

CONSTITUTIONAL INTERPRETATION AND SOCIAL CHANGE: YOU CAN'T ALWAYS GET WHAT YOU WANT (NOR WHAT YOU NEED)

Joel Bakan*
Vancouver

The author argues that the Canadian Charter of Rights and Freedoms is unlikely to provide an efficacious means for bringing about progressive social change. He notes that the various rights and freedoms articulated in the Charter can be logically interpreted to require a variety of progressive programs, but argues that it is unlikely the courts will give them such content. The reasons for this have to do with the structure of rights discourse, the inaccessibility of the courts to most potential litigants, and the attitudes and beliefs of judges. According to the author, lawyers and scholars who see a progressive potential in the Charter tend to downplay these factors.

Il est peu probable que la Charte canadienne des droits et libertés soit un instrument efficace de réforme sociale, soutient l'auteur de l'article. Il remarque que l'interprétation logique des divers droits et libertés énoncés dans la charte implique la création d'un grand nombre de programmes progressifs mais il soutient que l'interprétation qu'en donneront les tribunaux sera très probablement différente. Il donne pour motifs de cette opinion la façon dont on a l'habitude de concevoir les droits, l'inaccessibilité des tribunaux pour ceux qui pourraient le mieux tirer parti de ces droits et l'attitude et la façon de penser des juges. Selon l'auteur les avocats et chercheurs qui voient dans la charte la possibilité de progrès sont enclins à minimiser ces facteurs.

Introduction

The Charter of Rights and Freedoms has added a new dimension to debates about constitutional interpretation in Canada. Traditionally these debates have been about interpretive methodologies and the legitimacy of judicial review.¹ Such matters are still discussed, but there is now a new question on the agenda—namely, to what extent, if any, can constitutional interpretation be used as a strategy in struggles for progressive social change? Many lawyers and scholars are optimistic about the Charter's potential

* Joel Bakan, of the Faculty of Law, University of British Columbia, Vancouver, British Columbia.

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¹ For a discussion of such debates see: J.C. Bakan, *Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought* (1989), 27 Osgoode Hall L.J. 123.

in this regard. They point to the flexibility of the concepts enshrined in the Charter and demonstrate how these concepts can be interpreted progressively. Arguments are made showing that the rights to liberty, security of the person and equality, and the freedoms of expression and association, can be interpreted to require among other things protection of workers, amelioration of homelessness, better social assistance programs, and improved legal aid schemes.² Demands for social justice are articulated in the language of legal rights and freedoms and thereby clothed with the legitimacy and universality of legal requirements. The objective of those engaged in this kind of work is to persuade courts to "do the right thing". They focus on the prescriptive question: "what *should* courts do given the interpretive possibilities of the Charter's rights and freedoms?"³ Unfortunately, their analyses tend to omit consideration of the predictive question: "what are courts *likely* to do given the historical and political context in which they operate?" Factors affecting judicial decision-making that are unrelated to the Charter's interpretive possibilities are addressed only in passing, if at all. By implication these writers suggest that courts are moved to do what they do solely by the logical and conceptual cogency of arguments about the correct interpretation of Charter provisions. They ignore the difference between the possibility of interpreting rights and freedoms progressively, and the probability of persuading courts to adopt such interpretations. I believe this leads to a distorted understanding of the Charter's potential as a strategy for social change.

I want to suggest in this article that an adequate account of the role of the Charter in progressive social struggles requires going beyond prescriptive analysis to consider what courts are likely to do with the Charter

² See, for example, M. Jackman, *The Protection of Welfare Rights Under the Charter* (1988), 20 *Ottawa L. Rev.* 257 (arguing that the Charter can and should be interpreted to recognize an adequate standard of social and economic welfare); M.J. Mossman, *The Charter and Legal Aid* (1985), 1 *Journal of Law and Social Policy* 21 (arguing that the Charter offers the possibility, through sections 7, 10(b), and 15, of a right to legal aid); Parkdale Community Legal Services, *Homelessness and the Right to Shelter* (1988), 4 *Journal of Law and Social Policy* 33 (arguing that sections 7 and 15 of the Charter can be interpreted to establish a right to shelter, and to require that existing social programmes be applied equitably); D.M. Beatty, *Putting the Charter to Work* (1987) (arguing that the Charter can be used to protect disempowered people, in particular workers who are not organized). For *contra* views, see: R.A. Hasson, *What's Your Favourite Right?: The Charter and Income Maintenance Legislation* (1989), 5 *Journal of Law and Social Policy* 1 (arguing that there is little reason to believe the courts will play a positive role under the Charter in the context of social legislation and programs); J.C. Bakan, *Strange Expectations: A Review of Two Theories of Judicial Review* (1990), 35 *McGill L.J.* 439 (arguing *contra* Beatty that the courts have a history of antipathy towards workers and this is unlikely to change under the Charter).

³ I use the term "interpretive possibilities" to mean interpretations of a given Charter right or freedom that are conceptually and logically possible. I have argued elsewhere that the range of such possibilities is wide open. The vague and general expression of rights and freedoms in the Charter renders them indeterminate: a multiplicity of interpretations is conceptually and logically possible; Bakan, *loc. cit.*, footnote 1.

given their historical and political context. Any inquiry into the operation of judicial review in this context must take account of the constraints and pressures imposed upon courts by the order of social and economic relations in which they and the Charter are situated. Working out just what these constraints and pressures are is a crucial first step for understanding how the Charter might be used, on its own or in conjunction with other strategies, to pursue progressive goals, as well as how it might be used by conservative and reactionary social groups to support their regressive ambitions. This article will briefly develop the types of questions and analyses that are necessary for understanding the role of judicial review under the Charter in progressive social struggles. In particular, I will analyze three aspects of the context in which Charter litigation takes place: the ideology of formal equality, the problem of unequal access to justice, and the nature and effects of judicial ideologies.

I. *The Ideology of Formal Equality*

Historically, the development of rights and freedoms in liberal democratic states was informed by an ideology best described as "formal equality". The concepts grew out of a wider political and economic transformation from feudalism, where the "state" (as it was) directly enforced rigid and hierarchically organized relations of property and power, to capitalism, where the role of the state was reconceived as limited to the enforcement of property and contract rights. Under capitalism all individuals were to be equally free to own property and enter agreements for its exchange.⁴ The common law institutionalized this arrangement in the form of universal rights of property and contract: *everybody* was legally entitled to own property and exchange it freely. To this extent all individuals were treated as equals before the law.⁵ The common law's equality, however, was purely formal. Most people owned little more than the productive capacity of their bodies (their labour power), while a very few owned the bulk of society's wealth and productive property; and the rights of property and contract enforced and maintained this substantially unequal economic order. Thus, all individuals were treated as equals by the law, while they lived their lives in relations of radical inequality. Formal equality continues to be a pervasive ideology in the contemporary common law, but more important for our purposes, it structures the way constitutional rights and

⁴ For an excellent discussion of the development of the capitalist state, see: Stuart Hall, *The State in Question* in, D. McLennan *et al.* (eds.), *The Idea of the Modern State* (1984).

⁵ For discussions of the relationship between the rise of capitalism and developments in the common law, see: R. Weitzer, *Law and Legal Ideology: Contributions to the Genesis and Reproduction of Capitalism* (1980), 24-25 *Berkeley J. of Sociology* 137; P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979); M.J. Horwitz, *The Transformation of American Law, 1780-1860* (1977); P. Macklem, *Property Status, and Workplace Organizing* (1990), 40 *U.T.L.J.* 74.

freedoms are understood in liberal democratic states.⁶ The following sections will look at three manifestations of formal equality in the context of Charter interpretation.

A. *Overinclusion and Underinclusion*

The Charter lends itself strongly to interpretations that are structured by the idea of formal equality. Like the common law rights of property and contract, the rights and freedoms guaranteed by the Charter are universal: they are guaranteed to "everyone". The social status and economic circumstances of individuals are irrelevant in determining whether they are entitled to the protection of a right or freedom (though some rights require the person to be a citizen). Large corporations, millionaires, and unemployed persons are, for the most part, equally entitled to the Charter's rights and freedoms (though corporations are not protected under sections 7 and 15), in the same way they are equally entitled to the common law rights of property and contract. The idea of universality—that *everyone* is entitled to a given right or freedom—tends to function as a baseline assumption in the interpretive process. In determining the scope of a right or freedom, interpreters eschew differentiating between groups on the basis of their actual social power. Providing more protection to groups with less power, or less protection to groups with more power is understood as a violation of the principle of universality. This leads to a pathology of over and under inclusion: to ensure inclusion of disempowered groups within the scope of the right or freedom, powerful groups must be included (overinclusion); and to ensure exclusion of powerful groups, disempowered groups must be excluded (underinclusion).⁷ These tendencies impose a

⁶ The relationship between formal equality and constitutional rights was first noted in a critique by Marx of the constitutionalization of rights in France and the United States. According to K. Marx, *On the Jewish Question*, in Z. Colletti (ed.), *Marx's Early Writings* (1975), constitutional rights allowed only for "political emancipation", that is formally equal treatment of individuals by the state. They did not allow for "actual practical emancipation", that is emancipation from exploitative social relations. See also: B. Fine, *Young Marx's Critique of Law and the State: The Limits of Liberalism*, in B. MacLean (ed.), *The Political Economy of Crime* (1986), p. 42. For more recent discussions of the relationship between formal equality and constitutional rights, see: M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1987); H. Glasbeek and M. Mandel, *The Legalization of Politics in Advanced Capitalism* (1984), 2 *Socialist Studies* 84; J. Fudge, *The Public/Private Distinction: The Possibilities and the Limits to the Use of Charter Litigation to Further Feminist Struggles* (1987), 25 *Osgoode Hall L.J.* 485; J. Fudge, *The Violence of Abstraction: What Do We Mean by Law and Social Transformation* (unpublished manuscript, 1990); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay* (1988), 23 *Harvard Civil Rights—Civil Liberties L. Rev.* 295; S. Scheingold, *Constitutional Rights and Social Change: Civil Rights in Perspective*, in M.W. McCann and G.L. Houseman (eds.), *Judging the Constitution: Critical Essays on Judicial Law Making* (1989), p. 73.

⁷ I use the terms overinclusion and underinclusion to discuss the relationship between Charter interpretation and the relative power of actors in society. Interpretations of Charter rights and freedoms are overinclusive if they benefit powerful actors and underinclusive

substantial constraint on the utility of rights discourse in redressing actual inequalities of wealth and power.⁸ Rights and freedoms are interpreted so as to include protection of groups who do not need it, and exclude protection of groups who do.

A perusal of Charter case law reveals numerous examples of over-inclusion. One is struck by the frequent appearance of corporate complainants, and the willingness of courts to take seriously the "corporation as victim" scenario that underlies their claims.⁹ Judicial treatment of the Charter's guarantee of freedom of expression provides a good illustration of this. The laudable ideal that individuals and groups lacking political and social power should not be prohibited by the state from disseminating critical and dissident ideas to challenge dominant ideas and practices is

if they do not benefit disempowered actors. It is crucial to distinguish this use of the terminology from that found in some recent equality decisions. In these decisions the term "underinclusive" is used to describe legislation and programs that provide a benefit to one group but fail to provide the benefit to another group that is similarly situated. See: *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, (1989), 59 D.L.R. (4th) 321, and *Schacter v. Canada*, [1990] 2 F.C. 129, (1990), 66 D.L.R. (4th) 635 (C.A.). This latter understanding of the term "underinclusive" originated in J. Tussman and J. tenBroek, *The Equal Protection of the Laws* (1949), 37 Calif. Law Rev. 341.

On another point, some will argue that the Supreme Court of Canada's decision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, (1989), 56 D.L.R. (4th) 1, is an answer to my claim that formal equality affects Charter interpretation with overinclusion and underinclusion. The majority in that case held that whether a law violated section 15(1) depended on its impact, not on its form. A law which treated all groups similarly might have an unequal impact upon them, and a law that drew distinctions between groups might have an impact that promoted equality. This effectively refutes the idea that equality is achieved through facially neutral laws (formal equality), and suggests a willingness on the part of the court to look at how the law contributes to or detracts from the *actual* equality of actors. This is most clearly stated by Wilson J: "... s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society ..." (at pp. 154 (S.C.R.), 34 (D.L.R.)). See also *R. v. Turpin*, [1989] 1 S.C.R. 1296. As I will argue *infra*, however, formal equality is still manifest in the court's reasoning in *Andrews*, though not necessarily by way of overinclusion and underinclusion. Moreover, to the extent that *Andrews* may signal a willingness on the part of the court to avoid underinclusion and overinclusion in the context of s. 15(1), there appears to be some backing away from that position in *R. v. Hess and Nguyen*, [1990] 2 S.C.R. 906, where Wilson J, writing for the majority, suggests, *in arguendo*, that men, hardly a disadvantaged group, might be protected by s. 15 (at p. 928). Furthermore, there is much evidence of overinclusion and underinclusion in interpretation of other provisions of the Charter. Indeed, as will be seen in the following paragraphs, I have chosen my examples of overinclusion and underinclusion from the case law arising under s. 2 of the Charter.

⁸ See texts cited, *supra*, footnote 6.

⁹ See, for example, *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321; *R. v. Concoil Therman Corporation and Parkinson* (1986), 14 O.A.R. 255 (C.A.); *Edwards Books and Arts Ltd. v. The Queen*; *R. v. Nortown Foods Ltd.*, [1986] 2 S.C.R. 713, (1986), 35 D.L.R. (4th) 1; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, (1988), 54 D.L.R. (4th) 577; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, (1984), 11 D.L.R. (4th) 641; *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927, (1989), 58 D.L.R. (4th) 577. See A. Petter, *The Politics of the Charter* (1986), Sup. Ct. L. Rev. 473, and

much celebrated in liberal-democratic theory. In the legalized discourse of freedom of expression, however, actual relations of power among groups and individuals are usually ignored. Questions about which groups are vulnerable to state repression, and thereby need judicial protection of their freedom of expression, and which groups are not, are simply ignored: *everyone* is entitled to freedom of expression. This is inherent in the Supreme Court's interpretation of freedom of expression as protecting (subject to section 1)¹⁰ any activity that "attempts to convey a meaning",¹¹ regardless

M. Mandel, *op. cit.*, footnote 6, for discussion of some of these cases. In each case a violation of a Charter right was found. In some of the cases the legislation was upheld under s. 1. It is important to note that once a violation of a right is found, the onus of demonstrating that the impugned legislation meets the criteria of s. 1 is upon the government. The standard is a heightened balance of probabilities and, in most cases, cogent and persuasive evidence must be produced: *R. v. Oakes*, [1986] 1 S.C.R. 103, (1986), 26 D.L.R. (4th) 200 (see discussion, *infra*, footnote 15). In those cases concerning corporations where the legislation has been upheld under s. 1, it is only upheld after detailed analysis of considerable evidentiary records. It is interesting to contrast these cases to those where trade unions are concerned. In the latter cases, the court has been very lax in its application of s. 1, finding with little or no evidence that violations of workers' rights are reasonable and demonstrably justified. See: *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, (1986), 33 D.L.R. (4th) 174; *BCGEU v. Attorney General of British Columbia*, [1988] 2 S.C.R. 214, (1988), 53 D.L.R. (4th) 1; Dickson C.J.C. in *Government of Saskatchewan v. Retail, Wholesale and Department Store Union*, [1987] 1 S.C.R. 460, (1987), 38 D.L.R. (4th) 277, (hereinafter referred to as *Saskatchewan Dairy Workers*); and *Public Service Alliance of Canada v. The Queen in Right of Canada*, [1987] 1 S.C.R. 424, (1987), 38 D.L.R. (4th) 249 (hereinafter referred to as *P.S.A.C.*). These cases are discussed in relation to this point, *infra*, footnote 45.

¹⁰ On two occasions the court indicated that it is sensitive to power differentials between actors when applying s. 1 to social legislation. In *Edwards Books and Art Ltd. v. The Queen*; *R. v. Nortown Foods Ltd.*, *supra*, footnote 9, at pp. 779 (S.C.R.), 491 (D.L.R.), Dickson C.J.C., speaking for the majority, stated in his s. 1 analysis: "In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons." This passage was quoted with approval by Dickson C.J.C., Lamer J. and Wilson J. in *Irwin Toy v. Quebec*, *supra*, footnote 9, at pp. 993 (S.C.R.), 625 (D.L.R.). They also pointed out: "... in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude." (*ibid.*). Some scholars have suggested that the expression of such sentiments may indicate a shift in the court's approach to the Charter: P. Monahan and A. Petter, *Developments in Constitutional Law: The 1985-86 Term* (1987), 9 Sup. Ct. L. Rev. 69. It remains to be seen whether this is so (see discussion, *infra*, footnote 15). At the same time, the sentiments expressed in the s. 1 context do not seem to affect the formalism—and the consequent overinclusion and underinclusion—evident at the stage of interpreting rights.

¹¹ *Irwin Toy v. Quebec*, *supra*, footnote 9, at pp. 968 (S.C.R.), 606 (D.L.R.). "Activity is expressive if it attempts to convey a meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter

of *who* is attempting to convey it. Equality is presumed between all entities and individuals who are engaged in such activity, thus preventing distinctions being drawn between groups on the basis of their relative power and access to resources. Accordingly, corporate and media elites who flood the so-called "marketplace of ideas" with consumerist and conservative ideologies are protected from state regulation aimed at curbing their disproportionate and often harmful influence.¹² The original concern about state repression of disempowered and dissident groups underlying freedom of expression is thus twisted into protection of powerful actors.¹³ Overinclusion also follows from an unwillingness on the part of courts to distinguish between different contents of expression. Consideration is generally not given to questions about *what* meaning is being conveyed; indeed, courts tend to make a virtue of content blindness.¹⁴ Just as all actors are treated as equals, so are all messages. Thus, forms of expression, like pornography and hate literature, that create and support exploitative representations of women and minorities, are provided *prima facie* constitutional protection. Pornographers and hate-mongers are thereby able to claim their freedom of expression is violated by legislative restrictions on such material. To the

so as to ensure that *everyone* can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream." (Emphasis added).

¹² For discussions of how powerful actors make use of freedom of expression in a variety of contexts to enhance their power, see: H.J. Glasbeek, Comment: Entrenchment of Freedom of Speech for the Press—Fettering of Freedom of Speech of the People, in P. Anisman and A.M. Linden, *The Media and the Courts* (1986), p. 101; O.M. Fiss, Free Speech and Social Structure, in J. Lobel (ed.), *A Less Than Perfect Union: Alternative Perspectives on the U.S. Constitution* (1988), p. 346; A.C. Hutchinson, *Talking the Good Life: From Free Speech to Democratic Dialogue* (1989), 1 *Yale J. of Law and Liberation* 17; P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (1987), pp. 132-135; D. Kairys, *Exporting Freedom of Speech*, in J. Lobel (ed.), *ibid.*, p. 387.

¹³ *Ibid.*

¹⁴ Such sentiments can be found in the reasons of Dickson C.J.C., Lamer and Wilson J.J. in *Irwin Toy v. Quebec*, *supra*, footnote 9, at pp. 969 (S.C.R.), 607 (D.L.R.):

We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee.

See also: *R. v. Keegstra*, [1991] 2 W.W.R. (S.C.C.); *Canada (Canadian Human Rights Commission) v. Taylor* (1990), 75 D.L.R. (4th) 577 (S.C.C.); *R. v. Andrews* (1990), 77 D.L.R. (4th) 128 (S.C.C.); *Committee for the Commonwealth v. Canada* (1991), 77 D.L.R. (4th) 385 (S.C.C.). However, the court has considered the relative value and importance of different kinds of expression in applying section 1 of the Charter: see, for example, *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232, at p. 247, (1990), 71 D.L.R. (4th) 68, at p. 79; *Reference re ss. 193 and 195(1)(c) of Criminal Code*, [1990] 1 S.C.R. 1123, (1990), 56 C.C.C. (3d) 65; *R. v. Skinner*, [1990] 1 S.C.R. 1235; *R. v. Stagiutta*, [1990] 1 S.C.R. 1226.

extent they are successful, the Charter's guarantee of freedom of expression will contribute to sexist and racist hegemony in Canada.¹⁵

Underinclusion is illustrated by the reasoning in a series of decisions of the Supreme Court of Canada concerning freedom of association and strikes and collective bargaining.¹⁶ In these cases unions claimed that permanent and temporary restrictions on strike activity violated the Charter's guarantee of freedom of association. Such restrictions, they argued, prohibited forms of collective action that are essential for allowing workers a degree of bargaining power in the inherently unequal employment relationship.¹⁷ In responding to this argument LeDain J. refused to interpret freedom of association in terms of the particular concerns of working people and the unions representing them. According to him, the interpretation of freedom of association had to be universal: "... it is essential to keep

¹⁵ Examples of such overinclusiveness can be found in *American Booksellers Association v. Hudnut*, 771 F. 2d 323 (7th Cir., 1985), aff'd 106 S. Ct. 1172 (1986), (striking down anti-pornography legislation), and *R. v. Keegstra* (1988), 39 C.R.R. 5 (Alta. C.A.) (striking down anti-hate literature legislation). Examples can also be found in the interpretations of s. 2(b) by courts in cases where the court finds a violation of s. 2(b) but upholds the impugned legislation under s. 1: see *R. v. Keegstra*, *supra*, footnote 14 (upholding anti-hate literature legislation under section 1); *R. v. Andrews*, *supra*, footnote 14; *Canada (C.H.R.C.) v. Taylor*, *supra*, footnote 14; and *R. v. Red Hot Video Ltd.* (1985), 18 C.C.C. (3d) 1 (B.C.C.A.) (upholding anti-obscenity legislation under section 1). Some people have relied upon cases like *Keegstra* and *Red Hot Video*, along with *Irwin Toy v. Quebec*, *supra*, footnote 9, and *Edwards Books and Arts Ltd.*, *supra*, footnote 9, to argue that we need not be alarmed by the effects of expression on the regulation of hate literature and pornography. They point out that courts are likely to rely upon section 1 to uphold such regulation. I am not so sanguine. The scope of "reasonable limits" within the judicial interpretive community (see Part III, *infra*) is likely at best to reflect the current scope of regulatory regimes. The cases in which courts have found limits on pornography and hate literature to be reasonable involved legislation that was quite narrow in its impact. What if a government decided to do something quite radical in regulating oppressive forms of expression? An example might be found in the Ontario NDP's promise to tighten up restrictions on sexist stereotyping in beer commercials and other forms of advertising. In fulfilling this promise, it will have to stay within its best guess of what the judiciary is likely to find "reasonable", or run the risk of having its legislation struck down by a court.

¹⁶ The cases are: *Reference re Public Service Act, Labour Relations Act and Police Officers Collective Bargaining Act*, [1987] 1 S.C.R. 313, (1987), 38 D.L.R. (4th) 161 (hereinafter referred to as the *Alberta Reference*); *P.S.A.C. v. The Queen*, *supra*, footnote 9; *Government of Saskatchewan v. R.W.D.S.U.*, *supra*, footnote 9. In each case a majority of the court refused to accord strike activity the protection of s. 2(d) of the Charter (freedom of association). In a more recent case the court relied on these cases to justify excluding collective bargaining from the scope of section 2(d): see *Professional Institute of the Public Service of Canada v. Commissioner of the Northwest Territories*, [1990] 2 S.C.R. 367, (1990), 72 D.L.R. (4th) 1.

¹⁷ These claims, and the regime of collective bargaining they support are, of course, direct challenges to the ideology of formal equality inherent in the notion of freedom of contract (noted *supra*). One of the reasons behind the legislative creation of rights to strike and bargain collectively was to remedy the gross imbalance of power between the individual employee and the employer.

in mind that this concept [freedom of association] must be applied to a wide range of associations and organizations of a political, religious, social or economic nature, with a variety of objects, as well as activity by which the objects may be pursued."¹⁸ McIntyre J., in concurring reasons, added associations of property owners, commercial actors and gun clubs to the list of associations whose activities would have to be protected if the activities of unions were protected.¹⁹ Thus, in the same way all expression had to be treated equally in the above examples, here all associations had to be treated equally, regardless of who they were or what they did. Unlike in the freedom of expression examples, however, the result in these cases was underinclusion, not overinclusion. The majority judges argued that freedom of association could not be interpreted to include protection of the essential activities of unions as this would have required protecting the essential activities of *all* associations. In other words, unions had to be excluded to ensure other associations would not be included.

B. Application of the Charter

A second indicia of formal equality in Charter interpretation relates to the scope of application of the Charter. As we have seen, formal equality abstracts individuals out of their concrete social relations of inequality and portrays them as formal equals. This leads logically to the proposition that individuals do not coerce one another: if they are all equal and free, then existing social relations must be the product of choice and consent. It then follows that the only threat to individual rights and freedoms—the only potentially coercive force in people's lives—is the state. State action is understood as an imposition upon a natural order of choice, consent and freedom. The Supreme Court has premised its decisions concerning the Charter's scope of application on this understanding.²⁰ According to the court, only the state has duties corresponding to the Charter's rights and freedoms. Thus, individuals are protected by the Charter only from state action, not from the action of anybody else. Private entities, like corporations, landlords and employers among others, are left free of Charter scrutiny. This is a significant limitation given that most coercion in people's lives is at the hands of private entities, exercising their common

¹⁸ Reference re Public Service Act, Labour Relations Act and Police Officers Collective Bargaining Act, *supra*, footnote 16, at pp. 390 (S.C.R.), 239 (D.L.R.).

¹⁹ *Ibid.*, at pp. 404-405 (S.C.R.), 225-226 (D.L.R.).

²⁰ In both *R.W.D.S.U., Local 580 v. Dolphin Delivery*, *supra*, footnote 9, and *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, (1989), 62 D.L.R. (4th) 634, Charter claims were made in disputes between two private entities, a trade union and employer in the former, and a pregnant woman and a man seeking to enjoin her from having an abortion in the latter. In each case the court held that the defendant had no duties corresponding to Charter rights and freedoms because it (he) was not a government actor. This approach is affirmed in *McKinney v. University of Guelph* (1990), 76 D.L.R. (4th) 545.

law created and enforced rights of ownership, control and exchange of property.²¹

C. *Excluding the State as Protector of Rights and Freedoms*

The premise that the Charter protects individuals only from state action has consequences going beyond the question "upon whom does the Charter impose duties?" It relates as well to the question "what kind of duties are created by the Charter?" Some writers have suggested that the Charter imposes positive duties on government; duties to take remedial action against unequal social relations. Unfortunately this view is contradicted by the premise that the Charter protects individuals only *from* state action, from which it follows that the Charter does not require the state to protect individuals *through* its action. Underlying this exclusion of positive duties is the ideology of formal equality. Once it is assumed that all individuals are equal, an interpretation of the Charter requiring the state to address inequality is unintelligible. Thus, accepting formal equality precludes viewing the Charter as a potential remedy for state inaction, and limits it to curtailing state action. This logic is evident in the Supreme Court's interpretation of section 15. According to McIntyre J. (with whom the majority agreed on this point):²²

[Section 15] is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law.

In other words, section 15 is reactive to "the application of law". It cannot be relied upon to enjoin the state to pass laws or create programs that are aimed at ensuring "equality between individuals or groups within society".²³

²¹ For a detailed analysis of this point in the context of *R.W.D.S.U., Local 580 v. Dolphin Delivery*, *supra*, footnote 9, see A.C. Hutchinson and A. Petter, *Private Rights/Public Wrongs: The Liberal Lie of the Charter* (1988), 38 U.T.L.J. 278. See also Fudge, *op. cit.*, footnote 6.

²² *Andrews v. Law Society of British Columbia*, *supra*, footnote 7, at pp. 163-163 (S.C.R.), 9-10 (D.L.R.). McIntyre J. also states, *ibid.*, at pp. 175 (S.C.R.), 18 (D.L.R.): "discrimination in section 15(1) is limited to discrimination caused by the application or operation of law . . ." Gwen Brodsky and Shelagh Day argue, correctly in my view, that this approach imposes a substantial limitation on the potential of the Charter to address gender inequality: *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back* (1989), p. 280.

²³ Two arguments are often made in response to scepticism about the potential for courts to use the Charter to require state action. First, people point to s. 15(2) of the Charter as if it were an answer to such scepticism. The difficulty with this approach is that s. 15(2) does nothing more than protect affirmative state programs from s. 15(1) of the Charter. It cannot plausibly be read to require such programs. Secondly, people point to the decision of the Federal Court of Appeal in *Schacter v. Canada*, *supra*, footnote 7, as an indication of the courts' willingness to fashion positive remedies for violations of rights. The appellant in that case (Canada) conceded that s. 32 of the Unemployment

The debate about abortion provides an interesting example of how rights discourse is limited by this understanding. The majority judgments in *R. v. Morgentaler*²⁴ made it clear that "security of the person" (section 7) was violated when the state criminally prohibited women from having abortions. Consistent with McIntyre J.'s approach to equality rights in *Andrews*,²⁵ the majority in *Morgentaler* assumed the guarantee of security of the person could only be violated by direct state interference with individual choice. Beetz J. was explicit on this point when he said:²⁶

Generally speaking, the constitutional right to security of the person must include some protection from state interference when a person's life or health is in danger. The *Charter* does not, needless to say, protect men and women from even the most serious misfortunes of nature. Section 7 cannot be invoked simply because a person's life or health is in danger. The state can obviously not be said to have violated, for example, a pregnant woman's security of the person simply on the basis that her pregnancy in and of itself represents a danger to her life or health. There must be state intervention for "security of the person" in s. 7 to be violated.

Thus, only if the state prohibits an individual who is sick or in need of an abortion from getting treatment, will there be a violation of that individual's security of the person under section 7. The state would not be required by section 7 to take positive action that ensured women access to safe abortions, and, more generally, all people access to health care.

Insurance Act violated s. 15(1) of the Charter because it provided certain child care benefits to adoptive parents but not to natural parents. It was argued by the appellant, however, that the only possible remedy was to declare the benefit scheme of no force or effect (under s. 52 of the Constitution Act, 1982), thus putting adoptive and natural parents on an equal footing by depriving adoptive parents of the benefit. The respondent (Schacter) and the intervenor (LEAF) argued for upholding the trial judge's order which extended the benefit to natural parents (under s. 24 of the Charter). A majority of the Court of Appeal agreed with the latter approach and dismissed the appeal. They were of the view that subsection 15(1) could "only be guaranteed by the fashioning of a positive remedy" (*supra*, footnote 7, at pp. 142 (F.C.), 644 (D.L.R.)); and the appropriate positive remedy was to extend benefits to natural parents rather than take them away from adoptive parents. There is, however, nothing in this decision suggesting that s. 15(1), or any other Charter provision, requires the state to take action against inequality in social and economic relations. The Court of Appeal's reasons require only that if the state provides a benefit to one group, then it provide that benefit to similarly situated groups: "Section 32 [of the Unemployment Insurance Act] is defective . . . because neither it nor any other part of the Act goes far enough in equally providing benefits to others similarly situated . . ." (*ibid.*, at pp. 137 (F.C.), 640 (D.L.R.), quoting with approval the trial judge). There is no duty on the state to provide the benefit in the first place, nor to continue to provide it (at pp. 150 (F.C.), 651 (D.L.R.)). Thus, *Schacter* is consistent with the holding in *Andrews v. Law Society of British Columbia*, *supra*, footnote 7, that the Charter does not require state action. Rather, it only imposes limits on how the state can act if it decides to act. The Court of Appeal explicitly adopts this view in quoting, *ibid.*, at pp. 141 (F.C.), 644 (D.L.R.), the following passage from *Andrews*: "It [subsection 15(1)] is an all encompassing right governing all legislative action." (Emphasis added).

²⁴ [1988] 1 S.C.R. 30, (1988), 44 D.L.R. (4th) 385.

²⁵ *Supra*, footnote 7.

²⁶ *Supra*, footnote 24, at pp. 90 (S.C.R.), 428 (D.L.R.).

Moreover, the approach adopted in *Morgentaler* would exclude *a fortiori* interpretations of section 7 that required the state to socialize some or all of the costs of reproduction, thereby ensuring that women who want to go through with their pregnancies are not precluded from doing so by the prohibitive costs of child rearing.

II. Unequal Access to Justice

To this point we have focused on how rights discourse is structured by formal equality and the limits this imposes on the Charter's use in progressive social struggles. Further difficulties are presented by the nature of the judicial system responsible for providing authoritative interpretations of the Charter. In the first place, access to the courts is unequal. It is a trite observation that litigation is very expensive. Although everybody is formally entitled to litigate, only very few can actually afford to litigate even the simplest claim. The oppressed and disempowered groups who are the supposed beneficiaries of progressive Charter litigation will, because of their lack of resources, be the least likely to have genuine access to the courts. Charter litigation is particularly costly because a litigant will be required to counter the substantial evidential records that are often adduced by the government under section 1, and because of the likelihood of multiple appeals.²⁷ Finally, even if one is able to enter the Charter litigation process, the lawyers on the other side of the case, whether representing business or government, will have more resources, in terms of such things as time, research capacity and staff, to fight the case, because their clients can afford to pay. Thus they will enjoy a substantial advantage in Charter cases.²⁸

III. Judicial Ideology

A further difficulty encountered by progressive lawyers engaged in Charter litigation is the affinity between attitudes and beliefs of judges and the interests of litigants who represent the social and economic elite. Judges

²⁷ There are, of course, examples of state funding for Charter litigation, but such funding is normally not available to agencies pursuing programs that threaten the *status quo* or those that engage in political activity and organizing as part of their strategy. See: H.J. Glasbeek, *Some Strategies For an Unlikely Task: The Progressive Use of Law* (1989), 21 *Ottawa Law Rev.* 387.

²⁸ Glasbeek, *ibid.*, at pp. 7-8. See also S. Wexler, *Practicing Law for Poor People* (1970), 79 *Yale L.J.* 1006.

²⁹ There is a vast literature in the field of sociology of law that deals with the relationship between law and dominant ideologies in the context of adjudication. Some helpful studies in the area are: S. Gavigan, *Law, Gender and Ideology*, in A.F. Bayefsky, *Legal Theory Meets Legal Practice* (1988), p. 283; R. Cotterrell, *The Sociology of Law: An Introduction* (1984); A. Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law* (1985), 19 *Law and Society Rev.* 11; R. Martin, *Ideology and Judging in the Supreme Court of Canada* (1988), 26 *Osgoode Hall L.J.* 797; M. Kline, *Child Welfare Law, Ideology and First Nations* (1991, LL.M. Thesis, Osgoode Hall Law School).

will normally unquestioningly and uncritically rely upon dominant ideologies in the process of characterizing disputes and interpreting legal texts.²⁹ By "dominant ideologies" I mean the web of premises, frameworks, images, and "common sense" that are presented as natural, necessary and beyond question by dominant knowledge-producing institutions (for example, schools, universities, mass media, corporate advertising). These ideologies are not random. They take for granted the desirability of prevailing institutions of social relations, such as private ownership of property, wage labour, or the "family", and thus serve to legitimate these institutions and establish a presumption against other forms of social relations.³⁰ We hear time and again that judges see the world through dominant ideological lenses because of their elite backgrounds and social positions.³¹ We hear this a lot because it is most often true. Judges are for the most part white, male, wealthy, and they are always lawyers. Biographies and statistics demonstrate convincingly that members of the judiciary do not represent the Canadian population, not in terms of class, race, ethnicity, gender, culture or education. Recent data suggest women constitute less than fifteen per cent of the federally appointed judiciary in all jurisdictions.³² The representation of members of visible minorities on the bench has been, and continues to be, even lower than that of women.³³ This is not surprising

³⁰ We saw above that the ideological connection between rights and formal equality was related to the development of rights within a particular set of social and economic relations; namely, capitalism. The relationship between dominant ideologies and social relations is central as well to discussions about law and what I will call "judicial ideology". By "judicial ideology" I mean ideologies that are not part of the *form* of law—like formal equality and rights—but are formally external to the law, and brought into the law through the adjudicative process. Gavigan, *ibid.*, p. 292, has captured the distinction between these two different ways that law is related to ideology in the following passage:

There are two levels of inquiry, which may be coextensive. The first is a question of identifying the ideological nature of legal doctrine and principles: 'equality', 'best interests of the child', 'community standards' and so on. The second, equally important, inquiry involves identifying the extent to which the judiciary itself employs 'ideological thought' (which is formally external to the law) but which is then incorporated into legal doctrine and becomes virtually unassailable.

³¹ For general discussions of this point, see Bakan, *loc. cit.*, footnote 1; J.C. Bakan, *Partiality and Legitimacy in Constitutional Theory* (1989), 4 Legal Theory Workshop Series; P. Brest, *Interpretation and Interest* (1982), 34 *Stan. L. Rev.* 765; J.A.G. Griffith, *The Politics of the Judiciary* (1981); D. Olsen, *The State Elites*, in Leo Panitch (ed.), *The Canadian State: Political Economy and Political Power* (1977), p. 199; Petter, *loc. cit.*, footnote 9.

³² Breakdown by jurisdiction of federally appointed women judges: Federal Courts (14%); Alta. (12%); B.C. (9%); Man. (12.5%); N.B. (3%); Nfld. (7%); N.W.T. (0%); N.S. (7%); Ont. (8%); P.E.I. (12.5%); Que. (8%); Sask. (9.5%); Yukon (0%). Looking at the country as a whole there are seventy-five women among 854 federally-appointed judges (information as of April 1, 1990, provided by the Constituency Office of the Minister of Justice, Kim Campbell, P.C., M.P.).

³³ On the basis of informal interviews with chief justices' secretaries in the provincial and superior courts of the four western provinces, there was a combined total of seven

given that the substantial majority of appointments to the bench are from the elite strata of private practice where, because of systemic discrimination within the legal profession, women and members of visible minorities are under-represented.³⁴ The elite strata of the legal profession also tend to exclude lawyers who practice poverty law, union side labour law, and those involved in other forms of progressive or activist practice. Finally, in addition to these more "subtle" factors, political patronage continues to be a major factor in judicial appointments, with the percentage of appointments by the Mulroney government of persons with known connections to the Progressive Conservative party ranging from a high of eighty-eight per cent in Manitoba, to a low of thirty-one per cent in British Columbia.³⁵

The homogeneity of the judiciary is also closely tied to that of law school student populations. To be a judge, one must be a lawyer, and, to be a lawyer, one must go to law school. The great majority of students at law schools are white and from middle class or wealthy backgrounds.³⁶ Until quite recently women students were substantially under-represented as well. (The large majority of law professors continue to be white and male). That law students tend to come from wealthy backgrounds is not surprising when one takes account of certain structural features of legal education. Wealthy individuals are better situated, in terms of pre-law educational opportunities and financial support while at university, to get

provincial and superior court judges in these jurisdictions who are members of visible minority groups as of April 30, 1990.

³⁴ As noted in *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research in Education in Law* (1983), p. 19: "... law study and law practice are effectively beyond the reach of many able but disadvantaged groups". For example, in 1988 women accounted for only twenty per cent of all lawyers in Canada: N. Boughton, *Rock a Bye Lawyer*, *Canadian Lawyer* (October 1988), p. 8.

³⁵ Altogether, Russell and Ziegel report that forty-eight per cent of the 225 federal judicial appointments under Mulroney have been of persons with known connections to the Progressive Conservative Party; P. Russell and J.S. Ziegel, *Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments* (1989), Table 16. With respect to provincial appointments, the Canadian Bar Association has reported that "political favoritism has played no part in appointments" of provincial court judges in Alberta, B.C., Newfoundland, Saskatchewan, and the Northwest Territories. It should be noted, however, that the Canadian Bar Association compiled its data from statements made by judges and politicians. See the Canadian Bar Association Committee Report: *The Appointment of Judges in Canada* (1985), pp. 37-38, 57-58.

³⁶ A 1989 study by the Canadian Financial Aid Project found that sixty-five per cent of the 1718 law students surveyed indicated that their parents earned over \$45,000 annually. The greatest percentage of students' parents (37.1%) earned over \$75,000 annually (Summary of Questionnaires, p. 12). A 1988 survey of incoming students to Osgoode Hall Law School found that sixty-five per cent reported family incomes in excess of \$60,000, thirty-seven per cent in excess of \$100,000, and seven per cent in excess of \$250,000. Eighty-five per cent of these students were white. Survey by Professor Neil Brooks, Osgoode Hall Law School, York University.

the kind of marks required for admission to law schools. Furthermore, it is nearly impossible for a student to be financially self-sufficient during law school. The work-load is heavy and students must take a full course load each term to finish in three years. Part-time law programs are rare, and those that exist are very limited in scope. This makes it difficult, if not impossible, for students to support themselves financially during law school, and filters out those who cannot afford to be unemployed for three years.

The factors discussed to this point—judicial appointments, the legal profession and legal education—combine to channel into judicial positions individuals from the elite strata of society. It is therefore not surprising to find that judges tend to share beliefs, values and perspectives that roughly reflect, or at least are not contrary to, the dominant social ideologies of the society in which they operate. Indeed, dominant ideologies play a central role in adjudication.³⁷ An example of their operation can be found in the Supreme Court of Canada's reasoning in the trilogy of cases decided under the Charter concerning labour relations.³⁸ Throughout the development of capitalism, working class political action has been constructed ideologically as violent, irrational and harmful to the "public interest".³⁹ Such negative imagery has been regularly relied upon by the state and employers to legitimate initiatives against workers' collective actions. The courts have been leaders in this regard, consistently relying upon anti-union rhetoric to justify fashioning generous remedies for employers involved in labour disputes.⁴⁰ Nothing much has changed with the Charter.⁴¹ In

³⁷ See texts discussed *supra*, footnote 29.

³⁸ These cases are the "right to strike" and picketing cases cited, *supra*, footnotes 9 and 17.

³⁹ This continues to be true today. For an interesting discussion of the distorted coverage of labour relations by the North American mass media, see: M. Parenti, *Inventing Reality: The Politics of the Mass Media* (1986), chapter 5.

⁴⁰ For discussions of this point, see: H. Arthurs, *The Right to Play Golf* (1988), 13 Queen's L.J. 17; J.A. Manwaring, *Legitimacy in Labour Relations: The Courts, The British Columbia Labour Relation Board and Secondary Picketing* (1982), 20 Osgoode Hall L.J. 274; J. Finkelman, *The Law of Picketing in Canada* (1937-38), 2 U.T.L.J. 67, at p. 344; H. Arthurs, *Tort Liability for Strikes in Canada* (1960), 38 Can. Bar Rev. 246; B. Laskin, *Picketing: A Comparison of Certain Canadian and American Doctrines* (1937), 15 Can. Bar Rev. 10; W. Holt, *Tilt* (1984), 52 George Washington L. Rev. 280; W. Holt, *Labour Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication* (1984), 22 Osgoode Hall L.J. 591; E.A. Jones, *Picketing and Coercion: A Jurisprudence of Epithets* (1953), 39 Virginia L. Rev. 1023; D. Avery, *Images of Violence in Labour Relations Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921* (1988-89), 37 Buffalo L. Rev. 1.

⁴¹ The emergence of anti-union ideology in Charter adjudication has been noted and analysed in the following pieces: J. Fudge, *Labour, The New Constitution and Old Style Liberalism*, in *Labour Law Under the Charter* (1988), at p. 61; H.J. Glasbeek, *Contempt for Workers* (1990), 28 Osgoode Hall L.J. 1; B. Etherington, *Note on Dolphin Delivery* (1987), 66 Can. Bar Rev. 818; J.R. Manwaring, *Bringing the Common Law to the Bar*

each of the labour cases decided under the Charter, majorities of the court unquestioningly accepted dominant ideological constructions of strikes and picketing and relied upon them to reject arguments for constitutional protection of these activities. For example, in the court's view, workers are irrational, coercive and potentially violent;⁴² their collective activities should not be characterized as fundamental rights, but as mere privileges, granted by the legislature and subject to being revoked;⁴³ uninterrupted

of Justice: A Comment on the Decision in the Case of *Dolphin Delivery* (1987), 19 Ottawa L. Rev. 413; M. MacNeil, Courts and Liberal Ideology: An Analysis of the Application of the Charter to Some Labour Issues (1989), 34 McGill L.J. 87; Bakan, *loc. cit.*, footnote 1; P. Macklem, Developments in Employment Law: The 1988-89 Term (1990), 1 (2d) S.C.L. Rev. 405.

⁴² The majority judgment in *B.C.G.E.U.*, *supra*, footnote 9, suggests that workers respond to picket lines in an automatic, unthinking and irrational way. The majority states that "[p]icketing sends a strong and automatic signal" (at pp. 231 (S.C.R.), 13 (D.L.R.)), and cites (at pp. 232 (S.C.R.), 13 (D.L.R.)) with approval Paul Weiler's statement (Reconcilable Differences (1980), p. 79) that, in British Columbia, a picket line addressed to unionized workers generates an "automatic, almost Pavlovian" response. It also cites with approval Stewart J.'s view, in *Heather Hill Appliances Ltd. v. McCormack* (1965), 52 D.L.R. (2d) 292, at p. 293, [1966] 1 O.R. 12, at p. 13 (Ont. H.C.), that the decision by an individual to respect a picket line is a matter of "faith and morals and an obligation of conscience . . . and this commandment is obeyed not only by fellow employees of the picketers but by all true believers who belong to other trade unions which may have no quarrel at all with the employer who is picketed". In other words, it is more a matter of religious zeal than rational deliberation. Images of coercion are also rife in the majority judgment in *B.C.G.E.U.*, at pp. 231-232 (S.C.R.), 13-14 (D.L.R.): "[a] picket line has great power of influence as a form of coercion"; "[a] picket line in both intention and effect, is a barrier"; it "set[s] up a barricade". All of this despite the fact that there was nothing in the factual record of the *B.C.G.E.U.* case suggesting public access to the courts was actually impeded by the pickets: H.J. Glasbeek, *loc. cit.*, footnote 41. Finally, the Supreme Court has in its Charter/labour decisions relied on and reinforced the imagery of workers as violent. According to the court in *Dolphin Delivery*, *supra*, footnote 9, at pp. 586 (S.C.R.), 186 (D.L.R.), picketing has "some element of expression". It hastens to add, however, at pp. 588 (S.C.R.), 187 (D.L.R.), that "freedom [of expression], of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct." The linking together of picketing and the potential for violence leaves the impression that picketing is at least as likely to be violent as it is to be peaceful. This impression is further reinforced by the way the judgment of Dickson C.J.C., Lamer and Wilson JJ. in *Irwin Toy*, *supra*, footnote 9, at pp. 213 (S.C.R.), 607 (D.L.R.), lumps together a discussion of picketing with its observation that neither murder nor rape would constitute forms of expression.

⁴³ Both majority judgments in the *Alberta Reference*, *supra*, footnote 16, suggest that workers' collective action is better characterized as a privilege than a fundamental right or freedom. For LeDain J., at pp. 391 (S.C.R.), 240 (D.L.R.), "the modern rights to bargain collectively and to strike" are "the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise"—they "are not fundamental rights or freedoms". Similarly, in McIntyre J.'s view, at pp. 413 (S.C.R.), 232 (D.L.R.), the legislative right to strike has not "become so much a part of our social and historical traditions that it has acquired the status of an immutable, fundamental right"; it "has always been the subject of legislative control".

production serves the public interest, while unions serve only the narrow economic interests of their members;⁴⁴ and, accordingly, government should be trusted and deferred to when controlling unions, not held to the high standards of Charter scrutiny that have been deemed appropriate in other areas.⁴⁵

⁴⁴ In *Dolphin Delivery*, *supra*, footnote 9, McIntyre J., writing for the majority, held that secondary picketing, which was protected under s. 2(b) of the Charter, could be restricted under s. 1. The premise underlying his reasoning was that any interference with the production of goods and services was contrary to the "public interest", and it was therefore necessary that unions be restricted in terms of activities that could lead to such interference. As he points out, *ibid.*, at pp. 591 (S.C.R.), 189 (D.L.R.), "[i]t is . . . necessary in the general social interest that picketing be regulated and sometimes limited". For further discussion of this point, see Bakan, *loc. cit.*, footnote 1, at pp. 175-176; Etherington, *loc. cit.*, footnote 41; Manwaring, *loc. cit.*, footnote 41. The idea of union activities being counter to the "public interest" can be found as well in Dickson C.J.C.'s discussion of what is an "essential service" where he defines the concept in very broad terms and thereby creates a wide scope of justification for governments wishing to limit strikes: *Saskatchewan Dairy Workers*, *supra*, footnote 9, at pp. 476 (S.C.R.), 287 (D.L.R.). Wilson J. criticizes Dickson C.J.C. on this point, *ibid.*, at pp. 487-488 (S.C.R.), 296 (D.L.R.). For a general discussion of judicial understandings of the "public interest" in the context of labour relations, see Griffith, *op. cit.*, footnote 31, pp. 202-207. The corollary to unions acting *against* the public interest is that they act in their own self interest. This understanding is apparent in the following statement by McIntyre J. in the *Alberta Reference*, *supra*, footnote 16, at pp. 412 (S.C.R.), 231 (D.L.R.): "Since trade unions are not one of the groups specifically mentioned by the Charter, and are overwhelmingly, though not exclusively, concerned with the economic interests of their members, it would run counter to the overall structure and approach of the Charter to accord by implication special constitutional rights to trade unions."

⁴⁵ This happens in two ways. First, the right or freedom in issue is interpreted narrowly and restrictively against the union, contrary to the court's exhortations in other cases (for example, *Hunter v. Southam Inc.*, *supra*, footnote 9; *R. v. Big M Drug Mart*, *supra*, footnote 9) that rights and freedoms be interpreted in broad, liberal and remedial terms. The majority judgments in the *Alberta Reference*, *supra*, footnote 16, are examples of such narrow and restrictive interpretations. In their judgments, LeDain J. and McIntyre J. refuse to interpret freedom of association to include protection of strikes. Each judge explicitly emphasizes the importance of deferring to the legislature in the context of labour relations. See Bakan, *loc. cit.*, footnote 1, at p. 179. Secondly, where the union is engaged in activities that are found to be protected by a right or freedom, the court or judge easily finds that a limitation on the right or freedom is justified under s. 1, contrary to the rigorous standards for the s. 1 inquiry established in *R. v. Oakes*, *supra*, footnote 9, and applied in other cases. Examples can be found in the court's decisions in *Dolphin Delivery*, *supra*, footnote 9, and *B.C.G.E.U.*, *supra*, footnote 9. In each case the majority judgment finds that restrictions on picketing violate freedom of expression. And in each case, with very little reasoning or argument, and virtually no evidence, the majority upholds the restriction under s. 1. The ease with which restrictions on freedom of expression are upheld by the court under s. 1 in the context of picketing is discussed in the following pieces: Bakan, *loc. cit.*, footnote 1, at pp. 172-173; Glasbeek, *loc. cit.*, footnote 41, at pp. 35-36; MacNeil, *loc. cit.*, footnote 41; Etherington, *loc. cit.*, footnote 41. A further example of deference by judges to anti-union initiatives by the government can be found in Dickson C.J.C.'s decisions in the three "right to strike" cases. In *P.S.A.C.*, *supra*, footnote 9, and *Saskatchewan Dairy Workers*, *supra*, footnote 9, in particular, he readily allowed under s. 1—in the absence of "cogent and persuasive" evidence (a requirement established in *Oakes*)—for legislative obliteration of rights he had held to be fundamental in the strongest terms in the *Alberta Reference*, *supra*, footnote 16.

IV. *Anti-Scepticism*

On the basis of the above analysis, I want to suggest that the ideology of formal equality pervasive in dominant understandings of rights and freedoms, combined with the inaccessibility to and conservatism of the judicial system, render improbable acceptance by the courts of progressive interpretations of the Charter. No doubt this is a sceptical conclusion about the Charter's potential in social struggles, but scepticism is preferable, in my view, to false optimism. While ignorance may be bliss, it is a not a good basis for developing strategies about struggles for social change. Nonetheless, there are those who persist in advocating optimism and faith. Maintaining such an attitude requires ignoring aspects of judicial review (like those we have looked at) that might generate scepticism. Charter optimists are rather good at this and invite others to join them. David Beatty, for example, suggests that one way "to allay the doubts of those who are instinctively suspicious of judicial review" is "to portray constitutional review in its best light".⁴⁶ Look at it for what it might be, not what it is. Consequently, if the actual practice of judicial review does not live up to the ideal, ignore the practice. In this spirit, Beatty has explained the consistently anti-union decisions of the court under the Charter by pointing out that, *if* these cases had been "decided properly", *then* they would have demonstrated the utility of the Charter in protecting the interests of working people.⁴⁷ The logic of this approach is akin to that of the old Yiddish aphorism: "If my grandmother had wheels she would have been a trolley car".⁴⁸ One cannot deduce from Beatty's logic that judicial review under the Charter *does* protect the interests of working people anymore than one can deduce from the logic of the aphorism that grandmothers have wheels. Nor does Beatty's logic answer the claim that courts are unlikely to protect the interests of working people given their historical and political tendencies. Portraying judicial review in its "best light" appears to mean ignoring factual analysis rather than dealing with it. Beatty is not alone in this type of reasoning. According to Brian Langille, while recent decisions of the court are "substandard in many ways ... [and] deserve criticism along many dimensions",⁴⁹ this does not justify criticism of judicial review as a whole. Rather, the institution of judicial

⁴⁶ D.M. Beatty and S. Kennet, *Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies* (1988), 67 Can. Bar Rev. 573, at p. 574 (characterizing Beatty's argument in *Putting the Charter to Work*, *op. cit.*, footnote 2).

⁴⁷ *Ibid.*, at pp. 581-584, 616.

⁴⁸ For a more extended discussion of the relationship between Beatty's work and Yiddish aphorisms, see: Bakan, *loc. cit.*, footnote 2.

⁴⁹ B. Langille, *Revolution Without Foundation: The Grammar of Scepticism and Law* (1988), 33 McGill L.J. 451, at p. 475. See also, B. Langille, *The Jurisprudence of Despair, Again* (1989), 23 U.B.C.L.J. 549. For a critique of Langille's argument, see: Bakan, *loc. cit.*, footnote 1, at pp. 185-191; A.C. Hutchinson, *That's Just the Way it Is: Langille on Law* (1989), 34 McGill L.J. 145; R. Coombe, *Same As It Ever Was: Rethinking the Politics of Legal Interpretation* (1989), 34 McGill L.J. 603, at pp. 635-642.

review should be the assumed framework for argument and criticism of a prescriptive nature: if you do not like a decision under the Charter, your criticism of it should be formulated within the "language game" or "form of life"—the rules, principles, methodologies—that constitute the institution of judicial review. In Langille's view, this kind of internal prescriptive criticism is appropriate and effective while external forms of analysis (those that emphasize description and prediction) are irrelevant, and possibly even illegitimate. Critics should, in his view, be dissuaded—for their own good—from doing it.⁵⁰

In short, Langille and Beatty suggest that legal analysts think *within* law, and avoid thinking *about* law as an historical and political phenomenon. I believe this is a fatal prescription for those interested in the role and potential of law in struggles for social transformation. Ignorance of the history and politics of judicial review—its reality—is a poor departure point for understanding its strategic importance, or lack thereof, in social struggles. As well, Beatty's and Langille's prescription has disturbing implications for legal scholarship. The suggestion (explicitly made by Langille) that legal scholars *should not* pursue lines of inquiry that take them outside the accepted conventions of the legal "form of life" is rather chilling in a university environment, where the credo is to pursue knowledge through relentless questioning, and where scepticism is a virtue. One of the most exciting developments in modern legal studies is the reliance by many scholars on insights and methodologies of disciplines outside of law to develop critical accounts of law. Such scholars have chosen to work within and among these other disciplines—these other "forms of life"—to construct analyses of law that are richer and more complex than those available within the constraints of legal thought.⁵¹ Taking Langille seriously means viewing such endeavours as somehow misguided.

A further difficulty with anti-scepticism is its selectivity. Beatty, for example, is quick to portray legislative institutions of the state in a critical manner (as are many other defenders of the Charter). He points out (correctly in my view) that the ideals of democratic and representative government are not reflected in the practices of these institutions. Minority groups, workers and others who lack wealth and power are effectively disenfranchised because of the substantially greater influence over government agencies enjoyed by members of the ruling class.⁵² To this extent Beatty develops an *external* or descriptive critique of democratic institutions. His critique is concerned with and based upon what these institutions actually do in light of constraints that would not be apparent if one were to look no further than the idealized version (that is, ideals of participation in

⁵⁰ Langille, *Revolution Without Foundation*, *ibid.*, at pp. 499-504.

⁵¹ For recent examples of such work see: R.F. Devlin (ed.), *Canadian Perspectives on Legal Theory* (1991).

⁵² D.M. Beatty, *op. cit.*, footnote 2, pp. 50-54. See also: Bakan, *loc. cit.*, footnote 2.

self-government, representation, accountability) of how they function. Such scepticism and realism should be commended. But why is it abandoned when questions are raised about the judiciary and legal system? Why should legal institutions be portrayed in their "*best* light", while all other institutions are portrayed in a critical light? Does it not beg the question of the comparative advantages of the courts and other institutions in social struggles if one begins with different levels of scrutiny for each?

Not all writers who advocate the use of constitutional rights in strategies for social change ignore the constraints imposed by dominant ideologies of rights and the conservative nature of the legal system. Many are aware of these constraints and seek ways to overcome them. One such approach emphasizes the historical contingency of dominant conceptions of rights. Writers in this vein argue that rights do not have to be conceived of as individualist, abstract and universal. While dominant conceptions of rights may manifest such characteristics, they point out there is no logical nor conceptual foundation to these conceptions. Thus, they argue, it is possible to reinterpret the concept of rights so as to avoid the limitations of currently dominant conceptions. Collective rights, communal rights, positive rights and rights to substantive equality are all examples of such attempts to challenge dominant conceptions of rights using reinterpretive strategies.⁵³ A second approach focuses upon reconceptualizing the institution of judicial review. Writers of this ilk argue that judicial review should be understood as a forum for dialogue about public values and norms, not an abstract search for right answers. Within this conception, the proper judicial role would be to mediate a normative dialogue that takes account of context and proceeds through practical reason; judges would not attempt to avoid responsibility for their decisions by hiding behind formalism, "neutrality" and "objectivity".⁵⁴ According to some of these writers a necessary part of this kind of reconceptualization is that judges be able to empathize with and understand the perspectives of oppressed people. They must be taught to see the world through the eyes of people who are from different social and economic groups than themselves. Judges would thus be equipped

⁵³ For examples of this kind of work, see: E. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement* (1986), 61 N.Y.U.L. Rev. 589; S. Lynd, *Communal Rights* (1984), 62 Texas L. Rev. 1417; P. Macklem, *Of Texts and Democratic Narratives* (Review Essay of Hutchinson, *Dwelling on the Threshold* (1991), 41 U.T.L.J. 114.

⁵⁴ For example, see: D. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation* (1988), 136 U. Penn. L. Rev. 1135; F. Michelman, *Forward: Traces of Self-Government* (1986), 100 Harv. L. Rev. 4; F. Michelman, *Law's Republic* (1988), Yale L.J. 1493; M. Minow, *Forward: Justice Engendered* (1987), 101 Harv. L. Rev. 10; M. Perry, *Morality, Politics and Law: A Bicentennial Essay* (1988), chap. 6. For critiques of the school of thought represented in these works, see Bakan, *loc. cit.*, footnote 31; A.C. Hutchinson, *The Three 'Rs': Reading/Rorty/Radically* (1989), 103 Harv. L. Rev. 555, at pp. 578-583.

to challenge dominant perspectives and ideologies and to use their authority to empower the perspectives of oppressed people.⁵⁵

The difficulty with the work of those who reinterpret the concept of rights and those who reconceptualize the institution of judicial review is its absence of any analysis concerning the historical and political conditions that would be necessary for currently dominant conceptions of rights and judicial review to be replaced by new ones. I agree with these writers that neither rights nor judicial review are logically required to be the way they are, but it does not follow that reinterpretation will actually change anything. Indeed, these writers encounter the same difficulties noted earlier in relation to purely prescriptive approaches to constitutional interpretation, and this is not surprising since their approach is just a more general mode of prescriptive analysis. Reinterpreting concepts and institutions, whether particular rights and freedoms, the general concept of rights and freedoms, or the institution of judicial review, does not lead to, nor even necessarily contribute to, the transformation of these concepts and institutions in dominant ideology, nor, *a fortiori*, the transformation of social relations that are enforced and legitimated by dominant ideological conceptions of these concepts and institutions.

Conclusion

I do not wish to suggest that writers who work in the prescriptive mode are wrong in conceptual or logical terms. Their arguments are generally sound and indicate that, with some imagination and creativity, one can operate within normative prescriptive discourse with considerable freedom. Particular rights and freedoms *can* be interpreted to require action against social injustice, rights discourse *can* be reconceived to include concerns about substantive inequality and human need, and judicial review *can* be reconstructed as a forum in which the perspectives of oppressed peoples are empowered. There are no insurmountable conceptual or logical limits affecting these endeavours. The difficulty, however, is that social and political change is not a conceptual or logical matter. It will not happen by merely asking the courts to abandon their conceptions and practices. No doubt it is important to attack the dominance of ideologies (about rights and about society in general) which help reinforce, maintain and legitimate oppressive social relations. The dominance of such ideologies, however, cannot be broken by reinterpretation alone. Ideologies become dominant because they are symbiotic with the prevailing order of social relations, and the interests of those who are dominant within it; they are unlikely to lose their status merely because an alternative set of ideas is constructed and presented. This does not mean that dominant ideologies are invincible. I only want to suggest that breaking their dominance involves more than demonstrating they are contingent, unreasonable, contradictory, and that

⁵⁵ Minow, *ibid.*; Cornell, *ibid.*

alternatives are possible. As Marx stated, one cannot "[combat] the real existing world . . . [by] merely combatting the phrases of this world".⁵⁶

The Charter does not alter a basic historical fact: namely, progressive change follows from mobilization and organization by oppressed and disempowered people, not the "benevolence" of those who have power. As John Stuart Mill said: "Nothing is more certain than that the improvement in human affairs is wholly the work of the uncontented characters."⁵⁷ Struggles against exploitation and oppression, for genuine equality and liberation, are not new in Canada. They did not begin in 1982. People have always organized and struggled for progressive change. The limited extent to which social and economic equality has been realized in Canada, and the limited concrete protections from the most egregious forms of exploitation that exist in Canadian law, have come as a result of such struggles. For these reforms women and men have put their lives on the line; they have been fired from their jobs, imprisoned, and killed. There may be a role for the Charter in social struggles, especially in coordination with other forms of political strategy, but understanding what the role is requires the Charter be approached with caution and realism, not with a false optimism about what it could or might be, if it were not what it is.⁵⁸ In light of the history of social struggles it seems naive, almost silly, to think that with the Charter in place all we have to do is cook up imaginative legal arguments and go to court for the realization of an egalitarian and just society. History would suggest that those with power do not give it up so easily.

⁵⁶ K. Marx and F. Engels, in C.J. Arthur (ed.), *The German Ideology* (1947) p. 41. See also, Bakan, *loc. cit.*, footnote 30.

⁵⁷ As cited in R. Miliband, *Activism and Capitalist Democracy*, in C. Harlow (ed.), *Public Law and Politics* (1986).

⁵⁸ Examples of thoughtful and realistic approaches can be found in S. Brickey and E. Comack, *The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?*, in T.C. Caputo, M. Kennedy, C.E. Reasons and A. Brannigan (eds.), *Law and Society: A Critical Perspective* (1989); Day and Brodsky, *op. cit.*, footnote 22; Fudge *loc. cit.*, footnote 6; D. Herman, *Are We Family?: Lesbian Rights and Women's Liberation* (1990), 28 Osgoode H.L.J. 789.