in characterizing the purpose of legislation under the *Charter*, the court must refer to the intentions of the legislature which actually enacted the law.

[59]*Morgentaler*, *supra*, note 8 at 420.

abortion committee approval requirement would be held unconstitutional under a new constitutional bill of rights, it might have enacted a more or a less liberal law, or even no new law at all. Guessing at what the present Parliament would intend is even worse. One commentator has criticized any attempt "to predict the mood of a present or future [legislature as]... an exercise in reading political tea leaves."[60] Whatever the accuracy of such an exercise, courts will certainly not openly discuss their predictions about the state of politics, even if such considerations do actually play a role in their exercise of remedial discretion.

In fact, any attempt to determine legislative intent in this context is meaningless. It imposes a contingent fiction of "what if" on top of the basic fiction of legislative intent.[61] While those who favour extension will stress the legislative intent in providing the benefit in the first place, those who favour nullification will emphasize that the legislature previously made a deliberate decision to limit the provision of the benefit. In terms of what the legislature actually did, both of these positions are half-right and half-wrong. In terms of what the legislature actually would have done, both positions are very likely wrong.

In *Schachter*, the Federal Court displayed little interest in the legislative intent behind the various provisions of the *Unemployment Insurance Act* under scrutiny. Parliament had provided child-bearing benefits to biological mothers in s. 30 of the *Unemployment Insurance Act* in 1971 following the recommendations of the Royal Commission on the Status of Women. Later in 1982, parental leave benefits to adoptive parents were provided in s. 32 of the Act but not to biological parents. What would Parliament have intended had it been faced with a choice between conferring parental leave benefits on all parents or none of them? Strayer J. found that s. 32, enacted in 1982, was "based on the social importance of a parent or parents being able to spend time at home at the time of introduction to that home of a pre-school child, without regard to the sex of the parent claiming benefits."[62] Section 32.1, enacted in 1988, permits a biological father to claim benefits in respect of time away from work to care for a newborn child only when the mother has died or is unable to care for the child. One could argue that the Parliament that enacted s. 32 in 1982 would have been willing to extend parental leave benefits to both biological parents since s. 32 provides gender-neutral benefits to adoptive parents. If one considers what the current Parliament would do, however, the 1988 amendment may be seen as evidence that Parliament prefers child care by "natural" mothers over biological fathers and, on balance, would prefer to extend no benefits to any parents

[60]A.B. LaFrance, "Problems of Relief in Equal Protection Cases" (1979) 13 Clearinghouse Rev. 438 at 440.

[61]As Kovacic, *supra*, note 34 at 58, argues, "With an underinclusive statute... the court seeks to determine an intent the legislature never had; that is, what it would have done if it had enacted the statute in a different way or if it had known that the only two choices were to expand the statute it had enacted or not to enact the statute." On the basic fiction of legislative intent see J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1.

[62]*Schachter*, *supra*, note 9 at 541.

beyond maternity benefits. Trying to divine legislative intent from such a wide array of legislative provisions enacted at different times by different Parliaments is manifestly futile. The artificiality of the whole exercise is heightened by the fact that what Parliament actually intends to do in the wake of *Schachter* is to provide 10 weeks of parental leave benefits for all parents and to make fewer parents eligible for any benefits.[63]

Even if courts can anticipate legislative responses such as the amendments passed in response to the *Schachter* decision, judicial replication of such compromise responses has not been considered institutionally appropriate. It would be a bold judge, to say the least, who would be willing to formulate a compromise remedy of lowering adoptive parents' benefits to 10 weeks and extending this lowered period to all biological parents. Thus, a major problem with judicial recourse to legislative intention is that it obscures the reality that there are important differences between judicial and legislative remedies. Legislatures are not bound to the dichotomous choice of extending or invalidating that seems to constrain judges.[64]

Legislative intention is thus an unsatisfactory remedial approach. It does not encourage courts to enquire into what outcomes would be more or less regressive (and for whom) or to avoid harmful outcomes if the court guesses that the legislature would have desired such a response. Moreover, it obscures the court's responsibility for the remedial choices it makes. It cannot foster a constructive institutional relationship between courts and legislatures because in trying to make legislative determinations, it puts the court into shoes the legislature would never be forced to wear. If courts truly wish to devise constitutional remedies that replicate what the legislature desires, they would be far better off, from the standpoint of their own competence and legitimacy, to find ways to remand the case back to the legislature. The legislature could then choose among the broad range of constitutionally permissible options.[65]

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[63]This change was contained in a policy paper, *Success in the Works*, released by Employment and Immigration Canada on April 11, 1989, before the Federal Court of Appeal delivered its judgment. See Hasson, *supra*, note 4 at 18. See also s. 11(3)(b) of Bill C-21, *supra*, note 24.

[64]The classic statement of this is Justice Harlan's in *U.S.* v. *Welsh* 398 U.S. 333 (1970) at 361. In *Califano* v. *Westcott*, *supra*, note 56 at 95, n.1, the United States Supreme Court extended a benefit for children whose fathers were unemployed to those whose mothers were also unemployed. The Court rejected the compromise remedial suggestion (one that had been actively discussed in Congress) that the benefit be provided to children in families in which the principal wage earner was unemployed. They held that such a remedy raised "definitional and policy questions" that they as judges could not resolve. See also Ginsburg, *supra*, note 23 at 315.

[65]This could be done if the court temporarily stayed its own remedy in order to invite a legislative solution to the problem of uneven distribution. For example, a stayed remedy of extension would have allowed Parliament to replace the court's remedy of an extended 15 weeks of parental leave before it was implemented with promptly passed legislation providing for 10 weeks of benefits. (Of course, prompt passage of legislation through both Houses is not always possible!)

This general approach was used in *Dixon* v. *A.G. British Columbia* (1989), 59 D.L.R. (4th) 247, 35 B.C.L.R. (2d) 273 (S.C.) when the court stayed its own remedy of striking out malapportioned electoral boundaries and successfully induced the legislature to create its own reapportionment

C. *The Least Disruptive Remedy: Keeping it Cheap*

In deciding whether to extend or nullify legislation, courts may be influenced in their exercise of remedial discretion by their perceptions of the costs[66] of alternative remedies. Significantly, however, the Federal Court in *Schachter* did not analyze its remedial choices on the basis of the relative financial costs or the disruption they would cause.[67] At trial, Strayer J. mentioned that evidence estimating the costs of extension of parental leave benefits at $502 million in 1986 was presented to the court but stated that he did not take this "into account in reaching my decision as to the appropriate declaration."[68] The Court of Appeal divided on the issue of whether the courts could order a remedy that "appropriated" public funds but did not deal with the issue of the comparative costs of extending benefits to biological parents or depriving adoptive parents of existing benefits.

In not allowing the remedy to be determined by cost considerations, the Federal Court implicitly rejected a test for calculating costs and disruption used by the Supreme Court of Canada in deciding whether to grant interlocutory stays of legislation challenged as unconstitutional. In *Re Attorney General of Manitoba and Metropolitan Stores*[69] the Supreme Court built upon the traditional test of assessing the balance of convenience before granting interlocutory remedies and stated that even under s. 24(1) of the *Charter*, a court must consider the effect of granting an interlocutory remedy on the public interest. In defining the public interest, the Court relied on a conceptual distinction between those cases in which an interlocutory stay would operate to suspend the operation of an impugned law for a large number of people and those in which it would have the less intrusive effect of exempting a small number of people from the legislation. The use of this test to determine remedies in cases such as

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remedy. The legislature's remedy balanced equality of voting power against geographic and regional considerations in a fashion that the court would have had difficulty doing itself. See generally K. Roach, "Reapportionment in British Columbia" (1990) 24 U.B.C.L. Rev 79.

[66]Costs include not only quantifiable financial costs to the government treasury but also social and economic costs that are not borne by the government. We believe that when courts consider costs, they will tend to concentrate on the former rather than the latter type of costs. See *infra*, note 73 and accompanying text.

[67]It has been argued that in *Phillips*, the Court selected the most disruptive remedy. In that case the court struck down benefits extended to single mothers and disabled single fathers rather than ordering the less disruptive remedy of extending them to the smaller group of single fathers who would qualify for the allowance. See Gibson, *supra*, note 40 at 187.

Gibson's argument assumes that costs and disruption will be measured in a more qualitative sense than simply the level of state expenditures. On the cruder measure, the court's remedy of striking down benefits in *Phillips* saved the government money.

[68]*Schachter*, *supra*, note 9 at 551. He also suggests that such evidence would be relevant under s. 1.

[69][1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 [hereinafter *Metropolitan Stores*].

Schachter where the law and facts have been decided would, in our view, be most unfortunate.

Under the *Metropolitan Stores* test, one might argue that the remedy of extending parental leave benefits to biological parents is "more intrusive" than the alternative remedy of striking down the parental leave provisions for adoptive parents. Because of the operation of legal precedent, by extending parental leave benefits to Mr. Schachter, the court would effectively extend benefits to a much larger group (biological parents) than would be affected if the benefits presently enjoyed by adoptive parents were repealed. The application of this test, however, begs the moral question of how fair it is to deprive one group of a remedy because it is cheaper to do that than to extend it to a numerically larger group. It also entirely neglects complex questions about the fairness of who wins and who loses as a result of this outcome in the larger social context — and which remedy is more intrusive to whom.[70] If the nullification remedy were chosen under the *Metropolitan Stores* test, adoptive parents would lose the benefits essentially because there are less of them than biological parents. Courts, in our view, should not allow constitutional remedies to be determined by this kind of mechanical preference for majorities over minorities.[71]

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[70]Candace Kovacic, *supra*, note 34 at 59 argues that if the courts are going to try and assess the costs of extension versus invalidation, they should consider not only the cost of providing the benefit to the government, but also the cost of *losing* the benefit to the recipient. We would add that it is not only the cost to the government of providing the benefit that should be considered, but also the cost to those who will be supplying the government with the money.

What remedy is "fair" in this wider context depends on the socio-economic position of adoptive parents relative to other groups, particularly those who are now subsidizing their parental leave benefits. For example, adoptive parents although a minority of parents, are not an economically disadvantaged minority. Because of *de facto* adoption policies, adoptive parents tend to be upper middle class, two parent (and often two-earner) families. Whether it is "fair" for taxpayers, employers and employees to subsidize child care by this group after placement is a difficult question, particularly if it is argued that parental leave benefits primarily assist the adopted child rather than his or her parents or if the benefits of extending parental leave to biological parents and their children are considered.

[71]In the interlocutory context, the Supreme Court did not shy away from the implications of its test in *Metropolitan Stores*. For example in that case Justice Beetz cited with approval *Société de développement de la Baie James* v. *Chief Robert Kanatewat*, [1975] C.A. 166 in which the Quebec Court of Appeal struck out an interlocutory injunction halting the James Bay development by noting that the grant of the injunction "is a striking illustration of interlocutory relief which compromised the common good of the public as a whole" (*Metropolitan Stores*, *supra*, note 69 at 339). Justice Beetz thus seems to approve of a process in which a disadvantaged and vulnerable minority, the James Bay Cree, would be denied relief because the benefits of halting development to their society were judged to be less compared to those enjoyed by a larger group, "the people of Quebec," by virtue of hydro-electric development in the James Bay Area: *Société de développement de la Baie James* v. *Chief Robert Kanatewat*, *supra*, at 177, Turgeon J.A. It is hoped that courts would not use this majoritarian and ultimately racist form of social cost accounting in determining *Charter* remedies.

Reliance on costs may also reflect a superficial kind of presumptive legislative intention, a general guess that if the legislature could not do what it wanted, it would select an alternative that was of roughly equivalent cost or one that would save it money. Such an approach is subject to all the criticisms we have levelled against an approach based on legislative intention.[72] Assessing the costs of various policies relative to other budgetary considerations is an integral part of the legislative process and courts are no more suited to second-guessing a legislature in this task than they are to anticipating what policy it will choose in general. In *Schachter*, for example, Strayer J. mentioned evidence estimating the costs of extension at $502 million in 1986. To someone used to thinking on an individual scale, this sounds very expensive, but in reality this cost figure would only be relevant for the government when compared to other budgetary and revenue items.

A further problem with courts considering costs is that they will often unfairly devalue costs that are not easily quantifiable[73] or that they will value hard-to quantify factors in ways that reflect perspectives with which they are most comfortable. For example, in the context of the benefits in *Schachter*, it might be comparatively easy for judges to place a high value on the gains for "the family" in a gender-neutral parental leave benefit extended to all parents, but harder for them to quantify the cost to women employees that an apparently gender-neutral benefit might actually hide.[74] Courts are simply not equipped to conduct a sophisticated cost-benefit analysis, especially one that takes into account values that are not easily quantifiable or easily perceived by judges. In the face of these shortcomings, we believe both Strayer J. and the Federal Court of Appeal were wise to refrain from approaching the remedies issue with the remedial goal of minimizing costs and disruption.

In short, a remedial approach based solely on cost considerations does not guarantee progressive outcomes any more than does an approach based on legislative intention. Just as it is impossible to predict how a court will second-guess a legislature's policy choices, it is difficult for a court to attempt to cal-

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[72]See *supra*, part II(B).

[73]See J.L. Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews* v. *Eldridge*: Three Factors in Search of a Theory of Value" (1976) 44 U. Chi. L. Rev. 28.

[74]If a new mother earns less than a new father (and women still tend to earn less than men), then the best decision, in economic terms, will be for her to cease work for the parental leave period rather than him. This adds a further economic incentive to ideologies of motherhood and other sexist influences which have resulted in a pattern of interrupted work force participation (with adverse effects such as loss of job security and seniority) that has penalized women workers for some time. Thus, one cost of a facially neutral parental leave benefit might be the further entrenchment of women as primary care-givers to infants. See the most recent report on this subject by the National Council on Welfare, *Women and Poverty* (Toronto: National Council on Welfare, 1990) summarized in S. Fine, "Motherhood too costly, report warns" *The Globe and Mail* (14 August 1990) A5.

culate the budget or weigh social costs and benefits. In either case these remedial approaches make the outcome of litigation a gamble with the resultant disincentive to litigate. Moreover, these approaches fail to provide a constructive relationship between courts and legislatures, one which is respectful of their different institutional roles. Both attempt to substitute courts for legislatures, performing tasks for which they are ill-suited. The whole enterprise, conducted under the auspices of the *Constitution*, seems to us, at best unhelpful, since the legislature can conduct the same kinds of enquiries much better than the courts. At worst, it is misleading, since the constitutional patina of the case may lead the legislature erroneously to defer to a court's guesses about its own intent or budget.

III. Constitutional Remedies as "Constitutional Hints"

We have criticized current approaches to *Charter* remedies on the basis that either they try to make remedies problems[75] disappear (the "always striking out" approach) or they require courts to engage in enquiries for which they are unsuited (the "second guessing" and "keeping it cheap" approaches). Our proposed alternative approach attempts to avoid these pitfalls.

We believe that the inadequacy of the current approaches stems from the courts' dichotomous vision of the *Constitution* in remedies issues and, consequently, of their role in ordering relief. The "always strike" approach views the *Constitution* as determinative of remedies problems. It tries, as we have said, to make the issue of remedial choice disappear by finding in the text of the *Constitution* a universal rule about what to do when a violation is found. As Mahoney J.A. says, "s.52(1) ... states a constitutional fact which no court can ignore."[76] Likewise, the Gibson view would require extension in all cases so that existing rights would be preserved as mandated by s. 26 of the *Charter*. The alternative view, expressed in the other two approaches, abandons the *Constitution*. The *Constitution* is exhausted once a violation is found and external sources, such as legislative supremacy or a cost-benefit principle, must step in to inform the court's disposition of the case. While both of these views attempt to formulate universal rules for remedies cases, they present sharply divergent visions of courts and the *Constitution*. The first has no room for judicial discretion about remedies, envisaging the court as executioner of the *Constitution*'s blanket judgment. The second confers on courts absolute remedial discretion, free from any constitutional constraints, and guided solely by the kinds of considerations one normally expects to influence legislatures.

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[75]By "remedies problems" in this discussion, we mean to restrict ourselves to cases in which statutes are found to infringe the *Constitution* in ways for which a single remedial outcome is not constitutionally mandated.

[76]*Schachter*, *supra*, note 9 at 143.

We find it difficult to read the *Constitution* as either disposing of all remedies cases in the same way or remaining entirely neutral on the subject. We find more credible the view that the *Constitution*, while not often requiring one particular disposition to the exclusion of all others, nevertheless has much that is useful to say about what remedies are appropriate in any given case.[77] In other words, by returning to its analysis of the provisions of the *Constitution* which led the court to find a constitutional infringement, as well as other provisions,[78] the court is likely to identify for itself "constitutional hints" about what kind of remedies would be appropriate and just in the particular case. This approach has the immediate advantage of involving the court in a task with which it is familiar, instead of trying to be something that it is not. It relates the remedies decision more closely to the rights violation by allowing the values and interests which were infringed to infuse the choice of relief.

Most importantly, requiring courts to justify their choice of remedy with reference to the values they believe are contained in the *Constitution* assists in the achievement of the objectives we previously identified. The values in the *Charter* that we think will be most helpful in selecting remedies are those which protect disadvantaged groups against oppression by legislatures.[79] Conceding the institutional deficiencies of courts as allies of the oppressed, requiring these values to be implemented at the remedies stage goes some way to foreclose fulsome judicial expositions of rights which somehow end up hurting those they claim to protect.[80] At the same time, judicial articulation of constitutional values through concrete remedies provides helpful hints to legislatures about what kinds of legislative action or inaction might trouble judges in the future. Rather than attempting to act as legislatures, a "constitutional hints" approach to remedies allows courts to respond to legislatures by providing them with information about how to make decisions in accordance with the *Constitution*.[81] We believe that legislative action informed by careful analysis not only of what judges think the *Constitution requires*, but also of what judges think it *prefers*, can foster a better institutional relationship between these branches of govern-

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[77]Of course, we do not mean to suggest that the *Constitution* actually speaks, but that by interpreting the *Constitution*, courts will find much that is useful to them in selecting remedies. *Contra*: D. Beatty & S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988) 67 Can. Bar Rev. 573 at 582ff.

[78]For example, other sections of the *Charter* which were raised as alternative bases for relief, the various interpretive provisions of the *Charter* and other Constitutional provisions and conventions.

[79]See generally ss. 15(1) and 15(2) of the *Charter*, *Andrews*, and *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8.

[80]*Phillips* is a case in point. See also the regressive outcomes outlined in *Brodsky*.

[81]Legislatures want such information. Recall, for example, how carefully the federal government scrutinized the various judgments in *Morgentaler*, and repeatedly declared that the new abortion bill (Bill C-43, *An Act Respecting Abortion*, 2d Sess., 34th Parl., 1989-90) avoided all of the judicially-identified flaws in the old law and was therefore constitutional.

ment than other remedial approaches. It can encourage legislatures to enact laws which are drafted with the *Constitution* in mind, reducing the need to test legislation in the courts. It may also diminish the likelihood of a vicious circle of courts second-guessing legislatures which in turn second-guess courts, with all the waste of time and resources that follows.[82]

The idea of looking to constitutional values in the remedial decision-making process is not entirely new to courts. It re-captures the connection between remedies and rights which Blackstone and Dicey[83] celebrated as a strength of the common law, but does so in a manner fitting to contemporary understandings of the nature and purpose of constitutional rights. Remedies are not formalistically deduced from the forms of actions or the scope of rights but rather are shaped with attention to the instrumental purposes and values which judges perceive that *Charter* rights are intended to protect.[84] The "purposive" approach to remedies taken by the Supreme Court in some cases is consistent with a "constitutional hints" approach in that the latter relates remedial decision-making under s. 24(1) to the values and interests that the judges find in other parts of the *Constitution.*[85] Such a remedial approach suggests that judges should carry their analysis of *Charter* rights in particular cases through to their discussion of *Charter* remedies.

The utility to legislatures of judicially articulated "constitutional hints" has not yet been recognized in Canada.[86] Both the court's chosen remedy and the reasons given to justify its remedial choice can influence legislative deliberations while allowing legislatures the opportunity to respond and revise remedies

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[82]This approach will not retard the movement towards the "legalization of politics" that Michael Mandel, *supra*, note 4 and others have criticized as a consequence of the entrenchment of the *Charter*. It does try to make the judiciary's role in politics more overt, honest and accessible. On the limits of "constitutional hints" see part IV *infra*.

[83]See *supra*, note 14.

[84]For an example of this approach see *Hunter* v. *Southam*. Of course the progressive potential in this approach is still confined to the progressive potential of the judiciary.

[85]In *R.* v. *Gamble*, [1988] 2 S.C.R. 595 at 641, 638, 45 C.C.C. (3d) 204. Wilson J. stated that "[a] purposive approach should, in my view, be applied to the administration of *Charter* remedies as well as to the interpretation of *Charter* rights..." and that applicants should "be allowed a reasonable measure of fiexibility in framing their claims for relief in light of the interests the *Charter* rights on which they rely were designed to protect."

In *Schachter, supra*, note 9 at 136, Heald J.A. reasoned that extension of parental leave benefits "appears to be the only remedy which respects the purposive nature of the *Charter* while at the same time giving effect to the equality rights enshrined in s. 15 of the *Charter*."

[86]A similar approach to remedies has been suggested in the United States. Evan Caminker argues that a court's candid discussion of why one remedy accords more fully with constitutional values than another "will inform the ensuing legislative deliberations and generate normative claims for leaving the court's starting point undisturbed; the legislature is therefore more likely to take account of both constitutional values and policy preferences when formulating its ultimate remedial response." E.H. Caminker, "A Norm-Based Remedial Model for Underinclusive Statutes" (1986) 95 Yale L.J. 1185 at 1205.

that courts believe are supported, but perhaps not mandated, by the *Constitution*. Use of "constitutional hints" in selecting constitutional remedies is consistent with the relationship between courts and legislatures that is contemplated by the existence of ss. 1 and 33 of the *Charter* and the Canadian phenomenon of courts issuing advisory "reference" decisions. It moves beyond the dichotomy of government by judiciary and judicial abdication. This approach does, however, require reform energies to be directed at both the judicial and legislative arenas because it contemplates a continuing dialogue between courts and legislatures with no solutions that are necessarily final. This and other limitations of a "constitutional hints" approach will be examined below after our consideration of what the approach might achieve if directed to some of the remedial choices courts have already encountered.

In the recent case of *Hebb*, Judith Hebb was convicted of theft of a package of cigarettes and sentenced to a $500.00 fine or 30 days imprisonment in default of payment. After two time extensions, a warrant of committal was issued which she sought to quash under the *Charter*. Most of her arguments rested on the principle that it is wrong to imprison a person because she is poor. Her counsel submitted that imprisoning someone for defaulting on a fine was a violation of s. 9 of the *Charter* prohibiting arbitrary detention and imprisonment; that it is contrary to human dignity protected by s. 7 to deprive someone of her liberty according to a *per diem* rate; and that s. 15 is infringed by differential treatment on the basis of economic condition. A separate and narrower s. 15 claim was also made. By requiring the court to obtain and consider a report concerning the conduct and means of accused persons who were between 16-22 years old to pay the fine before they were incarcerated for non-payment, s. 718(10) of the *Criminal Code* discriminated against Hebb on the basis of her age because she was 35 years old and not protected by that provision. Kelly J. accepted the latter argument as the basis of the *Charter* infringement because he felt it was "appropriate to deal only with as many constitutional issues as are necessary to dispose of the application before the court."[87] Thus, as in *Schachter*, with respect to the specific rights violation identified in the judgment, either invalidating the beneficial protection enjoyed by a subgroup or extending it to all persons was equally constitutionally permissible.

On the "always striking out" approach to remedies, the *Constitution* required Kelly J. to invalidate the provision because the law was, under s. 52(1) terms, "inconsistent" with the *Charter*; the protections that Parliament intended young people to receive would be nullified even though they were not in them-

[87]The court in *Hebb, supra*, note 48 at 6 applied Estey J.'s direction to this effect in *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357 at 383, 9 D.L.R. (4th) 161: "The development of the *Charter*, as it takes place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new *Charter* provisions, none should be undertaken."

selves unconstitutional but provided in an underinclusive manner. On the other two approaches the *Constitution* was neutral. The legislature originally intended to extend these protections only to young offenders covered by the *Juvenile Delinquents Act*.[88] Cost considerations were, not surprisingly, hazy. On the one hand, extension would require the judiciary to obtain reports before imprisoning all accused persons, not just 16-22 year olds. On the other hand, extension might save the provincial treasury money that is spent on our modern day "debtors prisons," not to mention the social and economic costs incurred by the imprisoned debtors.

Why then did Kelly J. effectively extend s. 718(10) of the *Criminal Code* rather than strike it out? An examination of his reasons reveals that despite his *dicta* about limiting the constitutional issues he would consider in this case, he did not consider the *Constitution* to be exhausted once the limited infringement of s. 15 was found. While he was not prepared at the rights violation stage of his analysis to find that the *Constitution requires* impecunious persons not to be imprisoned for their poverty, he was willing to select a remedy that would indicate to a legislature that the *Constitution* clearly *discourages* such a policy. As Kelly J. stated:

> Where the result [of invalidation] is the removing of a protection that is constitutionally encouraged — that is, judicial consideration before incarceration — as opposed to the enlarging of such a protection, it is submitted that the court should favour a result that would expand the group of persons protected rather than remove that protection completely.[89]

Hebb is an easy case, in that the judge was clearly disturbed by the prospect of impoverished people being imprisoned because of their inability to pay their fines. It is not difficult to see that the values underlying various *Charter* provisions point strongly against imprisonment in default — probably to the point of prohibiting it.[90]

In *Morgentaler* both Dickson C.J. and Beetz J. declined to decide whether women have constitutional rights to abortion. They confined their judgments to the procedural defects of the therapeutic abortion committee system. Thus,

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[88]See A. MacDougall, "'Are There No Prisons?' Hebb: Imprisonment in Default of Fine Payment and S. 7 of the *Charter*" (1989) 69 C.R. (3d) 23 at 26.

[89]Kelly J. concluded in *Hebb*, *supra*, note 48 at 21: "It would not be 'appropriate and just in the circumstances' to deprive 18 to 22 year-olds of such an important safeguard as the requirement of judicial review before incarceration."

[90]In an example of strong *dicta* intended to stimulate legislative reform, Kelly J., *supra*, note 48 at 22 declared: "Our *Constitution* enshrines a system of justice based upon a belief in the inherent dignity and worth of every individual... That a person should be imprisoned only because of his or her inability to pay a fine is inconsistent with such a system." On legislative reform in this area see Ontario Law Reform Commission, *Report on the Basis of Liability for Provincial Offences* (Toronto: Queen's Printer, 1990); K. Campbell, "Sentencing Reform in Canada" (1990) 32 Can. J. Crim. 387 at 391-92.

strictly speaking, a decision to invalidate only the procedurally defective exemption clause contained in the former s. 251(4) of the *Criminal Code* would not have violated any constitutional rights specified in the judges' opinions, although it would have violated the substantive rights to liberty, security and conscience that Wilson J. identified in her concurring judgment. When faced with the alternatives of making all abortions legal or illegal, the majority of the Court chose the former and did so as a matter of remedial discretion. What justified what was perhaps the most important (but least discussed) exercise of remedial discretion that a court has yet to make under the *Charter*?

As we have suggested, Dickson C.J.'s recourse to legislative intent was not persuasive.[91] It is difficult to know what the 1969 Parliament would have done if brought "back to the future" to decide what to do with its procedurally defective reform legislation. If the Chief Justice's remedial choice was influenced by present political configurations, he certainly did not mention them in his judgment. More fundamentally, resort to the fiction of legislative intent allowed Dickson C.J. to eschew responsibility for the important remedial decision that *he* — not any Parliament — made. It allowed him to continue to avoid the substantive questions that were dodged in the judgment[92] and it provided precious little guidance when thought was directed to what, if any, prohibitions of abortions would be consonant with the values he saw in the *Constitution*. It is wrong to consider the crucial exercise of remedial discretion in *Morgentaler* as unproblematic or value neutral; it required much more justification.

The only reason for Beetz J.'s choice of remedy is found in the following passage:

> [t]he violation of pregnant women's security of the person would be greater, not lesser, if s. 251(4) was severed leaving the remaining subsections of s. 251 as they were in the *Criminal Code*[93]

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[91]As with all decisions to nullify sections of statutes, the decision was circumscribed by the vagaries of legislative drafting. For example, if the former s. 251 of the *Criminal Code* had been drafted differently so that the provision in s. 251(4)(c) justifying abortions on the grounds the continuation of pregnancy "would or would be likely to endanger [the woman's] life or health" was contained in a section apart from the abortion committee provisions, the Court would have had a third remedial option. Instead of either making all abortions legal (by striking all of s. 251) or making all abortions illegal (by striking the committee provisions but leaving s. 251(1) intact), it could have invalidated only the defective procedural provision but left the prohibition of abortions and the justifications on the grounds of life and health intact. Alternatively, the Court could have temporarily stayed its remedy in order to induce Parliament quickly to devise legislation that was a compromise between making all abortions legal or illegal.

[92]The remedy was more consistent with the reasoning in Justice Wilson's judgment. See M.L. McConnell, "'Even By Commonsense Morality': *Morgentaler, Borowski* and the Constitution of Canada" (1989) 68 Can. Bar Rev. 765 at 792; L.E. Weinrib, "Abortion Policy on Demand: Constitutional Rights, Statutory Purposes and Institutional Design" U.T.L.J. [forthcoming].

[93]*Morgentaler, supra*, note 8 at 125.

and his subsequent statement that "the objective of protecting the foetus would not justify the *complete* removal of the exculpatory provisions from the *Criminal Code.*"[94] Although Justice Beetz also did not find that women had *Charter* rights to abortion, in these explanations for his exercise of remedial discretion he hints that making all abortions legal is constitutionally preferable to making them all illegal. By giving this "constitutional hint," he starts to ensure that remedial discretion is exercised in a manner consistent with the values he sees in the *Constitution* and he encourages Parliament to keep the rights of women to security of the person in mind in their response to the case. A much fuller discussion, including consideration of what is "in accordance with the principles of fundamental justice" could have helped both in justifying the decision and in informing the legislature and the wider polity.[95] A full articulation of the values which support a particular remedy can help ensure that remedies advance rather than frustrate the values judges find in the *Constitution* and that they inform the legislature about which of its many options find support in the court's interpretation of the *Constitution.*[96]

The relevance of a "constitutional hints" approach in *Hebb* and *Morgentaler* is fairly obvious. Allowing all accused to be imprisoned regardless of their financial ability to pay their fines or making all abortions illegal are remedial alternatives that many people believe would offend *Charter* rights. What sort of role could a "constitutional hints" approach to remedies play in more difficult cases such as *Schachter*?

Looking back to what it has said about the constitutional values implicated in the case for hints about remedies may lead the court to reject some remedial requests as inconsistent with the values it sees in the *Constitution.* At trial, Strayer J. rejected Schachter's initial remedial request that he be able to share the 15 weeks of maternity benefits granted to his wife under s. 30 of the *Unemployment Insurance Act.* This proposed remedy was likely motivated by the plaintiff's prediction that the court would be inclined to grant only the least disruptive remedy and that this could be done by reading flexibility into existing benefits rather than expanding them. Strayer J. emphatically rejected this rem-

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[94]*Ibid.* at 128.

[95]Even so, legislative debate surrounding subsequent amendments to the *Criminal Code* was influenced by hints in the judgments in *Morgentaler* about the constitutional status of abortion rights. If Dickson C.J. had articulated the reasons why he considered invalidating all of the former s. 251 to be the preferred remedy, or if Beetz J. had elaborated his reasoning in this regard, these comments likely would have figured in the ensuing legislative debate.

[96]The new abortion legislation (Bill C-43) certainly avoids the procedural defects that were the basis for the *Charter* violation in *Morgentaler.* While it is very disappointing that the government has chosen to re-criminalize abortion, it is arguable that the new legislation does reflect an uneasy recognition that the *Constitution* prefers fewer rather than more state restrictions on abortion. For example, under the narrow *ratio* in *Morgentaler,* it would have been possible to impose a more onerous approval requirement such as a second opinion from another doctor.

edy as unjust and inappropriate on the basis that the maternity benefits provided in s. 30 "are essentially distinct in purpose and effect from parental benefits and the position of the father cannot be 'equalized' by depriving the natural mother of benefits the rationale for which can only apply to her."[97] Strayer J. looked to the position of women as a disadvantaged group[98] in order to reject a remedy that would have diluted the benefits they have had since 1971 to protect them from the employment burdens of loss of time during the period just before and after giving birth. Protecting the disadvantaged from further disadvantage[99] is an important constitutional consideration that can help courts in deciding how to exercise their remedial discretion and ensuring that remedies for inequalities are not counterproductive.[100]

Strayer J. also rejected Schachter's alternative remedial request that should parental leave provisions be extended, they only be extended to biological fathers. Here Strayer J. reasoned that a gender neutral extension of parental leave benefits "is most consistent with s. 15(1) of the *Charter*" and that "in principle benefits should be available to the natural mother as well as the natural father."[101] It is possible to take issue with the judge's interpretation of constitutional principles as mandating gender neutrality in this context. Sexual stereotyping arguably might be more effectively combatted and men given an incentive to take their fair share of early child care responsibilities if parental leave benefits were only extended to them.[102] However, providing benefits only for men would disadvantage those women who left the workforce to care for their babies since they would not be compensated. Remedial choices are often controversial and will remain so under a "constitutional hints" approach to remedies. Nevertheless the articulation of "constitutional hints" by judges encour-

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[97]*Schachter*, *supra*, note 9 at 551.

[98]It is significant that Strayer J. strengthened his decision to deny Schachter this remedy on the basis of its effects on women and not on the more abstract basis of its effects in diluting existing rights under s. 30 of the *Unemployment Insurance Act*. His reasoning centred on values in ss. 15 and 28 of the *Charter* and not on the generic savings provisions contained in s. 26 of the *Charter*. *Contra*: D. Gibson, *supra*, note 40.

[99]For example, Chief Justice Dickson's statement that "[i]n interpreting and applying the *Charter*, I believe that the courts must be cautious to ensure that it does not simply become an instrument to roll back legislation which has as its object the improvement of the condition of less advantaged persons" (*Edwards Books and Art* v. *R.*, *supra*, note 17 at 779). See also *Andrews* for a statement that s. 15 of the *Charter* shares the "remedial" purposes of human rights codes.

[100]This aspiration is necessarily qualified by the realistic possibilities of courts being able to identify the disadvantaged group in a particular context and to fashion a remedy which does not end up disadvantaging the same or another disadvantaged group. In the context of *Schachter*, as we have noted, it is difficult to characterize the new legislation as a progressive reform; however, it is also hard to assess how much the new federal unemployment insurance package was due to the decision in *Schachter*.

[101]*Schachter*, *supra*, note 9 at 550-51.

[102]See *supra*, note 74. Whether this kind of benefit makes any real difference to women's economic oppression in employment is also open to doubt.

ages a larger debate about the meaning of equality to inform and enrich the exercise of remedial discretion.[103]

Although Strayer J. made reference to values he saw in the *Constitution* to reject two of the plaintiff's remedial requests, he did not justify his ultimate remedial decision to extend rather than to nullify parental leave benefits through any discussion of what remedy he thought the *Constitution* preferred. In fact, Strayer J. tried to appear "neutral" about whether parental leave benefits should be extended, adjusted or nullified despite the fact that his own remedy was to extend the benefits.[104] He made no attempt to tie his exercise of remedial discretion to his findings that the provisions before him violated s. 15 of the *Charter*. On the basis of his own s. 15 analysis, Strayer J. could have attempted to justify his remedial decision to extend the benefits on the ground that nullifying parental leave benefits available on a gender neutral basis would perpetuate the sexual stereotype of women as primary care givers, forced to devote an inadequate period of maternity leave benefits to the care of young children, as well as to recovering from the physiological burdens of child birth. Nullification of the benefits would perpetuate a state of affairs in which women and men are unable to choose to have the male partner take a period of partially compensated leave to care for a newborn child.[105] This state of affairs may not have been found to violate s. 15 of the *Charter* but it could have been characterized as suspect under the *Charter* and as such a remedial alternative to be avoided.

In general, Strayer J. did not carry through his s. 15 analysis to attempt to show why he thought the remedy of extension was appropriate and just.[106] In many ways, this lack of substantive justifications made the remedy seem more problematic than it need have been. One reason why *Schachter* is a controversial remedies case is that the Federal Court at both the trial and appeal levels did not persuasively or carefully explain why their analysis of the s. 15 issues supported a decision to extend rather than nullify the parental leave benefits.

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[103]See for example R. Gold, *supra*, note 54 (comparing remedies supported by anti-discrimination and structural models of equality).

[104]*Schachter*, *supra*, note 9 at 548.

[105]*Ibid.* at 539, 547. In his s. 15 analysis, Strayer J. also speculated that biological parents were being disadvantaged on the basis of immutable personal characteristics (at 540) and explored the general social benefits of parental leave (at 543-44). Therefore, he was certainly not reluctant to articulate values he thought might be judicially recognized in the *Charter before* he turned to the question of remedies.

[106]One of the reasons for this may have been Strayer J.'s initial failure to specify precisely what was the basis for the s. 15 violation. He indicated, *supra*, note 9 at 539 that the legislation treated biological mothers and fathers as well as biological and adoptive parents differently, and that the statute used arbitrary distinctions, but did not expressly find which of these offended the *Charter*. The absence of a clear conception of what was wrong with the statute made the choice of remedies much harder.

Schachter was appealed only on the issue of remedies and this contributed to the Court of Appeal's treatment of the case as a "remedies" case based on rival textual interpretations of s. 24(1) of the *Charter* and s. 52(1) of the *Constitution*. In general, the judges did not attempt to justify the remedy of extension by reference to the trial judge's or their own s. 15 analysis, the Supreme Court's approach to the interpretation of equality rights,[107] or other constitutional values. Heald J.A. came closest to raising his gaze from the remedial trees to the larger constitutional forest when he stated:

> The right to equality of result enshrined pursuant to s. 15 will be meaningless unless positive relief is provided in cases of underinclusive provisions such as those to be found in s. 32 ... The *Charter* deals with the protection of existing rights. The judgment of the Trial Division protects the existing rights of the respondent and others like him. On the other hand, the judgment proposed by the appellants will not protect those existing rights. Accordingly I think the remedy prescribed is constitutionally permissible.[108]

Heald J.A.'s reference to remedies which protect existing rights may refer to s. 26 of the *Charter* which states that the guarantee of *Charter* rights should not be construed as denying the existence of any other rights and freedoms. As we have previously discussed, s. 26 of the *Charter* does not, in our view, mandate any particular remedial response. Even if it did, we fear it would be too inflexible in dictating extension of all benefits in order to preserve existing rights. Nevertheless, the reference to existing rights may suggest Heald J.A. considered that it would have been procedurally unfair to nullify the parental leave provisions of adoptive parents in the *Schachter* case given that they were not represented in the litigation. Although the extension of underinclusive legislation should not be the remedy in every case, nullification of legislation in the absence of participation from a group to be deprived of a benefit would, in our view, likely violate basic constitutional values of fairness and participation.[109] Heald J.A.'s reference to the right to "equality of results" provides a severely undeveloped constitutional hint that could have related his decision to extend parental leave benefits to an analysis of s. 15 of the *Charter*. His suggestion that equality will be meaningless and non-purposive unless positive relief in the form of an extension is awarded picks up on an argument made by the inter-

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[107]*Andrews*; *Reference re Worker's Compensation Act, 1983 (Nfld.), ss. 32, 34*, [1989] 1 S.C.R. 922, 56 D.L.R. (4th) 765; *R.* v. *Turpin*.

[108]*Schachter, supra*, note 9 at 134. Heald J.A., *supra* at 136 reasons that the extension of benefits "appears to be the only remedy which respects the purposive nature of the *Charter* while at the same time giving effect to the equality rights enshrined under s. 15 of the *Charter*."

[109]These values could be protected if courts pro-actively used liberal intervention rules to ensure that groups which could be deprived of benefits are represented in the litigation. On intervention see J. Welch, "No Room at the Top: Interest Group Intervenors and *Charter* Litigation in the Supreme Court of Canada (1985) 43 U.T. Fac. L. Rev. 204; K. Swan, "Intervention and Amicus Curiae Status in Charter Litigation" in Sharpe, *supra*, note 32; P. Bryden, "Public Interest Intervention in the Courts" (1987) 66 Can. Bar Rev. 490.

venor, the Women's Legal Education and Action Fund (LEAF), that striking down the benefits of adoptive parents would only achieve similarity of treatment and not redress the disadvantaged position of women who have traditionally borne the burden of child care. Extending underinclusive legislation was presented in LEAF's argument as consistent with the emphasis on improving the position of disadvantaged groups articulated by the Supreme Court in *Andrews*.[110] This is a start towards justifying the exercise of remedial discretion by reference to the larger constitutional landscape.

In our view, there are other "constitutional hints" which the courts could have used to justify their remedy of extension of parental leave benefits.[111] Nullification of adoptive parents' benefits would have a disproportionate impact on female adoptive parents (relative to male adoptive parents) who would in many cases have to take an uncompensated period of leave from their jobs to provide care for a newly adopted child. Such a remedy would hurt those who are already disadvantaged in this narrow context.[112] Furthermore the extension of parental leave benefits to biological parents advances the values of equality by providing some compensation for those women who, after their maternity leave has expired, take time away from employment for child care. It also, on its face, combats sexual stereotyping by providing the same opportunities to men like Shalom Schachter who wish to assume, for a period of time, full time child care responsibilities. The use of "constitutional hints" about how equality requires minimization of disadvantage would also help courts discount the weight of the 1988 amendments which suggest a Parliamentary intent to provide benefits only to biological fathers on extremely limited grounds related to the woman's death or disability. This amendment promotes the stereotype of women as primary care givers which is inconsistent with the vision of equality articulated in *Andrews* and with the sexual equality guarantee in s. 28 of the *Charter*. Although the amendment is not the subject of direct challenge in the case, a rejection of its premises as inconsistent with constitutional visions of equality could guide the exercise of remedial discretion in this case, as well as send a message to Parliament.

The point of this discussion is not to prove that the remedy in *Schachter* was in fact the most progressive outcome for the litigation for, as we have said, the case is an extremely difficult one and the calculus of progressiveness is com-

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[110]In their factum to the Federal Court of Appeal, LEAF compared the remedial decision to extend underinclusive legislation to the approach to equality enunciated in *Andrews*, and *Brooks* v. *Canada Safeway Limited*, [1989] 1 S.C.R. 1219, [1989] 4 W.W.R. 193 (see factum paragraphs 37-47).

[111]There are, of course, other "constitutional hints" that could have supported nullification. See, for example, *supra*, note 70 and *supra*, note 74.

[112]If one takes a broader social perspective, which positions both male and female adoptive parents (who are employees) in relation to all parents, a different conclusion might follow. See *supra*, note 70.

plex. Our purpose is only to show that the trial and appellate courts could have used this approach to justify their remedial decisions, and to suggest that their judgments would have been better for it. The substantive justifications for the remedy, although open to question, would have made the form of the extension remedy less problematic. When the case is heard by the Supreme Court of Canada it should not, in our view, be thought of as simply a remedies case; well analyzed remedies cases should discuss the rights and the values that courts see in other parts of the *Constitution*.

Before we go on to explore the limitations of a "constitutional hints" approach to remedial decision-making, it is useful to review how attention to "constitutional hints" might have avoided a regressive outcome in one particularly egregious case. As previously discussed, Nova Scotia courts faced with what they saw as a s. 15 violation when allowances were provided for single mothers and single disabled fathers but not other single fathers, struck these benefits down.[113] The courts interpreted s. 52 as requiring that the benefits be struck down even though the judges at both the trial and appeal levels said they were uncomfortable with the perverse result of the litigation and urged the legislature to re-enact the benefit on a gender neutral basis. If they had realized that nullification of benefits, not in themselves unconstitutional, was just as much an intrusion into what has traditionally been seen as the legislative domain as their extension, the judges could not have presented themselves as forced into a situation where striking down single mothers' benefits was the only option. Had remedial choice been recognized, each court would have been forced to justify its intuitions and hopes that the benefits should be extended by reference to the larger constitutional context.[114]

A "constitutional hints" analysis in *Phillips* might be conducted as follows. The remedial option of nullification of the benefits would deprive a severely economically disadvantaged and politically vulnerable group (low-income single mothers) of vital benefits. Extension of the benefits would aid those men in comparable need and treat all single parents equitably without gender stereotypes. Thus, the remedy of extension could find support in the values courts see in ss. 15 and 28 of the *Charter*. This approach would also have provided an outlet for the Court's stated desire to influence legislative deliberations. Although perhaps not finding (in this case) that a constitutional right to social assistance for single parents exists, the Court could have made clear that withdrawal and reduction of these benefits was disfavoured on its reading of the Constitution.

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[113]*Phillips*.

[114]And, if the court still considered invalidation of benefits to be the best remedy, it would have had to take responsibility for its decision by articulating why, on its interpretation of the *Constitution*, this was the better outcome.

IV. The Limits of "Constitutional Hints"

It is important not to overstate the power of "constitutional hints." We hope that our approach to remedial decision-making will help to prevent obviously regressive results such as that in *Phillips*, but we recognize that there are no guarantees. A "constitutional hints" approach requires judges not to regard their discretion to devise remedies as unfettered or as bound by the text of ss. 24, 26 of the *Charter* or s. 52 of the *Constitution*, but rather to justify remedies by going beyond what their finding of a rights violation strictly requires. This means they must express tentative views about why one remedial alternative finds support in their reading of the *Constitution*. Judges may be reluctant to give such hints, preferring to decide constitutional cases on the narrowest grounds possible.[115] Even if judges are willing to suggest "constitutional hints," their determinations of what is a "progressive" result in a particular case will always be controversial.[116] Some will argue that the *Charter* favours less rather than more governmental activity and as such is not a fertile source for hints to make remedies progressive.[117] Even if "constitutional hints" produce progressive judicial remedies, regressive governments may not "take the hint" and may act to amend the remedy.

Despite these dangers, we think that a "constitutional hints" approach is a good way to deal with the remedial discretion that judges inevitably exercise under the *Charter*. It forces judges to recognize and take responsibility for the remedial choices they continually make by preventing them from saying that they are precluded from extending legislation by the terms of the *Constitution* or from disguising their remedial choices in the fictions of legislative intent or cost-benefit analysis. Judges exercising remedial discretion should have to assess remedial options in terms of the values and interests they see in the *Constitution*.

A "constitutional hints" analysis provides language by which courts can explain and defend their remedial choices, but does not mandate any particular outcome. "Constitutional hints" are suggestions about the law, not declarations of it. Although two judges of the Federal Court of Appeal extended parental leave benefits in *Schachter*, they took pains to note that they were not finding

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[115]Such action is not as "restrained" as it may appear because, with or without "constitutional hints," judges still have to decide on an appropriate and just remedy. Because of the important role that the *Charter* plays in much policy-making, governments will, as the aftermath of *Morgentaler* indicates, be left to speculate on what judges really mean by their remedies.

[116]See *supra*, note 8.

[117]A. Petter, "The Politics of the *Charter*" (1986) 8 Sup. Ct L. Rev. 473. But see P. Macklem, "Of Texts and Democratic Narratives" (1991) 41 U.T.L.J. [forthcoming] on the progressive potential of the textual indeterminacy of the *Charter*. And see Bakan, *supra*, note 5.

that a s. 15 right existed to the 15 weeks of parental leave they extended to biological parents or, indeed, to any period of parental leave. As Heald J.A. noted:

> The remedy given by Mr. Justice Strayer does not in any way impinge on Parliament's prerogative to choose among constitutionally valid policy options in enacting legislation which conforms to the requirement of the *Charter*. Since the remedy is a temporary one, it is unlikely that Parliament would find it necessary to rely upon section 33 of the *Charter*.[118]

A remedy determined on a "constitutional hints" approach would be temporary in the sense that the court would not conclude that the remedial result was mandated by its reading of the scope of constitutional rights. The court could indicate, perhaps in strong terms, that it was close to such a finding but a legislature could always revise the constitutionally preferred remedy. Thus judicial articulation of "constitutional hints" is important in a tactical sense because the legislature retains the policy option of re-adjusting or retracting the benefits that the court has extended. Remedies backed by "constitutional hints" provide a constitutionally preferred starting point; they do not guarantee that the legislature will not move away from it.

It is, of course, possible for courts to base their remedies on findings that they are required by constitutional rights. For example, in *Morgentaler* the remedy of making all abortions legal could have been mandated by the rights of women; in *Hebb* the court could have concluded that imprisonment because of financial inability to pay fines was unconstitutional, and in *Schachter* extension of parental leave benefits could have been a "final"[119] as opposed to a "temporary" remedy, if the court concluded there was a constitutional right to 15 weeks of parental leave. Such final remedies tied to explicit conclusions about the scope of rights may be desirable and appropriate in some contexts.[120] As a practical matter, however, courts may not (and probably should not) be quick to say that what they see as progressive remedial results are *required* on their reading of constitutional rights. For courts cautiously treading into new areas and innovative forms of relief, remedies informed by "constitutional hints" are an attractive means of testing the waters. The "constitutional hints" approach allows a court to implement the remedy it believes is favoured by the *Constitution* with the comfort of knowing that should the legislature have strong preferences, find the remedy too costly or consider that the remedy is regressive in effect, it can displace the court's remedy by ordinary legislation. Our limited faith in courts makes us wary of strategies which require innovative remedial results to be backed by declarations of constitutional rights to specific remedies.

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[118]*Schachter*, *supra*, note 9 at 135.

[119]Absent the use of s. 33 in applicable cases.

[120]Both the "easy" cases of *Morgentaler* and *Hebb* are candidates for such an approach. In other contexts, findings of rights and even the language of rights may be less appropriate. *Schachter* perhaps exemplifies the latter situation.

At the same time, our hopes for the democratic process in the context of an entrenched bill of rights leads us to be cautiously optimistic about the role that "constitutional hints" could play in legislative deliberations. If legislators decide to ignore "constitutional hints," they will have to overcome the burden of legislative inertia and defend deviations from what the courts have explained is a constitutionally preferred state of affairs. And unless the legislature seeks to end dialogne through the use of s. 33, their responses may again be subjected to judicial review.

"Constitutional hints," we believe, can contribute to a more constructive relationship between legislatures and courts. As Allan Hutchinson has noted, courts and legislatures often speak different languages.[121] We do not think, however, that this difference makes communication impossible. In fact, trying to understand someone who speaks in another language often leads to a better understanding of self and others. Governments already devote substantial resources to trying to understand what the courts mean in their *Charter* decisions. Communication between courts and legislatures is, of course, not a very democratic form of discourse. But it is one that is bound to occur again and again given the reality of the entrenchment of the *Charter*. The "constitutional hints" approach at least tries to make the conversation clearer and more accessible.

In concluding, the utility and limits of "constitutional hints" can be usefully reviewed by examining a controversial case. In *Silano* v. *R.*[122] a provision which gave people 26 years of age and older an additional $25 a month in social assistance was held to violate s. 15 of the *Charter* by denying younger people the equal benefit of the law. The court found the legislative assumption that those under 26 would be able to draw on their families for financial support, would be more mobile in finding employment, and would not have dependent children, untenable. Thus, they rejected the age distinction as being arbitrary with respect to need. The Court then struck down a regulation providing that those under 26, would receive $25 less than those who were older.[123] The actual judicial decision had the progressive effect of increasing the benefits received by those under 26 but shortly after the decision the British Columbia legislature readjusted the benefits by raising the benefits of younger recipients $19 while reducing those of older recipients by $6 in order to keep the net total outlay the

[121] A. Hutchinson, "Redressing Wrongs Done Under the *Charter of Rights*" The Globe and Mail (14 March 1990) A8.

[122] (1987), 42 D.L.R. (4th) 406 (B.C.S.C.).

[123] Note that the remedy of striking out could only obtain that result because of the way the provision was drafted. The regulation could just as easily have provided that older people receive an additional $25. Therefore, in order to reach the same remedial result, the court would have had to extend rather than strike down the regulation. See, *supra*, part II(A)(2).

same.[124] The Court's extension of the additional benefits could have been justified by "constitutional hints" about the importance of welfare rights and the value of developing accurate measures of needs. This was not done, but even if it had, the British Columbia government may not have listened. For us, this does not signify the futility of *Charter* litigation in general or "constitutional hints" in particular; rather it acknowledges the continued importance of electoral politics.

"Constitutional hints" will not always be actualized in either subsequent legislative or judicial decisions, nor will judicial remedies justified on this remedial approach provide any reliable means of attaining social justice. As citizens, we must constantly scrutinize (and criticize) the actions and the justifications of both our judges and our legislators. To the extent that judges are encouraged by the approach we have outlined to articulate openly the values that guide their exercise of remedial discretion, we think a "constitutional hints" approach to constitutional remedies can make a positive contribution to this process.

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[124]Mandel, *supra*, note 4 at 266.