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# CHIEF JUSTICE NEMETZ'S JUDICIAL RECORD: JUDICIAL DECISION-MAKING AND JUDICIAL VALUES

DAVID S. COHEN†\*

## INTRODUCTION<sup>1</sup>

Much of Chief Justice Nemetz's life has been devoted to the public good and public service — to the betterment of society through law. Through his judgments and through his contribution to the administration of justice in British Columbia and Canada, he has brought the law closer to every one of us. Few of us can appreciate the degree of sacrifice and dedication to the public good which a life of judging requires. For all these reasons, and out of respect for the dedication of the judiciary, lawyers rarely discuss “judicial values” and particularly the values of a specific judge; to do so risks exposing judges as human and law as human.

Yet in talking about judicial values — even the values of a particular judge — we are doing much more than talking about the personal values of a specific person, inferred from his behaviour generally. Rather we are describing and evaluating core *institutional* values — in particular the ways in which the legal system through its structure and process defines and proscribes the activity and choices of judges. Thus my subject is a judge as a member of a small

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<sup>1</sup> I am indebted to a student, Suzanne Frost, who asked me a simple question during a seminar discussion several years ago. “Why,” she said, “does government compensation apply only to people who have homes and who have lost them in a natural disaster, and ignore those who have never had a home?” I am also indebted to Jonathan Kozol who, in a two part series on *The Homeless* published first in the *New Yorker*, 25 January 1988 and 1 February 1988, and then in a book, *Rachel and Her Children: Homeless Families In America* (1988), exposed the tragedy of the homeless in urban America.

community of judges; and specifically my subject is judicial behaviour on the bench as reflected in the outcome of cases and reasons for judgment. While judges and lawyers necessarily spend a great deal of their time involved in individual cases,<sup>2</sup> this series of lectures in honour of Chief Justice Nemetz permits us the privilege of stepping back from the day to day process of law, and allows us to think about the meaning and thus the place of law in Canadian society and the relationship of law to judicial values.

I have always had difficulty attempting to comprehend the core value of law.<sup>3</sup> Legal academics, judges and lawyers are familiar with ideas about “the rule of law”,<sup>4</sup> reasoned argument, principled decision making, the rule of precedent and so on. Yet there always seemed to me to be something deeper about what law represented in our social order, something which is independent of the form of legal argument, the resolution of individual disputes, or debates between functionalists and rule-governed decision-makers.

In particular, this attempt to articulate the core value of law is independent of the debate between the rationalists and intuitionists in explaining judicial behaviour. That is, the core value of law is independent of one’s explanation of *how* judges make choices. It has little if anything to do with explanations of judicial judgment as the process of logic, information and mechanical jurisprudence, and opposing theories which explain judicial choice as a product of “hunch” and intuition and art. I would not even begin to explain or justify the arguments of Lord Denning that the foundation of law is religion.<sup>5</sup> The core normative idea which I believe *is and defines* judicial

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<sup>2</sup> I appreciate that many lawyers in private practice see law as individual cases and spend their time assisting individual clients. At best, law to practising lawyers may simply create parameters within which one engages in ad hoc dispute resolution (among monied classes). Law represents controlled chaos.

<sup>3</sup> What I mean by “core value” is an idea which describes what law is designed to do, what it always does and what it only does. It may extend to an idea which describes no other social institution, but that is likely an overstatement.

<sup>4</sup> There are many aspects of the rule of law which bear on the topic which I discuss in this paper. Perhaps the most problematical are decisions, including those of the Chief Justice, which rely on s. 96 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, to require that certain bureaucrats, where they are invested with judicial authority, cannot be appointed except by the federal government as superior court judges. In *Concerned Citizens of B.C. v. Capital Regional District* [1981] 1 W.W.R. 359, Chief Justice Nemetz held that the Executive Council of British Columbia — the Cabinet — could not have the authority to review effluent permits, since in doing so it was exercising judicial authority, namely reviewing errors of law.

<sup>5</sup> “[I]f we seek truth and justice, we cannot find it by argument and debate, nor by reading and thinking, but only by the maintenance of true religion and virtue.” Rt. Hon. Lord Justice Denning, “The Influence of Religion on Law”, 33rd Earl Grey Memorial Lecture (1953) at 20.

behaviour goes even deeper, is more central than the debate between rationality and passion. It is independent of the intellectual processes, conscious or unconscious, which appear in judgments.<sup>6</sup> It defines what law is and thus what judges do.

*What then is the core idea of law?* The question, as I hope to demonstrate, can only be answered in a very abstract form: law preserves what we have. Its meaning, however, may be illustrated by a simple example. Several months ago, when I began thinking about this paper, I happened to be reading a series of articles on the homeless in urban America.<sup>7</sup> I then realized (and this perhaps simply reflects my ignorance of the values inhering in law) that law offers valuable and unique assistance for some homeless families and tragically ignores another group of families which, at least in terms of their homelessness, are indistinguishable from the first.<sup>8</sup> I would like to explore the meaning of this discrimination by imagining three homeless families.<sup>9</sup>

The first homeless family owned a home in the past, but has had its home either expropriated by the government or perhaps, as a result of government or police action, rendered worthless and uninhabitable. It may simply have had its privacy interfered with by an unauthorized police search. If that family goes to a court of law and argues that it has a legal right to compensation, one can predict with virtual certainty that it will either have its home returned intact, receive compensation which will permit it to purchase a home<sup>10</sup> or receive compensation for its losses due to the trespass. That is the import of the now famous aphorism in *Semayne's Case*,<sup>11</sup> quoted by the Chief Justice, that "every man's house is his castle".<sup>12</sup>

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<sup>6</sup> See: J. C. Hutcheson, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision" (1929) 14 *Corn. L. Q.* 274; Frank Knight, "The Limitations of Scientific Methods in Economics" in R. G. Tugwell, ed., *The Trend of Economics* (1924) 254.

<sup>7</sup> J. Kozol, *supra*, note 1.

<sup>8</sup> They are distinguishable, of course, in terms of the situation which produced their homelessness, but they are equally impoverished, equally unable to care for their children, equally innocent of moral wrongdoing.

<sup>9</sup> There is a fourth homeless family which I discuss later. See *infra*, note 93.

<sup>10</sup> In fact, if there is any ambiguity in deciding if interest is payable on the award, Chief Justice Nemetz, in ensuring that "the owner is made economically whole", would award compound interest. See *Minister of Highways and Public Works v. British Pacific Properties Ltd.* [1980] 2 W.W.R. 525 at 534 (dissenting).

<sup>11</sup> (1604) 5 Co. Rep. 91a, 77 E.R. 194.

<sup>12</sup> *Eccles v. Bourque* [1973] 5 W.W.R. 434 at 449.

The second homeless family has also owned a home in the past, but has had its home either damaged or destroyed by another person or has had its privacy interfered with by an intruder. Again, if that homeless family goes to a judge and asks for compensation from the person who has caused its loss, it is almost certain that it will receive compensation which will permit it to restore the home to its pre-trespassed position and to compensate it for its losses.<sup>13</sup>

The third family does not have a home; it does not have shelter.<sup>14</sup> The parent — the vast majority of the homeless consist of single parents — and her children live in conditions which we cannot comprehend:

The rooms for the homeless families had roaches, water seeping through the ceilings, missing windowpanes, holes in the floor. . . . "Some mornings, there's no food. I give them a quarter if I have a quarter. They can buy a bag of chips. After school I give them soup. . . ." <sup>15</sup>

If that family goes to a judge, assisted by the most persuasive, learned and experienced lawyer imaginable,<sup>16</sup> it is certain that the parent will *not* obtain a court order awarding her a sum of money to purchase a home.<sup>17</sup> While I might have said that the homeless family would *almost* certainly be refused funds or could remain in vacant houses, one need only refer to the well-known decisions which have evicted the homeless from abandoned apartments.<sup>18</sup>

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<sup>13</sup> The availability of the trespass action and its importance in protecting the interests of homeowners is strengthened and emphasized by several subsidiary elements of the action. For example, unlike most legal actions, the *defendant* must prove that she acted unintentionally and without negligence in order to avoid legal liability. See: *Cook v. Lewis* [1951] S.C.R. 830, [1952] 1 D.L.R. 1; *Larin v. Goshen* (1975) 56 D.L.R. (3d) 719 (N.S.C.A.).

<sup>14</sup> The word "home" is likely derived from the Norse word *heima*, which refers not only to a place but also to "a comfortable state of being". See W. Rybczynski, *Home: A Short History of an Idea* (1986) at 62.

<sup>15</sup> J. Kozol, "The Homeless and Their Children — Part II", *The New Yorker*, 1 February 1988, 36 at 52.

<sup>16</sup> My thesis is strengthened by the unreality of that statement. Protecting what we have is an ideology which is reflected in the delivery of most legal services through the market so that those that have, *and those who can afford legal representation*, have their security protected.

<sup>17</sup> Some might argue that my last statement is too broad — that is, all I can and should say is that it is *likely* that she will not receive funds to purchase another home, or at least, if she finds shelter in an empty home, a judge would not evict her. The open-textured concepts of legal rules with their resulting indeterminacy would permit a judge to respond to the claim of the homeless. I agree with the indeterminacy argument.

<sup>18</sup> There are several tragic cases in which the courts, while decrying the injury which they must inflict when they apply the law "as it is", and while alleging

The response of law, the legal system and judges to the three homeless families tells us something profound about judicial values. The core judicial value which I will attempt to describe in this paper is a norm which forms part of the entire structure of law: it forms part of all legal principles and rules; it comprises procedure and evidence; it is reflected in the rhetoric of judgment writing; and it defines how law is delivered to the community. In doing so I will be using examples drawn from the judicial record of Chief Justice Nemetz to illustrate the way in which this core judicial value manifests itself in and constrains judicial decision-making.<sup>19</sup>

It is not, at least to me, a radical proposition to suggest that the primary value which drives and justifies judicial behaviour is an overwhelming, almost monistic concern with preserving and securing to individuals "what they have".<sup>20</sup> This liberal democratic ideal is the commitment of law to liberty and freedom from the actions of others. And it applies with equal force to protect individuals from the actions of other individuals and actions of the community or state.

The connection between law as "the individual dispute" with which we are familiar and law as a social institution preserving liberty is brought out in a recent report on the court system in Ontario. In 1973 the Ontario Law Reform Commission, in its *Report on*

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that they trust "charity" to provide for the homeless, have reaffirmed the right of property owners to take private measures to evict the homeless and to obtain judicial orders of eviction, notwithstanding the availability of the necessity defence. See: *Southwark L.B.C. v. Williams* [1971] Ch. 734; *McPhail v. Persons Unknown* [1973] 3 W.L.R. 71. These cases and the values they reflect are discussed in J. A. G. Griffith, *The Politics of the Judiciary*, 2d ed. (1981) at 137-42.

<sup>19</sup> Before going on I should describe my research technique and its limitations. With the assistance of the computer research facilities at the Faculty of Law, I was able to obtain every reported decision with which Chief Justice Nemetz was involved either as the author of the written reasons, a concurring judge or as a dissenter. I have thus omitted by far the largest category of judgments — the Chief Justice's oral judgments. I have been told that they reflect a consistent concern with social justice and the norms and attitudes of the community. As well, I have been necessarily selective in choosing judgments from among the many hundreds of written reasons which the Chief Justice has handed down. The latter limitation has not produced any substantial problems, for the Chief Justice has been consistent in his ideas throughout his tenure.

<sup>20</sup> Of course, judges also *define* what individuals have through their definition of property, liberty, security, privacy, contract, and through their definition of the permissible ways in which rights are transferred — trust, contract, gift, testamentary disposition and so on. The way in which this definitional exercise contributes to preserving what we have is somewhat more difficult to describe since in many cases the definition was created incrementally some time in the past. Where the judges define those concepts today, the distributional choices they represent are obvious. See Conclusion.

*Administration of Ontario Courts*,<sup>21</sup> began with the idea that the basic function of a court system in a civilized society is to impartially adjudicate disputes without resort to violence. While no one would disagree with that description, the larger political theory of which it is a part is apparent in a subsequent discussion of “the independence of the judiciary” in which Mr. Justice Rand’s words are quoted with approval:

[I]ndependence of judges. . . . enables the guarantee of *security to the weak against the strong and to the individual against the community*; it presents a shield against the tyranny of power . . . and against the irresponsibility and irrationality of popular action, whether of opinion or of violence. . . .<sup>22</sup> [emphasis added].

Law is conceived of as a *shield* — it is a passive rather than activist social institution — it secures one’s welfare against intrusion by the state, but does not actively engage in assisting those who live in poverty. Law represents the individual *against* the community, but does not assist in the efforts of the community to make the lives of individuals better. Law’s values, if understood in this light, are as political as any other set of values. Here the political value of law is that it enables us to live our lives secure in the knowledge that we will not be subject to arbitrary intrusions on our liberty; we enjoy, through law, freedom from the state and from others.

Understanding law in this way erases the alleged contradiction between order and liberty.<sup>23</sup> Liberty and freedom *from* the state provides security and order to our lives. The law, while it necessarily invokes non-liberal concepts of restraint and coercion, does so only to prevent anarchy, and anarchy would, in the eyes of the law, leave liberty to be ravaged by “the strong or the unscrupulous”.<sup>24</sup>

Presented with the hypothesis (at this stage simply an assertion) that the law as an instrument of social order is designed to preserve what we have, three subsidiary questions must be addressed. First, how does it preserve what we have? Second, and more important, is preserving what we have a good thing? Third, and most important of all, can law be used as an instrument of social progress? In the next

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<sup>21</sup> Ontario Law Reform Commission, *Report on Administration of Ontario Courts, Part I* (1973) (Chair: H. Allan Leal).

<sup>22</sup> *Ibid.* at 7, quoting Hon. I. C. Rand, *Report of the Inquiry into the Alleged Misconduct of Mr. Justice Landreville* (1966) at 95-6.

<sup>23</sup> H. Laski, “Law and the State” in H. Laski, *Studies in Law and Politics* (1932).

<sup>24</sup> See B. N. Cardozo, *The Paradoxes of Legal Science* (1928) at 94.

two parts I will address the first and second questions, with particular emphasis on the contribution and role of Chief Justice Nemetz in the exercise of lawmaking. In the conclusion I will reflect on the conception of law as an instrument of social progress, which, at least in the view of some, is the legacy of the *Canadian Charter of Rights and Freedoms*.<sup>25</sup>

## I. HOW LAW PRESERVES

The question, "How does law preserve what we have?", can be addressed at two levels. Obviously, law preserves what we have by recognizing and thus legitimating security of expectations, property and thus autonomy. However, if law were to be openly recognized as engaged in that political exercise,<sup>26</sup> it is unlikely that it could generate the moral legitimacy with which it is associated. Thus the deeper answer to the question, "How does law preserve what we have?", is extremely subtle and complicated. I would like to focus on several aspects of judging and justice which contribute to the legitimacy and moral authority of law in providing us with security from each other and the community.<sup>27</sup>

First, and probably most important, law preserves what we have by incorporating a corrective rather than distributive model of justice. The idea of corrective justice asks only that we determine whether one person has unlawfully or wrongfully caused an injury to another. If the answer to that question is positive, then we demand that the injurer restore the victim to the position she was in prior to the wrongful interference with her rights. The corrective justice model of lawmaking explicitly denies both the instrumental and social-ordering ideas which are commonly associated with political decision-making, and is intimately connected with choices about the legal liability of individuals to one another, and of the state to individuals in many cases.<sup>28</sup> It is quite easy to see that corrective justice

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<sup>25</sup> Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>26</sup> My thesis is that judicial decision-making is a manifestation of law as politics. The law as a political institution performs a function which other political institutions often do not; it preserves what we have.

<sup>27</sup> I must ignore several others. For example, the imposition of judicially created evidentiary immunities on coroners' inquests to provide witnesses with immunities is an example of the use of evidentiary rules to limit inquisitorial state powers. See *Re Wilson Inquest* (1968) 66 W.W.R. 522 (Nemetz J.A. dissenting).

<sup>28</sup> Corrective justice, or rectificatory justice as it is sometimes called, is most often associated with Aristotelian philosophy. Aristotle, *The Nicomachean Ethics*, Book V, Chapter 4 (David Ross trans. 1925).



permits and demands that we compensate the now homeless homeowners, and ignores the plight of the always homeless.

While corrective justice as a model of lawmaking has considerable intuitive attractiveness, it is not without its failings. For example, it presumes that we know what individual rights ought to be recognized when compensation is claimed from the state or other individuals. That is, corrective justice does not tell us what rights we should protect from interference. It is clear, for example, that economic welfare is not, in the abstract, considered to be a right subject to protection under current applications of the corrective justice model of tort law.<sup>29</sup> The role of law is not only to *preserve* what we have but also, by defining property, liberty, contract, privacy and so on, to create what we have.

Perhaps the most significant manifestation of corrective justice is an overriding judicial reluctance to impose liability for "inaction". Briefly, while an individual may be legally responsible to another for acting in a fashion which injures the other, it is extremely difficult to persuade a judge that *failing to assist another* ought to give rise to legal liability. While this action/inaction has been considerably modified in *Anns v. London Borough County of Merton*,<sup>30</sup> there is little doubt that judges have retained a requirement that in order to impose liability the court will demand that the plaintiff demonstrate that the defendant either acted to induce reliance on her words or conduct, or created or increased a risk of damage to the injured person.<sup>31</sup>

The idea in corrective justice that merely failing to help another will not be a legal wrong is derived, at least in part, from a legitimate concern that to do so would demand the delivery of benefits to another and thus would constitute an unjustifiable interference with another's liberty to act as she chooses.<sup>32</sup> It finds voice not only in decisions limiting recovery of damages, but as well in the criminal

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<sup>29</sup> See: R. A. Posner, "The Concept of Corrective Justice in Recent Theories of Tort Law" (1981) 10 J. Leg. Stud. 187; R. A. Epstein, "Nuisance Law: Corrective Justice and Its Utilitarian Constraints" (1979) 8 J. Leg. Stud. 49.

<sup>30</sup> [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.).

<sup>31</sup> See *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1 at 47 *per* Brennan J.

<sup>32</sup> Thus the misfeasance/nonfeasance distinction has been justified by concerns with using tort law to "enforce general unselfishness". See: R. L. Hale, "Prima Facie Torts, Combination, and Non-feasance" (1946) Colum. L. Rev. 196 at 215; F. Harper and F. James, Jr., *The Law of Torts* (1956) at 1049. As Allen Linden put it, the doctrine manifests a concern for "rugged individualism, self-sufficiency, and the independence of human kind". A. Linden, *Canadian Tort Law*, 4th ed. (1988) at 265.

law, where judges, including Chief Justice Nemetz, are extremely hesitant to invoke the power of the state against individuals simply for agreeing to act in a general fashion which may constitute a criminal offence,<sup>33</sup> or for merely failing to take positive steps to prevent a crime from being committed.<sup>34</sup>

Second, law preserves what we have not only through its underlying structure as a vehicle of corrective justice, but also through its rhetoric. In deciding cases, legal rhetoric justifies judicial choice through reference to rules rather than standards and norms in decision-making.<sup>35</sup> Some writers have presented a dichotomous version of state and law.<sup>36</sup> The passive, reactive, libertarian state has its counterpart in a judicial order which pursues "fair" conflict resolution as a goal of justice. The pursuers present themselves and law as neutral, objective and scientific technicians who, while they exercise choice, do so dispassionately and unideologically according to technical standards. Conversely, the activist, progressive state would have its counterpart in a judicial order which pursues policy implementation and development as a goal of justice. Judges in this latter state necessarily present themselves and law as non-neutral, and seek to achieve normative goals drawing on explicit general community norms.<sup>37</sup>

This concern with rhetoric leads one to the most salient characteristic of judicial decision-making — the application of an allegedly determinate legal rule based on precedent to a set of facts.<sup>38</sup>

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<sup>33</sup> Thus, for example, in *R. v. Gill* (1968) 67 W.W.R. 101, Nemetz J.A. set aside convictions for conspiracy to procure a miscarriage where the Crown prosecutor simply demonstrated a general agreement to refer women to an abortionist rather than a specific agreement relating to a particular criminal act.

<sup>34</sup> Thus in *R. v. Bourne* (1969) 71 W.W.R. 385, Nemetz J.A., while refusing an appeal of an accused who had been convicted of possession of heroin, confirmed that more than "mere indifference or negative conduct" was required to demonstrate joint possession (at 387). Similarly, in *R. v. Konken* [1971] 3 W.W.R. 752, Nemetz J.A. set aside a conviction of a person who had, after taking an abandoned pump, discovered that it might belong to someone else who had lost a similar pump. Nemetz J.A. held that in order to convict for a "failure to act", *unequivocal and unambiguous knowledge* that the property belonged to someone else must be demonstrated.

<sup>35</sup> There are exceptions to this idea, including s. 24 of the *Canadian Charter of Rights and Freedoms*, *supra*, note 25, which permits a judge to exclude evidence where to admit it would bring the administration of justice into disrepute.

<sup>36</sup> See M. R. Damaška, *The Faces of Justice and State Authority* (1986).

<sup>37</sup> *Ibid.* at 88-9, 168-70.

<sup>38</sup> As Jerome Frank puts it, legal rules generally consist of conditional statements referring to facts:

For convenience, let us symbolize a legal rule by the letter *R*, the facts of a case by the letter *F*, and the court's decision of that case by the letter *D*.

Even if one ignores that the set of facts is generated by an extraordinarily limiting set of procedural rules, and the set of legally relevant facts is itself narrowly defined, one must appreciate that judges make choices based on these facts in a certain fashion and that this institutional characteristic has important implications for the substantive outcome of cases.

The most salient characteristic of judicial decision-making is the process of reasoning by analogy — the application of a particular rule enunciated or applied on a past occasion to a relevantly similar set of facts presented to the decision-maker. The result is, of course, a significant degree of legitimation of power associated with the apparent non-human source of authority, a significant risk of perpetuation of errors,<sup>39</sup> and non-articulation of the justification for the determination of relevant similarities or differences. The model is functionally static, involving a process of classifying new factual situations under existing rules.<sup>40</sup> At best, *stare decisis* represents a decision-making process which is incrementalist — the decision-maker making margin-dependent choices rather than evaluating all possible alternatives and making optimising decisions.<sup>41</sup> Decision-making based on precedent and analogy often incorporates unarticulated political, economic and social ideas, and is consistently constrained by its necessarily historical perspective.<sup>42</sup>

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We can then crudely schematize the conventional theory of how courts operate by saying

$$R \times F = D$$

In other words, according to the conventional theory, a decision is a product of an *R* and an *F*.

See J. Frank, *Courts on Trial: Myth and Reality in American Justice* (1950) at 14.

<sup>39</sup> For example, it is extraordinary that a rule which was developed to respond to an anachronistic land registry system in England in 1775 would be applied without significant modification in British Columbia for almost two centuries. It was not rejected until Chief Justice Laskin, adopting an unjudicial, functional rhetorical technique characteristic of the American Realists, finally laid it to rest. See *A.V.G. Management Sciences Ltd. v. Barwell Developments Ltd.* [1979] 2 S.C.R. 43, [1979] 1 W.W.R. 330.

<sup>40</sup> See R. A. Samek, "The Dynamic Model of the Judicial Process and the Ratio Decidendi of a Case" (1964) 42 Can. Bar Rev. 433.

<sup>41</sup> See: M. Shapiro, *Courts: A Comparative and Political Analysis* (1981); P. Devlin, *The Judge* (1979).

<sup>42</sup> See B. N. Cardozo, *The Nature of the Judicial Process* (1921) reprinted in M. E. Hall, ed., *Selected Writings of Benjamin Nathan Cardozo* (1947) at 107.

Two relatively minor examples of this rhetorical technique can be drawn from the Chief Justice's judgments. Thus, for example, in deciding whether a play should be interpreted as a "publication" in the context of an obscenity prosecution, judges, including Chief Justice Nemetz, are likely to turn to formal dictionary meanings as justification for their decisions. See *R. v. Small*

Judges, in deciding cases, engage in the somewhat paradoxical exercise of "predicting history". The idea of precedent necessarily requires deference to superior institutions and to history. Judges, in deciding what we have, do so not by engaging in broad analysis of social choice, but by looking to and interpreting the decisions of other judges in the past. The rhetoric of law is to be bound to follow and implement decisions in like cases earlier in our history. Judges will vary considerably in the degree to which they will ignore, manipulate and adhere to precedent, but that does not deny its power to constrain judicial choice.

Third, law preserves what we have through its requirement that judges be independent. Although independence has several components, for our purposes we can limit our analysis to two: first, a requirement that judges be independent from the current popular government; and second, that judges be impartial in respect of the participants and their dispute. The issue is of course of central importance where, as in the case of many claims by citizens, the opponent is defined as the government.

The role of independence is significant for several reasons. It permits the courts to impose sanctions on and attempt to regulate the behaviour of the legislative and executive branches of government, at least temporarily.<sup>43</sup> Courts can articulate and protect the interests of individuals and minorities without constant review by majoritarian institutions. And institutional independence achieves a degree of stability, continuity and thus security in the ongoing definition of entitlements.<sup>44</sup>

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[1973] 4 W.W.R. 563 at 575. I must point out that the rhetoric is not linked to the outcome of the dispute, but is a legitimation technique which can be used to justify either outcome. In *Small*, Nemetz J.A. found that the trial judge had misdirected himself, and ordered a new trial. Similarly, the courts consistently interpret legislation as "preserving common law rules", thus implicitly supporting the continuation and preservation of rights which are enunciated through those rules without serious analysis of the implications of that choice. That is not to say, of course, that the preservation of those common law rights is undesirable or that laudatory goals are not achieved through that vehicle. See *Myers v. Myers* [1979] 4 W.W.R. 353 (Chief Justice Nemetz holding that the *Family Relations Act*, S.B.C. 1972, c. 20 is remedial as it is intended to be in addition to and not in substitution of the common law. In that case the Chief Justice held that assets were to be divided equally between a husband and wife based on the equitable concept of a resulting trust.).

<sup>43</sup> Thus independence forms part of the ideology of the rule of law which holds that both the governed and the governing elites are formally equally amenable to the same judicial process. A recent example of this idea in practice is the decision of the Supreme Court to review executive decisions to employ nuclear arms in Canada. See *Operation Dismantle Inc. v. The Queen* [1985] 1 S.C.R. 441 at 472.

<sup>44</sup> As Jerome Frank wrote, "[t]radition . . . is the prime support of social stability," *supra*, note 36 at 254.

The formal independence of judges from the political will of the current government is achieved through the embodiment of the *Act of Settlement* in s. 99 of the *Constitution Act, 1867*.<sup>45</sup> This formal independence is strengthened by associated provisions of the *Constitution Act* which provide for federal appointments and payment of salaries fixed by Parliament. In theory, these provisions insulate judges from local pressure and reduce the ability of the executive to use financial coercion to influence judicial behaviour.

However, much more important than formal independence is the independence associated with the stability of the judicial system. Tenure means that individual judges retain power for extended periods of time. The judicial appointment process means that new actors are introduced into the system incrementally. Judges, given their training in law, experience a significant socialization process during their legal and professional education which is enhanced by the hierarchical structure of the courts and seniority systems within the judiciary.<sup>46</sup> This experience coupled with the individuation of decision-making means that judges will be constrained to act consistently over time in accordance with their definition of relevant generalizations. And since the relevant generalizations will likely be very similar across judges, we can expect the curial institution to exhibit considerable stability in its behaviour.<sup>47</sup> It is this stability which creates the security which protects what we have.

Related to judicial independence from government is the requirement of impartiality, which might best be described as "unrelatedness, passivity and ignorance". First, we demand that the decision-maker in the curial process be unrelated to the parties, witnesses, the factual background of the dispute, and the outcome. As Chief Justice Nemetz wrote in a recent decision,<sup>48</sup> labour arbitrators as

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<sup>45</sup> (U.K.), 30 & 31 Vict., c. 3. The *Act of Settlement, 1701*, (U.K.), 12 & 13 Wm. III, c. 2, provides for the appointment of judges during good behaviour and their removal only by the Governor General on an address to both the Senate and House of Commons.

<sup>46</sup> Robert Samek calls this the "sub-model of obedience", *supra*, note 40 at 435 *passim*.

<sup>47</sup> The process of reasoning which one finds in the case law as well as in constitutional argument is quite simple — like cases should be treated alike. What makes one case "like" another, however, cannot be determined by independent criteria; it depends upon values which may not be articulated. The stability in law is created by the consistency of judicial values as much as by anything else.

<sup>48</sup> *Refrigeration Workers Union, Local 516 v. Labour Relations Board of British Columbia* [1986] 4 W.W.R. 223 at 228, quoting Rand J. in *Szilard v. Szasz* [1955] S.C.R. 3 at 4. In this case, the Chief Justice refused to permit the Labour Relations Board from appointing a union member to a panel not-

administrative decision-makers engaged in judicial activities must act with "free, independent and impartial minds". Second, we demand "ignorance" in the sense that we demand that the judge receive her first knowledge of the factual dispute through the formal presentation of information by the parties. And third, we require that the judge remain relatively passive throughout the proceedings — the archetypal neutral umpire.<sup>49</sup> It is facile to think that impartiality means that judges have no views as to right and wrong, no intuitions as to moral judgment, no connection to the current government and no policy inclinations.<sup>50</sup> Fact-finding, the interpretation of statutes and cases, the exercise of choice in applying concepts of reasonableness and a myriad of similar facts all involve political, economic, social and moral reasoning. Nonetheless, we have conventionally presented the judge as being a "political, economic, and social eunuch" who has no interest in the world outside his judgments.<sup>51</sup>

There is little doubt that Chief Justice Nemetz considers judicial independence as constituting the core of his institutional character; in his writing he has described it as "a fundamental pillar of our democratic society"<sup>52</sup> and has applied rigorous standards to administrative decision-makers who have been challenged for bias. He appreciates that the legitimacy of judicial decisions depends more on the perceived and actual independence of the judiciary than on the substantive outcome of their choices. Nonetheless, recognizing that judges are independent in the senses I have described does not mean that the law and the judiciary as institutions are impartial in determining the claims of the truly homeless and the homeless who have lost their homes. It does not mean impartiality as between the treatment of claims which have been recognized in the past and the treatment of not yet recognized claims in the future.

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withstanding that the individual was a person of both integrity and high qualification in his field.

<sup>49</sup> See Denning L.J. in *Jones v. National Coal Board* [1957] 2 K.B. 55 at 64.

<sup>50</sup> At the same time, lawyers will generally hold the view that overtly "political" appointments are undesirable. By political I mean the appointment of judges who are connected through past experience or relationships with the current government. The major concern voiced in this context is that "quiet patronage appointments to the judiciary of people such as former Manitoba premier Sterling Lyon have demeaned the judicial process and brought it into disrepute," see K. Martin, "Scrutinize All Judicial Appointments, Lawyers' Group Urges", *The Globe and Mail* (30 January 1987).

<sup>51</sup> J. A. G. Griffith, *supra*, note 18 at 204.

<sup>52</sup> Nemetz C.J.B.C., "The Concept of an Independent Judiciary" (1986) 20 U.B.C. L. Rev. 285 at 291.

Fourth, the core value of law in preserving what we have is reflected and emphasized by the institutional characteristics of the courts, and in particular by the limited self-defined remedial powers which judges exercise.<sup>53</sup> Dichotomous determinations of right and wrong coupled with a binding award of monetary compensation and perhaps injunctive relief to restore or preserve the status quo, I think accurately describes traditional judicial remedial authority. Again, one can easily find in Chief Justice Nemetz's judicial record references to the limited remedial authority which courts should exercise.<sup>54</sup> In general judges have adopted an extremely conservative set of remedial tools: awards of damages, limited negative injunctions and declarations being the most common.

In all cases judicial remedies represent the remedial component of a model of law which will necessarily preserve and restore individuals to their pre-injured state. The shortcomings of this model which significantly limit the ability of the institution to effect fundamental structural reform are amplified when applied to the case of governmental wrongs.<sup>55</sup> This description of judicial remedial instruments might be contrasted with the remedial instruments of ombudsman offices, a non-legal institution which, while independent from the current government, is not impartial. Ombudsman offices are

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<sup>53</sup> In fact, the entire institutional design of the court system reinforces protecting what one has. For example, the obvious fact that the Canadian legal system can be invoked, as a practical matter, only by the more wealthy, and when invoked can be utilized extensively by that group, reinforces the idea of law as preserving what one has. As recently as 1970, Nemetz J.A. could not disregard the amount of a lawsuit in exercising his discretion to give leave to appeal to the Supreme Court of Canada even though no issue of public interest or important question of law was present. See *Royal Trust Company v. Ford and Christ Church Cathedral Buildings Ltd.* (1970) 73 W.W.R. 1 at 7. Yet at the same time, the Chief Justice was extremely sensitive to the failings of the legal system to ensure adequate criminal representation. In *R. v. Johnson* [1973] 3 W.W.R. 513, Nemetz J.A. allowed an appeal from a trial in which Johnson was convicted without an adequate professional defence.

Another example is the extremely archaic class action processes in Canada, which represent an almost insurmountable obstacle to access to the legal system by large groups of individuals who have suffered relatively minor losses or are seeking legislative review. Here again, Chief Justice Nemetz is somewhat paradoxical. His decision in *Shaw v. The Real Estate Board of Greater Vancouver* [1973] 4 W.W.R. 391 is one of the very few progressive class action decisions in Canada. As Nemetz J.A. put it, the purposes of class actions are "to provide an inexpensive means of preventing the frustration of justice by costly . . . litigation" (at 402).

<sup>54</sup> See *Retail, Wholesale and Department Store Union, Local 580 v. Western Wholesale Drug Ltd.* (1969) 68 W.W.R. 299 at 302 (injunction issued against defendant employer to restrain unfair labour practices must "delineate, wherever practicable, the precise acts or classes of acts which are intended to be enjoined").

<sup>55</sup> See H. J. Abraham, *The Judicial Process*, 4th ed. (1981) at 355-7.

characterized by investigatory, bureaucratic, non-binding interest mediation models of dispute resolution. The outcome is often to explain and disclose the basis for bureaucratic action, to improve bureaucratic processes, and to recommend and perhaps to procure appropriate remedies including information, the delivery of social benefits through the reversal of bureaucratic decisions, and compensation. Similarly, one might develop structural injunctions which can be used by the judiciary through the appointment of administrative officers to compel the delivery of prison services and educational programs to ensure that constitutional violations are not committed.<sup>56</sup>

Incorporating a model of corrective justice, employing historically focused precedent based decision-making, insisting on judicial independence and impartiality and applying extremely limited remedial sanctions all combine to define law as an institution which will necessarily result in the preservation of what we have. Indeed it is difficult, if one takes judicial decision-making seriously, to imagine that it could do anything else.

## II. THE GOODNESS OF SECURITY

Given my description of how law preserves what we have, we can address the second question, which, not surprisingly, is much more difficult to answer — “Is preserving what people have a good thing?” Perhaps the dimensions of the problem can be understood if the question were rephrased — “Is preserving property and liberty a good thing?” There is, sadly, no answer to that question; or rather there are two answers which are contradictory.

First, knowing whether securing what we have is good depends on our definitions of liberty, property and so on. Chief Justice Nemetz, throughout the course of his judicial career, has articulated and expressed his ideas on several fundamental characteristics of civil liberty which the law preserves — the privacy of one’s home, religious freedom, freedom of speech, freedom of contract and freedom from physical incarceration.

The property one has in one’s home is, as we all know, a central theme in the common law process. Nemetz J.A. in *Eccles v. Bourque*<sup>57</sup> applied an extremely restrictive interpretation of the *Criminal Code*<sup>58</sup>

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<sup>56</sup> As Owen Fiss has put it in *The Civil Rights Injunction* (1978), the structural injunction represents an injunction “seeking to effectuate the reform of a social institution” at 9.

<sup>57</sup> *Supra*, note 12.

<sup>58</sup> R.S.C. 1970, c. G-34, s. 450.



in refusing to permit the police to rely on a defence unavailable to private citizens when they (the police) unlawfully entered Eccles' apartment in pursuit of a fugitive. The police were not in uniform, but were visibly armed; they did not request permission to enter the apartment, but pushed the door open. Eccles sued for damages and was successful at trial. Nemetz J.A., dissenting on appeal, would have affirmed the trial decision, arguing that "scrupulous adherence must be had for the principles set out at common law" which regulate the conduct of the police in entering a house without a warrant.<sup>59</sup> Property, not as an end in itself but as an aspect of liberty and privacy and family, is thus defended from interference by the state.

Similarly, the protection afforded to political debate and commentary — the liberty to speak one's conscience — has been rigorously defended in the political idea of liberalism and by the Chief Justice. In *Vander Zalm v. Times Publishers*<sup>60</sup> Chief Justice Nemetz delivered the majority judgment of the Court of Appeal which overturned the trial decision and dismissed Vander Zalm's action for defamation arising out of the publication of a cartoon which depicted him, representing the Ministry of Human Resources, plucking wings from a fly. The idea of freedom of speech — that "the public interest requires that . . . public conduct . . . be open to the most searching criticism"<sup>61</sup> — is an aspect of liberty in democratic societies which has been constantly defended by the Chief Justice, not only in the *Vander Zalm* decision but elsewhere as well.<sup>62</sup>

The Chief Justice's concern with freedom of political debate evidenced in the *Vander Zalm* decision is linked to a broader concept of intellectual and personal autonomy that is reflected in his decisions which respect religious conviction. In *R. v. Davie*<sup>63</sup> an accused who

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<sup>59</sup> *Supra*, note 12 at 450.

<sup>60</sup> [1980] 4 W.W.R. 259.

<sup>61</sup> *Ibid.* at 261, quoting Bain J. in *Martin v. Manitoba Free Press Co.* (1892) 8 Man. R. 50 at 72.

<sup>62</sup> See *Pacific Press Ltd. v. The Queen in Right of British Columbia* [1977] 5 W.W.R. 507 (B.C.S.C.). In this case, Nemetz C.J.S.C. used the *Canadian Bill of Rights*, R.S.C. 1970, App. III, to quash warrants which were used to seize material from *The Vancouver Sun*. He held that a justice of the peace, in deciding to issue a warrant against a newspaper which may have the effect of impeding its publication, must have regard to the special place of a free press under the *Bill of Rights*, ss. 1(f) and 2. He held that the Justice did not consider whether alternative sources of information were available and whether reasonable steps had been taken to obtain the information from those sources.

<sup>63</sup> [1981] 2 W.W.R. 513.

had been charged with arson was left alone in a room which was equipped with a hidden microphone and video camera. After the police left the room, the accused dropped to his knees, saying "O God, let me get away with it just this once." The trial judge refused to admit the statement, holding that it was an unauthorized interception of a private communication, and thus was inadmissible under s. 178 of the *Criminal Code*. The Chief Justice, dissenting, would have confirmed the trial judgment. The Chief Justice held that the statement was a private communication within s. 178.16(1) of the *Criminal Code*. As he put it: "To hold otherwise not only would violate . . . the purpose of the Act but would also . . . be repugnant to all who hold religious beliefs, and thus contrary to the public interest."<sup>64</sup>

The Chief Justice has also employed law to protect one's liberty to contract from government interference. Liberty to contract encompasses not only activities designed to maximize profit, but also extends to the liberty to engage in activities to improve one's well-being, as well as to activities through which one defines one's most personal relationships with others. Chief Justice Nemetz has recognized the significance of contract as a liberal concept both in common law contract decisions<sup>65</sup> and in constitutional litigation. In *Bhindi and London v. British Columbia Projectionists' Local 348*<sup>66</sup> the Chief Justice was faced with an argument that a collective agreement which included a "closed shop" provision should be held unenforceable as contravening the *Charter of Rights and Freedoms*.<sup>67</sup> The Chief Justice interpreted s. 26 of the *Charter* as including the "ability

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<sup>64</sup> *Ibid.* at 519.

<sup>65</sup> Common law contract decisions support liberal notions of contract through the adoption of concepts which preserve enforceability in the face of regulatory schemes which require licensing of certain contracting agents, and which arguably would be strengthened if the courts were to declare illegal those contracts entered into by unlicensed individuals. Chief Justice Nemetz's decisions in this context are consistent with judicial attitudes promoting contract enforcement. See *Davidson and Co. v. McLeery* (1970) 75 W.W.R. 278 (contract for sale of shares enforceable notwithstanding that the *Securities Act, 1962*, S.B.C. 1962, c. 55, required licensing of salesmen).

Similarly, the courts have been reluctant to set aside contracts where arguments are made that the contract is a product of economic coercion associated with monopoly power or consumer ignorance. See *Arrow Transfer Co. v. Royal Bank of Canada* [1971] 3 W.W.R. 241 at 265 where Nemetz J.A. enforced a verification agreement entered into notwithstanding allegations that the banks had colluded to produce a standard contract imposed on consumers generally in the industry.

<sup>66</sup> [1986] 5 W.W.R. 303.

<sup>67</sup> *Supra*, note 25.

to enter into private contracts",<sup>68</sup> and encouraged by American authority, refused to subject contract and other "purely private action" to the principles and constraints embodied in the *Charter*. As the Chief Justice put it: "To include such private commercial contracts under the scrutiny of the Charter could create havoc in the commercial life of the country."<sup>69</sup>

Finally, law protects one's physical liberty. The core of the liberal idea of law is to prevent, except under extraordinarily stringent procedures, incarceration of private citizens by the state. One can point to a number of instances in the Chief Justice's record where his concern with personal freedom is readily apparent; as the Chief Justice has said, "any ambiguity . . . must be resolved in favour of the liberty of the subject."<sup>70</sup> This concern with the protection of physical liberty reached its ultimate expression in the participation of the Chief Justice in *Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288*,<sup>71</sup> in which the Court of Appeal held unconstitutional those provisions of the *Motor Vehicle Act* which provided for a mandatory jail term for persons convicted of driving while their licences were suspended without regard to either their negligence or intent to commit a crime. The Court, on one view, radically altered the balance between the judiciary and legislative institutions, by reviewing not only the procedural safeguards required by ideals of justice, but the content of the legislation itself. The decision was motivated by judicial abhorrence of the idea that a person could be imprisoned without the opportunity to demonstrate an

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<sup>68</sup> *Supra*, note 66 at 311.

<sup>69</sup> *Ibid.*

<sup>70</sup> *R. v. Turcotte and Parkinson* (1969) 69 W.W.R. 705 at 720. In this case Nemetz J.A. dissented from a decision which would have permitted the Court to use the provisions of the *Prisons and Reformatories Act*, R.S.C. 1952, c. 217, to impose indeterminate sentences on young offenders, thus increasing the sentences imposed under the *Food and Drugs Act*, R.S.C. 1952, c. 38. Nemetz J.A. held that in order to permit more severe sentences, one would have to be able to point to an express legislative provision to that end.

As well, a concern with the protection of physical liberty from interference by the state is manifested in the establishment of stringent procedural rights including the right to a public trial: *R. v. N.* [1980] 1 W.W.R. 68 (*Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, while it mandates trials "without publicity" should not be interpreted as permitting trials to be held "in camera"). It is reaffirmed in decisions which affirm the great importance of burdens of proof and the requirement that the Crown prove beyond a reasonable doubt all elements of the offence charged. See *R. v. Biedler* [1975] 3 W.W.R. 381 (B.C.S.C.) (Crown must prove that proceedings were commenced within limitation period established under the *Securities Act, 1967*, S.B.C. 1967, c. 45).

<sup>71</sup> [1983] 3 W.W.R. 756.

honest and reasonable mistake, or to prove that he acted without a guilty intent.<sup>72</sup>

If one takes the judicial record of the Chief Justice one finds one's personal right to one's home, freedom of speech and political debate, freedom of contract and physical liberty as describing the content of liberty. That content leaves no doubt in most of our minds that "preserving what we have" is good. But there is another issue.

More important than understanding the content of liberty and security of the person, a decision as to whether security and liberty is good depends on the identity of the person being asked the question. If one has those things which are preserved — liberty, ideas, ethical values, a family, property, a home — the answer is yes. And it is true to say that everyone has something. Not only is it a good thing, but it is inconceivable how we could exist as individuals or part of a community without it. Similarly, if one is relatively well-endowed either with wealth or abilities and has enjoyed an environment which has nurtured the development of her personal faculties, then again the answer is yes. For by promising security, one can apply oneself with the knowledge that the future products of one's labour will be preserved. Security and the promise of security are things we all want. It permits us to plan our personal lives, it provides incentives for and facilitates economic investment, and it reduces the risks of whatever propensity we might have to engage in private violent redress.

While I can say that providing security is a good thing, I can also say that it is not enough. The idea of security and liberty ignores one's connection with the larger society in which we live. The model of man which is incorporated in the liberal idea of law, if left at that, is one in which individuals apparently care little except for themselves. All of the ideas comprising the preservation of liberty are of little if any value to the homeless. Not only do they have nothing, they will have nothing unless we do something for them, and we have seen that law, while it preserves what one has, will not actively assist those who may need what we have. To say that liberty must be constrained by community interests is not to say that liberty is bad, but rather that "monism" of any sort is dangerous. Because equality, justice, political participation and so on are important political values in Canada does not entail that liberty is unimportant.

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<sup>72</sup> The Court, *ibid.* at 764, accepted the statement of Dickson C.J.C. that "there is a generally held revulsion against punishment of the morally innocent." *R. v. City of Sault Ste. Marie* [1978] 2 S.C.R. 1299 at 1310, (1978) 85 D.L.R. (3d) 161 at 170.

The obvious response to this commentary on law is a relatively simple question—“How can I expect judges to do this?” They do not have the authority to do so; they do not have the knowledge or expertise to do so; they do not have the administrative staffs to deliver social services to the homeless; they do not have the resources to allocate to the homeless. And so on. Some of those arguments have merit. My answer is that I don’t expect *judges* to do this. Rather, my purpose in presenting the values of judges in this fashion is to point out that law, whether it would preserve what we have or redistribute wealth, is as much as any other form of justice a political institution. We should admit that law doesn’t assist the homeless, but that does not mean that we should not make the choice as a society to do so.

### III. CONCLUSION

Which brings me to the final question. If I am right about this core judicial value, how can anyone expect law to be an instrument of social change? Certainly law is interstitially progressive. As I explained earlier, by protecting future entitlements, law facilitates human action.<sup>73</sup> Second, and again this is reflected in Chief Justice Nemetz’s judgments, law is not stagnant. At best, *stare decisis* represents a decision-making process which is incrementalist, the decision maker making margin-dependent choices rather than evaluating all possible alternatives and making optimizing decisions.<sup>74</sup> But there is nothing in law which permits one to say that it is *designed* to do this, and there is nothing in law which suggests that interstitial progress will be able to respond positively to the claims of the third homeless family.

Some might argue that the *Charter*<sup>75</sup> has transformed law, and that while the law of the past is not progressive, the law of the future will be. One might argue that one progressive idea in the *Charter* is that of equality — and in particular a right of equal *benefit of the law* under s. 15. But here we are concerned not with equality as between individuals, but with equality between groups — an idea which Chief Justice Nemetz invoked in the now famous decision of *R. v. Burnshine*.<sup>76</sup> In that case the Chief Justice used the *Canadian Bill of Rights*<sup>77</sup> to strike down the “indeterminate sentence” provisions of

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<sup>73</sup> S. Coval and J. C. Smith, *Law and Its Presuppositions* (1986).

<sup>74</sup> *Supra*, note 41.

<sup>75</sup> *Supra*, note 25.

<sup>76</sup> [1974] 3 W.W.R. 228.

<sup>77</sup> R.S.C. 1970, App. III, s. 1 (b).

the federal *Prisons and Reformatories Act*<sup>78</sup> which applied only to British Columbians.

The relevance of equality to the homeless lies in the transformation of economic inequality, traditionally a private issue, into a public, legal and constitutional question. Arguments have been made in the United States that the distribution of public services (from the most mundane street repair work to public educational expenditures) across communities so as to leave some groups less well off than others constitutes unequal treatment.<sup>79</sup> Sadly, the paradigm of law necessarily constrains the power of the idea of equal treatment to respond to the homeless and economically disadvantaged.

A powerful example of the limits of law, as I have attempted to describe it, is the recent judicial and political clash in British Columbia over social welfare funding. We can begin with the decision of the Supreme Court of British Columbia in *Silano v. The Queen in Right of British Columbia*.<sup>80</sup> In that case John Silano challenged regulations enacted under the *Guaranteed Available Income for Need Act*,<sup>81</sup> which provided \$25.00 less per week to single social welfare recipients under twenty-six years of age. The Court struck down the regulations as contravening s. 15 of the *Charter*. As Spencer J. held, \$25.00 is "of real importance to many of those affected".<sup>82</sup>

There are two problems facing those who would point to this as an example of the progressive character of the *Charter*. That is, to applaud this decision ignores both a critical assumption underlying the decision as well as the final outcome in the dialogue between welfare recipients, the courts and government. The critical assumption, of course, is the existence of the *G.A.I.N. Act*. The equality provisions of the *Charter* cannot justify judicial provision of welfare benefits or programs for the homeless; the judicial act is only supplementary to political choice. The critical outcome is the response of the government in the *Silano case* — *to reduce the level of payments to all G.A.I.N. recipients* rather than raise the level of the less well off. Here the judicial act is only preliminary to political choice.<sup>83</sup>

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<sup>78</sup> R.S.C. 1970, c. P-21, s. 150.

<sup>79</sup> See C. M. Haar and D. W. Fessler, *The Wrong Side of the Tracks* (1986).

<sup>80</sup> [1987] 5 W.W.R. 739.

<sup>81</sup> R.S.B.C. 1979, c. 158, Reg. 479/76, Schedule A, s. 4 [re-en. Reg. 65/84, s. 3; am. Reg. 155/87, s. 2].

<sup>82</sup> *Supra*, note 80 at 741.

<sup>83</sup> See B. Parfitt and M. Cernetig, "Welfare War Vowed Over Cuts", *The Vancouver Sun* (14 August 1987) A-1-2.

If equality rights can do little for the homeless, can liberal rights of "liberty and security of the person" do more? That is, law can also be progressive through a redefinition of liberty or property to encompass more than those aspects of welfare protected at common law. In defining liberty to include the power of control over one's reproductive system the Supreme Court of Canada has improved the welfare of women in ways which I cannot begin to comprehend.<sup>84</sup> Liberty can include more than freedom *from* others and the community. As Madam Justice Wilson said in *Jones v. The Queen*,<sup>85</sup> it can include the right to raise and educate one's children without conforming to state-mandated educational programs:

[T]he framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric. . . .<sup>86</sup>

Chief Justice Nemetz's remarks in *Robson v. The Queen*<sup>87</sup> predated those of the Supreme Court of Canada in *Jones*. In *Robson* the accused was convicted for driving while prohibited from doing so, after his licence was suspended by a police officer at a roadside alcohol check. The Chief Justice began by disavowing any attempt to incorporate property rights into the Charter's liberty concepts. He continued by defining liberty as encompassing more than the idea of "mere freedom from bodily restraint",<sup>88</sup> and extended it to include "the full range of conduct which the individual is free to pursue and . . . cannot be restrained except for proper governmental objectives."<sup>89</sup> [Nemetz C.J.B.C.'s emphasis] While those words might be inter-

<sup>84</sup> The same ideas about liberty, however, can explain decisions at common law which made it extremely difficult to convict abortionists. See *supra*, note 33. Similarly, in *Carruthers and Whelton v. Langley* [1986] 2 W.W.R. 459, the Chief Justice participated in a per curiam decision of the Court of Appeal which refused private citizens permission to bring an action which was intended to force Lions Gate Hospital to abide by s. 251 of the *Criminal Code*, *supra*, note 58, in a particular fashion.

<sup>85</sup> [1986] 2 S.C.R. 284, (1986) 31 D.L.R. (4th) 569.

<sup>86</sup> *Ibid.* at 318 S.C.R., at 582 D.L.R. (dissenting).

<sup>87</sup> (1985) 19 D.L.R. (4th) 112. In a later decision, *Hundal v. Superintendent of Motor Vehicles* [1985] 5 W.W.R. 449, the Chief Justice held that s. 86 of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, did not deprive the accused of his liberty to drive without due process of law, given the procedural structures established in the *Act*.

<sup>88</sup> *Ibid.* at 114.

<sup>89</sup> *Ibid.* He adopted the words of Chief Justice Warren in *Bolling v. Sharpe* (1954) 347 U.S. 497.

preted as encompassing positive rights to public benefits, it is clear that the idea of liberty is still that of liberty *from* state interference, rather than liberty to obtain things one does not already have from the state.<sup>90</sup> This point is made forcefully by Madam Justice Wilson in *Jones*, where she argues that :

Of course, this freedom is not untrammelled. We do not live in splendid isolation. We live in communities with other people. Collectivity necessarily circumscribes individuality and the more complex and sophisticated the collective structures become, the greater the threat to individual liberty in the sense protected by s. 7 [of the Charter].<sup>91</sup>

Thus neither liberty or equality will likely permit law to be progressive in the sense of providing a vehicle to assist the third homeless family in my original example. To fully appreciate why this is so, one might imagine the implications of a progressive legal system. When law “develops” even incrementally and thus does more than preserve, it must redistribute; to expand or modify an interest or an aspect of individual welfare is usually necessarily to subtract from or modify an aspect of collective or personal welfare currently enjoyed by a different group or individual. Thus regardless of one’s views of the decision of the Supreme Court in *Morgentaler v. The Queen*,<sup>92</sup> by expanding liberty to include reproductive choice, we have undoubtedly redistributed power away from men.<sup>93</sup> Regardless of one’s views of the relative deservedness of the three homeless families, if judges were to provide housing to the third homeless family, they would have to demand the resources necessary to do so from the population at large. One obvious way in which the problem of redistribution is hidden is through a legal system which is defined by preserving only what one has.

Conceiving of law as progressive, as demanding the redistribution of wealth rather than merely correcting injustices, leads some to argue that to do so crosses illegitimately the boundary into the legislative arena, which is the forum in which redistribution takes place.

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<sup>90</sup> At the same time, the liberty to drive has its source in a government-issued licence, and thus this case may be used to establish more general property rights in government benefits.

<sup>91</sup> *Supra*, note 85 at 319 S.C.R., at 582 D.L.R.

<sup>92</sup> [1988] 1 S.C.R. 30, (1988) 44 D.L.R. (4th) 385.

<sup>93</sup> An obvious rationale for a non-redistributive judiciary is that the interests of those who are less well off as a result of the redistribution are, given the current design of judicial process, not represented in the process. The response to this, of course, is to argue for a new institutional design, not to argue against redistribution.



There is, however, considerable debate as to whether redistribution takes place as it ought to in the legislative arena — the political power of the homeless is somewhat of a contradiction in terms.<sup>94</sup> More important, to say that it ought to be legislatures which redistribute points out that “law as justice” embodied in the *Charter* is not the answer to some of the more tragic social ills which we experience. Law does some things very well and other things not well at all. People who hope that the *Charter* will assist them in obtaining what they do not have will have two thousand years of corrective justice to overcome.

So in the end we will never know how the Chief Justice *as a judge* could have possibly responded to the third homeless family. The legal system does not recognize it and there is little in law which permits a compassionate person to respond to its requests for help.

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<sup>94</sup> This point can be appreciated by considering a fourth homeless family. This family owned a home in the past, but is homeless as a result of a natural disaster. Here one finds very well-developed and sophisticated government programs to assist this group of homeless in dealing with the trauma of dislocation and in rebuilding their lives and homes. See *supra*, note 9.