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Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?

The idea of a written Bill of Rights has been abroad in Canada ever since World War II.[1] It bore fruit in 1960 with the Diefenbaker Bill of Rights, a document with a rather hazy legal flavor. The notion of constitutionally entrenching our fundamental rights has been prominent on the Canadian constitutional agenda for the past fifteen years due more than anything else to its championship by Pierre Trudeau. Trudeau's latest version of a constitution Bill of Rights—contained in his otherwise battered and bruised Constitutional Amendment Act of 1978—received far more bouquets than brickbats from scholars and pundits alike. But powerful political opposition to this notion has recently surfaced, led by Alan Blakeney, a lawyer and our most sophisticated provincial Premier. Now Prime Minister Trudeau has arisen, Lazarus-like, from the political graveyard. Predictably he has placed this idea squarely on the post-Referendum agenda. But powerful political opposition to his proposal had surfaced in the late Seventies. The word filtering out of the First Ministers' conferences is that the provincial Premiers are split down the middle on this issue. Thus, as we enter the Eighties, the fate of a constitutional Bill of Rights is very much in question.

Yet less than a decade ago, this was an idea whose time had apparently arrived in Canada. In 1971, the Supreme Court of Canada, in its celebrated *Drybones* decision,[2] held that the Diefenbaker Bill did have legal teeth. It authorized Canadian courts to strike down even crystal-clear Parliamentary enactments which were inconsistent with the terms of the Bill of Rights.[3] In that same year the First Ministers, remarkably, reached unanimous agreement on the principle of entrenching in the Canadian constitution our basic political freedoms. The years of discussion and debate had apparently exorcised the ghosts of Parliamentary sovereignty, the constitutional principle we had inherited from Great Britain, and laid the foundations

for the American constitutional principle of a supervisory role for the judicial over the legislative-executive branches of government.[4]

In the Seventies that consensus has come unravelled. The Victoria Charter as a whole foundered on the shoals of Quebec public opinion. To put it mildly, the Supreme Court's treatment of the Bill of Rights ever since *Drybones* has been thoroughly shabby.[5] At the same time we read in our newspapers and magazines about how the United States Supreme Court has been continually embroiled in the turbulent social conflicts of the Seventies and of American constitutional judgments actually producing pitched street battles. The result is that Canadians have lost much of their earlier innocence on the subject. We realize that writing legal guarantees of individual rights into the constitution cannot be defended simply by favourable sentiments about the inherent virtues of those rights themselves. That step implies a fundamental shift in power from the political to the judicial organs of government. And a considerable number of government leaders and political figures in Canada have begun to edge gingerly away from that proposal.

I have always been ambivalent about the idea of a constitutional Bill of Rights in Canada. I first delved into the subject when I wrote a book on the Supreme Court of Canada and expressed some qualms in the midst of the general euphoria about the Courts's holding in *Drybones*.[6] Needless to say, my misgivings have not been laid to rest by the Court's subsequent performance in this legal arena. Yet I have always wanted to come back and take a second look at the problem; and to do so from the vantage point of a comparison of Canadian and American constitutional and judicial traditions. The United States has had almost two hundred years experience of judicial review under a constitutional Bill of Rights. This experience has produced a cottage industry of scholarly debate about whether or not the institution is a good thing. In the United States that dispute is just a speculative one. Two centuries of history have ingrained that institution into the American structure of government and popular attitudes. Canadians now have the challenge posed directly to them. Should we take that fork in the constitutional road? The American experience and literature is a rich lode from which we can mine nuggets for our own enquiry.

I can do no more than sketch the ingredients of that enquiry. Fundamental issues of jurisprudence lurk just beneath the surface of any controversy about the value of a constitutional Bill of Rights—tangled notions about rights, about courts, about constitutional reasoning. I

could not hope to do justice to any one of these concepts in the brief compass of this paper. I shall have to proceed more by asserting what I believe to be so, rather than demonstrating that such is the case. I shall not take haven in pure scholarly analysis of the issues. I shall commit myself to a specific constitutional proposal, around which I will organize my impressions about the American experience and the Canadian possibilities.

Making Rights Constitutional: The Nature of the Problem

I begin with this caveat: the perspective from which I shall consider this topic will be somewhat remote from the point at which issue typically is joined at conferences of our First Ministers. The major impetus in Canada for a constitutional Bill of Rights is concern for Canadian unity when challenged by cultural dualism. One important reason why Pierre Trudeau has always insisted on a new Bill of Rights has been his commitment to guarantee language rights to all French Canadians and thereby to defuse the threat of Québecois nationalism. There was a time, at the start of the Seventies, when it appeared that his honourable impulse might succeed. Its prospects seem somewhat dimmer at the start of the Eighties. The notion that a minority should have a fundamental right to use its own official language anywhere in Canada, a proposition which struggled for a century to establish a secure beachhead in English Canada, has lost currency inside Quebec. That story needs telling on its own.[7] I mention it here only to make clear that I am not addressing the problem of linguistic and cultural dualism, in which the central controversy is whether there should be a particular personal right at all, rather than whether an admitted right should be written into the constitution. Nor will I make an instrumental case for a constitutional Bill of Rights, as regards the contribution which entrenched rights could make to Canadian unity.

Instead, my focus is on the traditional liberal modes of human rights: freedom of speech and the press, freedom of conscience and religion, the right to counsel and the other ingredients of due process in our criminal justice system, and equality before the law irrespective of race, creed, nationality, or sex. I begin with the assumption that in Canada, as in the United States, there is widespread acceptance of the validity of these rights, at least as a matter of abstract principle, although obviously there remain heated controversies about their application.

In asserting that respect for these human rights is firmly embedded within the Canadian political culture, I do not mean to strike a holier-than-thou attitude about Canada. Unquestionably there are major blots on our historical record, not simply in the case of the French Canadians, which I have mentioned, but in the denial of basic human respect to such minorities as Chinese immigrants in British Columbia at the turn of the century, the Japanese Canadians during World War Two, the Jehovah Witnesses in Quebec under Duplessis, and countless, hapless targets of our criminal justice system throughout the years. There continue to be significant and unjustifiable incursions on the scope of these basic rights even now. But I would claim that there is wide-spread popular acceptance of these values, at least as general principles, and indeed that it is only for that reason that considerable support can be marshalled to imbed them in the constitution, so that they might be better guaranteed and refined for the future.

Why, then, the reluctance to write them into our constitution? If we take that step, we not only make a judgment about the intrinsic worth of these rights by sharply upgrading their legal status, we also transform the institutional status of our judges. It is on the *judicial* side of the ledger that qualms are developing about the virtues of a constitutional Bill of Rights for Canada.

There is no better illustration of this theme than the abortion cases. Few other decisions of the Supreme Court of the United States have produced so virulent a reaction from both sides as that generated by its intrusion into the abortion controversy. I recall that when I taught criminal law back in the Sixties I used to group abortion with drug use, pornography, and gambling in order to discuss with my students whether or not the use of the criminal sanction to buttress public morality about such private behaviour was ineffective, even counter-productive, and thus to be avoided on prudential grounds. In the Seventies, and with the rise of the women's movement, the issue has assumed a different hue, one of high moral principle, in which both sides have staked out absolutist positions—whether for freedom of choice or for the right to life. And, as is well known, a majority of the U.S. Supreme Court ruled likewise by drastically cutting back on the constitutional authority of state legislatures to control the choice made by the woman and her doctor.

The abortion decisions troubled a great many previously sympathetic commentators about the constitutional role of the Supreme Court.[8] They forced even its defenders to look for a better justification

for this judicial value choice than the one which the Court majority had itself constructed.[9] A look at this problem from a comparative perspective suggests why there should be such unease.[10] The abortion controversy absorbed the attention of final courts in a number of nations in the mid-Seventies. Ironically, one of them, the West German Constitutional Court, started from the same premise as that of the U.S. Supreme Court—that abortion does pose an issue of fundamental constitutional rights—but then arrived at the opposite conclusion, that a German law which *liberalized* a woman's freedom to have an abortion infringed on the constitutional value of the sanctity of life, in particular of fetal life. Reading these judgments together does starkly pose the question of what business the courts have in deciding such moral dilemmas; and what is more, overturning the judgments of the legislature and foreclosing any further debate and decision in that political forum.

In Canada we also had a legal *cause célèbre* on the subject of abortion, the *Morgentaler* decision.[11] That imbroglio primarily concerned the criminal law aspects of the proceedings, the use of some novel defences discerned in the Criminal Code and the common law, and the headline-making action of the Quebec Court of Appeals' substituting a verdict of guilty for a popular jury acquittal in Montreal.[12] A less publicized feature of the case was that counsel for Morgentaler used the Canadian Bill of Rights as one of his battery of legal arguments in front of the Supreme Court of Canada. He asked our Court to follow the *Wade* decision from the United States under the similar language in our own statutory Bill of Rights.

Not surprisingly—at least to those who know of the general fate of our Bill in front of the Supreme Court of Canada—that argument proved to be a frail reed. Not so predictably, the dismissal of that claim was written by Chief Justice Laskin, the most activist civil libertarian judge on our Supreme Court. Laskin made it clear that the American tradition of substantive due process—even in its new, revised version of personal rather than economic liberty—had no roots in the Canadian legal culture. He emphasized that the Canadian Bill of Rights was just a statutory instrument, and that Canadian courts had no business using it as a cover to consider the substantive wisdom of Parliamentary enactments. As far as Laskin and the rest of the Supreme Court were concerned, the abortion struggle had to be waged in the political arena, in Parliament. Unlike its counterparts in West Germany or the United States, our final court of appeal refused to intervene in that struggle with value judgments which it might

perceive in the broadly worded provisions of the Bill of Rights. Nor was that an aberration in Laskin's views, let alone in the prevailing judicial attitude in Canada. The Chief Justice returned to the same theme in *Miller and Cockrell*[13] in which he refused to invalidate the death penalty as "cruel and unusual punishment," again rejecting the then prevailing American decisions. However activist Laskin may be in the area of procedural due process and equal protection, there is a clear line beyond which he will not go in limiting the substantive powers of Parliament.

That is precisely the attitude which proponents of a constitutional Bill of Rights want to change. They want the Supreme Court of Canada to display a lot more backbone in protecting our fundamental rights. If Parliament enacts measures which seem to impinge on important human liberties, they want our judges to scrutinize these laws searchingly, and if a law does not measure up to the standards of the Bill of Rights they want the courts unflinchingly to strike it down. Underlying popular expressions of that attitude, one often finds the tacit premise that a constitutional Bill of Rights is simply another *law*: it would be a law superior in authority to ordinary enactments of the legislature, but capable of being applied by the courts in a manner similar to the way statutes are used to measure the actions of administrators, for example. That premise is a spurious one as is testified to by American experience with the amendments which make up and add to the Bill of Rights, and indeed the Canadian experience over the past 20 years under our statutory Bill of Rights. A Bill of Rights does have the formal attributes of the law. But it is very different in substance from the ordinary laws which courts customarily handle.

With a little reflection it is easy to understand why.[14] The purpose of a Bill of Rights is to express the basic ideals and fundamental values to which a nation is committed, and to so do in symbolic terms which will endure for a century or more. Of necessity such a charter will make use of such notions as "due process," "equality before the law," "cruel and unusual punishment." These are essentially moral concepts, which are worlds removed from the kind of meticulous legal detail that one finds in a Tax Code, for example. True, in the early years of the life of the Bill of Rights, these broad phrases can be meaningfully interpreted in light of the contemporary understanding of their meaning, normally gathered from the other kinds of laws that were being enacted and applied at the same time. But both circumstances and sentiments change. There is nothing sacrosanct

about that original meaning. Hewing to such a set of "frozen concepts" will only hamstring the natural evolution of our civil libertarian sensibilities. As good evidence as any is the fact that it took only twenty years in Canada for our current statutory Bill to reach that stage in its life cycle, as the drift of current criticism of the Supreme Court's interpretation justifies. We entrench a Bill of Rights in a constitution because we do not want it to be readily amended, even to be innocently updated. We prefer to erect difficult hurdles in the way of legislators who may be tempted to overrun our fundamental freedoms when pressed to do so by popular, though perhaps transient, majorities. But circumstances do change. Novel challenges emerge. Someone has to probe the implications of these abstract moral ideals. That task falls to the judiciary. This is the institution which has the ultimate authority to voice the supposed dictates of the constitution. But we should be under no illusions about who is responsible for these judgments. The current members of the final court of appeal, not the draftsmen of the Bill of Rights a long time before, will really settle such issues as whether the criminal sanctions against abortion offend against "due process," or whether the status provisions in the Indian Act offend against "equality before the law." It is only when we fully appreciate that fact of legal and constitutional life that we can really come to grips with the *institutional* dilemma posed by a proposal to entrench a Bill of Rights in the Canadian constitution.

Judicial Review and Democratic Rule

It is at precisely this point that the American model is especially illuminating of both the complexities and the possibilities in resolving that dilemma. I can do no more than distill that lore into a brief appraisal of those features of the American experience which are pertinent to the proposal that I will make for Canada.

I have always found it useful to sort the material in the debate about a constitutional Bill of Rights into three major questions:

> How can such judicial action be *legitimate* in a domocratic state?
> How can the judicial branch of government actually wield *effective* power to control the political and popularly-elected branch?
> Does the judicial institution tend to produce *wise* judgments about the proper scope and limits of civil rights in a modern society?

The first of these, the argument from democracy, is the most enduring element in the case against judicial review. After all, Canadian judges are appointed. They are tenured. They serve for life (or until

automatic retirement at the age of 75). They can be removed from office only for personal misbehavior, *not* because of the tenor of their legal rulings. The essence of the judicial office is freedom from accountability to the general public. We seek to foster an atmosphere of judicial detachment and impartiality, a set of mind which will exclude from consideration the popular emotions and sentiments often evoked by issues before the court. These features of the judicial institution make good sense insofar as we are concerned with the judge's task as adjudicator of a concrete dispute within an established framework of law. For example, is the evidence such that a doctor was guilty of criminal abortion, or that a defendant actually committed capital murder? It is not at all evident that the same design is appropriate for a judiciary—especially for a final court of appeal—which must decide whether the restraints on abortion offend against "due process" or whether the death penalty is "cruel and unusual punishment" within the meaning of a constitutional Bill of Rights.

By what title do our appointed judges divine the answers to these intractable controversies about fundamental values, especially when they presume to strike down the actions of elected legislators who have taken a different view? This is the contemporary concern which lurks within the traditional rubric of parliamentary sovereignty. The people elect a party to form a government in parliament, to pursue a set of policies embodied in a platform, and at the end of its tenure, to answer to the electorate for its performance in office. If we do not like what a government has done—if we disapprove of its policies relating to abortion, capital punishment, equal rights, whatever—should we not use the power of the vote to throw it out of office and replace it with another government? The ballot box is the mechanism through which we pursue the democratic principle of majority rule, through which we secure the consent of the governed about such pressing issues of public policy as energy pricing, for example. Why is not that the preferred institution for civil liberties policy as well, rather than rule by Learned Hand's "nine Platonic guardians."

This is a perennial, and an appealingly populist, challenge to a constitutional Bill of Rights for Canada. I have always found it to be the easiest objection to overcome because, ultimately, it misses the point about fundamental rights. Reflection on the American experience shows us that an adequate response must be made along three fronts.

In the first place, modern society and modern government are vast and complicated. The democratic ideal of Rousseau, for example,

simply is no longer tenable. We cannot be conducting constant town hall meetings in which everyone participates and where the majority explicitly concurs in a decision about what its government will do. Instead we have a complex division of labor among many government institutions, required by differences in citizen interest and expertise or simply the time available to debate the issues. True, at the apex of that government structure there is an elected and representative party, cabinet, and prime minister supposedly in charge. But the vast majority of offices and powers are wielded by professional appointees. And I am satisfied that the vast majority of decisions and policies which would be subject to judicial scrutiny under a Bill of Rights are made by precisely these kinds of bureaucratic officials.

The phenomenon is epitomized by the administration of criminal justice, which is operated by police and prosecutors, by parole board and penitentiary officials. By itself this system would generate enough business to make a Bill of Rights worthwhile in Canada. The entire system of criminal justice rests on a tension between the needs of effective crime control and claims to personal liberty. In Canada right now, the key administrative decisions resolving that tension are made *ad hoc*, at a level of low public visibility, and in the exercise of discretion conferred by vaguely worded statutory powers or common law doctrines. Most troubling of all, they are made by officials whose bureaucratic perspective is averse to that of the defendant, who wants as much due process as he can get. By contrast, a judge has no particular commitment to one side or the other. He acts only after a public hearing in which he must listen to representations from both sides, and he must articulate reasons to fit his concrete judgment into the background legal principles. Surely that judge can establish a much better claim to the final say about how the needs of administering the criminal sanction should be accommodated to a decent concern for civil liberties. And at this level of officialdom—which, I reiterate, generates the vast bulk of claims under a Bill of Rights—any scruples about the anti-democratic nature of judicial review are simply irrelevant. It was precisely this limited office for a Bill of Rights which was tendered in *Drybones* and was rejected by the Supreme Court of Canada as too weak. At that time I had serious qualms about the Court's ruling, fearing that the judges were carving out too sudden and too ambitious a role for themselves, one which they would quickly shy away from, to the detriment even of this low visibility, day-to-day benefit which could thus have been provided by the Bill of Rights. My reading of the decisions of the

Court in the past decade persuades me that those fears were indeed well-founded, and nowhere better than in the Court's persistent laissez-faire attitude to the administration of criminal justice.

Democratic scruples against judicial review will also not suffice in the case where a court strikes down a general statute clearly and unmistakably enacted by our elected legislature. Even here we find cases where judicial authority actually enhances democratic values. After all, a majority vote in a legislative assembly is not a democratic talisman. Majority rule is a procedural device through which we pursue such democratic values as self-government, popular consent to public policies, and so on. Meaningful democratic government implies an enduring core consisting of periodic elections between competing parties, fair voting rights for individuals, and uninhibited public commentary on the issues. Governments in power may be tempted to hamstring the opposition party in an election, to dilute the integrity of the ballot through malapportionment or gerrymander of constituences, or to censor the press in order to still criticism. Judicial power under a constitutional Bill of Rights to strike down measures such as these, and to require even an elected Parliament to adhere to the basic principles of a democratic regime, would seem to enhance rather than to detract from the essentials of democratic self-government by the people themselves.

Quite a different case must be made to justify many other broad advances made by American courts in the last quarter century, such as securing equal rights for racial minorities, preventing cruel and unusual punishment and other human indignities to criminal defendants, or offering women freedom of choice about reproduction. None of these rights is directly implied by the logic of the democratic process. If we endorse active judicial enforcement of the Bill of Rights here, we do sacrifice democratic values to that extent.

That prospect should not dismay us. There must be some moral limits on the actions of any government, even a democratic government. The decisions of the majority can claim no absolute value. They must decently respect basic liberties and principles of justice. But these moral limits often have a tenuous hold on the majority especially when they are put forward by dissenting individuals or enduring minorities. Thus somewhere in the system there should be a forum where an overzealous legislature—spurred on by current popular sentiments—can be forcefully reminded of these restraining principles. It seems to be asking too much of human nature to expect the political branch of government always to police itself. The natural

alternative is an independent judiciary, which is not beholden to the people for office and which can provide access and relief to Willard Hurst's "one man lobby," who comes to complain about a political injustice which has been done to a lonely minority.

Let me add this comparative note. Judicial review seems to fit *more comfortably* within a congressional system of government, designed to distribute the power of government among separate, independent branches. I suspect that it may be *more necessary* in modern parliamentary government, especially in its recent Canadian version. Our current parliamentary system rests on these two developments: first, strict party discipline in the House to avoid non-confidence votes which would dislodge the government and precipitate an election that no one wants; second, the growth of prime ministerial authority over his cabinet and his caucus, which has gradually eroded independent centers of power inside Ottawa (or Westminster, for that matter). That fusion of governmental power is supposed to give the leader and his cabinet the political resources to achieve serious policy innovation, to pursue a sustained and coherent program, and to answer to the electorate for the results. Many observers, both in Canada and the United States look fondly at that form of government, especially in comparison with the political entrepreneurship which is endemic to the American congressional system, with its numerous wielders of power, each of whom is a target for special interest lobbies and all of whom are engaged in continual dealing and logrolling, and whose cumulative product only too often is the frustration of reform efforts or the erection of jerrybuilt programs whose elements work against each other.

While parliamentary government may look like a more rational, a more responsible, even a more democratic instrument when its resources are used for benign purposes, it can be a lot less attractive in actual operation. A governing party with just a bare majority in the Canadian House can use party discipline and closure to impose any of its favorite policies, even though our first-past-the-post electoral system regularly produces governments which are formed exclusively by a party which has polled considerably less than a majority of votes. And as the Parti Quebecois has illustrated, with that leverage the government in power can quickly initiate a fundamental transformation in society through an instrument such as Bill 101, the Charter of the French Language, which was enacted almost untouched, irrespective of the intense opposition of a sizeable English-speaking minority.

As I understand the historic rationale of the American congressional model, it is to make that scenario difficult to unfold. There are too many independent centers of power capable of cheating the apparent will of the majority by reflecting the intense interests of minority groups who would be adversely effected. This provides greater assurance that any policy which navigates all of those obstacles and pitfalls will enjoy widespread support.[15] Judicial review in the United States is simply one added lever in that elaborate system of checks and balances, a lever which, in its recent activist phase, has given some of that protection to certain minorities who have not fared so well with the elective branches of American government. Few such institutional obstacles and protections now obtain in Canada. Thus, contrary to the conventional wisdom, I believe that there is a stronger—not a weaker—case for external (judicial) review of the output of the political process when that process is designed on the parliamentary model.

Judicial Power to Preserve Civil Liberties

Suppose that argument of principle is accepted. A critic of the idea of a constitutional Bill of Rights may retreat to different ground. Concede, if you will, that a majority is not morally entitled, even in a political democracy, to override the fundamental rights of a minority group or a dissenting individual. Still, in the final analysis the majority—through the government leaders it elects—does have the power to do just that. There is no better illustration than the fate of Japanese citizens of North America during World War II. In both Canada and the United States—one country with, the other without a constitutional Bill of Rights—these people suffered shameful internment during the war. In the final analysis, is not a judiciary too frail a reed upon which to rely to check powerful popular sentiments such as these, however detestable they may be?

I suppose that is a plausible claim if one conceives of courts in the same way as did the American *Federalist Papers*, as wielding neither the power of the purse nor the sword. This conception flows from the traditional view of judges as adjudicators. The central function of the judicial umpire is to settle concrete disputes between individual adversaries. In that role, judges must be aloof from the fray. They give the parties an authoritative judgment on the basis of a record compiled by their counsel. Once his verdict has been issued, the judge returns to his chambers to await the next case, between entirely different parties. Typically a judge takes no personal responsibility for seeing that his verdict is enforced and that relief is secured by the vic-

torious party. True, there is a bureaucratic structure—composed of police, sheriffs, marshalls, jailers, *et al*—which ultimately will enforce court judgments. Often the judge in question is called upon to issue new rulings in that enforcement process. But this organization for enforcement of the law is not under the supervision of the judiciary, let alone of any individual judge. These officials are not beholden to the courts for their wages, promotions, status or other job perquisites, as they would be if they were in a hierarchical system with the judge as chief executive officer. The ultimate authority over this cutting edge of the legal system is exercised by the political organs of government. That fact places inherent limits on the ability of the judiciary to realize the rights of minorities against powerful, popular sentiments which influence political leaders in a democracy. And a failure of the courts to prove effective defenders of civil liberties may exact an additional price. We face not just the danger that identification with too ambitious and ultimately futile an undertaking may discredit the courts and the rule of law which they symbolically embody; even more important, we are told, the attempt to displace the responsibility for fundamental rights from political to judicial institutions may corrupt the body politic. If the enterprise of democratic self-government no longer need display self-restraint in its treatment of minorities, perhaps we will not be spurred to master the virtues of political morality in the day-to-day governance upon which we must ultimately rely.

That is the argument, in any event. How valid is it? I must say that that Hamiltonian concept upon which it rests—that the courts are "the least dangerous branch of government"—looks rather strange and anachronistic in the United States today. Is not a more accurate, though still overdrawn, picture of contemporary judicial power in the United States conveyed by the sobriquet "the imperial judiciary?"[16] American courts have emphatically shown themselves capable of effecting fundamental transformations in American social practices in order to bring these into line with moral/legal ideals. The most dramatic example was the reapportionment effort, when the courts took on the political branches of government and won a smashing victory. The most sustained effort has been the battle for integrated education in big city schools, first in the South, then in the North.

To succeed in these enterprises, the judges have had to invent a remarkable device, the civil rights injunction,[17] whose use may well transform the essential character of judging itself. Consider the kinds of challenges faced by federal judges in these constitutional struggles

and the responses they have devised.[18]

How can the judge in his chambers possibly imagine all the hypothetical contingencies which will arise in the course of integrating a big city school system? Would not even an omniscient policy maker have to be constantly altering his course as circumstances change? The solution is for the judge to require each side to draft detailed decrees so that he can draw on their experience and exchanges to illuminate the problem for him; and then the judge remains available for continual adjustments to his initial, and always tentative, decree as and when that becomes necessary.

How can a judge, legally-trained and caught up in a flow of cases in a general jurisdiction, ever hope to develop the experience and expertise in a single area in order to appraise the merits of the prospective educational plans, to monitor their operations, to see whether they really are conducive to the goal of equal educational opportunity? The judge should appoint a special master or a civil rights committee, drawing on people with a background of training, experience, and scholarship in this area, to serve as his expert advisors and tell him what should be done at every step of the way.

But what if the entrenched bureaucracy proves obstreperous in living up to the letter, let alone the spirit of the decree? The judge can appoint a receiver who will take charge of the system or institution, who will be able to wield the powers of hiring and firing, promoting and demoting, holding and witholding merit wage increases, and use those levers to prod the staff into line with the judge's edicts.

But the legislature may simply be unwilling to provide the funds to support remedial programs, funds which those inside the organization would be more than glad to use to upgrade their own enterprise. The judge will then use his new-found "power of the purse,"[19] either to pressure the legislature into action (through the threat of shutting down the program altogether), or even directly to order the legislature to appropriate the necessary funds and to raise the taxes needed to pay for them.

How is all this possible? Through the no longer extraordinary remedy of the injunction, which trains detailed, mandatory orders at individual government officials, and tells them that if they do not comply, they will be held in contempt of court and may even go to jail as a result. I do not mean to suggest than an individual federal judge can slap everyone in jail if they do not live up to his orders (though last winter there was a remarkable news story about a midwestern judge who actually put all of the county commissioners in jail for the

weekend because they did not comply with her order to appropriate increased funds for her own court's budget). That battleground may shift to a different level of officialdom and bureaucracy, those controlling our powers of arrest and jailing. If the political leadership in society receives solid support from the rest of the government and the populace at large, it can easily thumb its noses at a judicial decree (as might have been the case if the Court had reached a different verdict about the Japanese Americans in the midst of World War II). But any such judicial order issued in a society in which there is popular commitment to the symbolic virtues of the Bill of Rights and the legitimate rights of the courts to interpret and enforce them. As well, however controversial a judicial ruling may be, there will be some considerable support for the substance of the position advanced by the judicial ruling, a degree of support which may vary considerably by issue. In that setting the official singled out as a target for the judicial decree cannot rely very comfortably on popular support. Thus a judge who acts astutely should be able to develop sufficient momentum for acceptance of his decree within the sytem, to achieve immediate compliance on the ground, and then to rely on the natural inertia against formal constitutional change to preserve his solution until it becomes a familiar part of the legal landscape.

One hears the occasional observation, from people who feel a little queasy about the extraordinary resources which a judge can marshall in these all-encompassing structural injunctions, that the American judiciary may well be on its way to becoming the *most* dangerous branch of government. Surely that prognosis is a little strong. But, at least to this outside observer, there is an ironic cast to this recent phenomenon. The American judge seems to be the one government official in that country who can cut through the layers of authority and obstruction in the system of separate countervailing powers, who can handle all the levers of government authority in the single-minded pursuit of a high priority goal. Once he has made a finding of a constitutional violation, the judge can mobilize a wide range of social resources to transform the system which has produced it (whether it be a school system which is to be integrated, a mental hospital which is to be turned into an effective center for treatment, or a penitentiary service that is to be made minimally humane). He need not worry unduly about pockets of resistance in other nooks and crannies of government in the community, because he can train the injunction on their leaders and impose his will on them. And, unlike the President, the congressional leader, the cabinet officer, a federal judge can per-

sonally try the contempt proceeding against those people who disobey his orders. He has his own hands on that ultimate weapon in the legal armory. Again I do not want to press my point farther than it goes. It is nonsensical to suggest that the American federal judiciary is all-powerful. As I said, if nothing else, judges do need the cooperation of the executive power to enforce their ultimate contempt decrees. If the judiciary went too far, it could conceivably mass all the other elements of government against it, legislative and executive, federal and state, and the judicial decree would be just words on paper. That is unlikely ever to happen, if only because the federal judiciary is not a monolithic, hierarchally-organized system itself. There is room for disagreement, for play in the joints, within our judicial institution. That should be sufficient to insure that judicial edicts do not go totally beyond the pale of popular tolerance. But the experience of the last decade demonstrates how far courts can get ahead of public opinion without having to trim their sails in the face of a unified government establishment. Certainly they are far more capable of doing so within their areas of responsibility than is the supposed "imperial President."

There is another popular argument in the same vein, to the effect that the political branches of government ultimately hold the trumps over an obstreperous judiciary, because they appoint the judges. That argument was made most eloquently by Robert Dahl some twenty-five years ago.[20] He pointed out that the United States Supreme Court was constantly being replenished with new judges who were selected by the President and consented to by Congress. Thus it was impossible for a stubborn judiciary to hold out for too long against the popular will. The people are able to see that they get judges in line with their views. A quarter of a century later, we can appreciate the limits in that argument. We can see the number of revolutions in public policy which have been accomplished by the U.S. Supreme Court, and the number which have stuck regardless of what the Gallup polls said. The fact is that judicial appointments are infrequent and erratically spaced (President Carter has not yet had any in his presidency, nor did Lester Pearson have any in his five years as Canadian Prime Minister). A tremendous momentum can be built up by which novel principles get embedded in the law, and are extracted only with extreme difficulty. And in any event it is terribly difficult to ensure that new judges will behave as the appointing President or Prime Minister anticipate. After all, that is the whole point of judicial tenure, and is a lesson experienced by Nixon with his strict constructionists and by Trudeau

with his appointments from Quebec and their negative attitude toward the Canadian Bill of Rights.

These institutional trends have profound implications for the scope of judicial action in the Bill of Rights arena. Earlier I observed that modern jurisprudence has made it clear that judges are not—cannot be—tightly constrained by the surface meaning of many constitutional provisions. Legal logic simply leaves too many gaps at that level of analysis. And these gaps multiply in number as the original constitutional understanding recedes into the mists of history. Contemporary judges have—and know they have considerable room for judgment about the meaning they may impute to broadly-phrased constitutional language; and they must accept personal responsibility for the solutions that they fashion for the novel problems they face.

This incipient transformation of the American federal judiciary has added a new dimension. However aware sophisticated American judges (such as Felix Frankfurter) were of the breadth of their *legal authority* under the Constitution, they remained reticent about the degree of their *judicial power*. They were diffident about taking on deeply entrenched patterns of governmental behaviour apparently supported by general public attitudes, for fear of popular reaction, of widespread noncompliance, and of the dangers this posed to the integrity of the judicial process and the rule of law which it embodied. The moral capital of the judiciary was a scarce resource, one which had to be carefully husbanded, and expended only on truly important causes where it was likely to be fruitful. The remarkable success of American courts in the last twenty years in transforming the surrounding social and political environment has made that sense of prudential restraint seem as quaint and as mythical as the notion of formal logical restraints which it succeeded. Indeed it now seems that the more power American judges seize and exercise, the more powerful they become.

Judicial Wisdom Under A Bill of Rights

From the point of view of the committed civil libertarian, this institutional trend is not a problem. It is the *answer* to the question, how can we guarantee the fundamental rights of an embattled minority against an intractable and intolerant majority? The drive for an integrated educational environment for black children forced to live in big city ghettoes epitomizes the sense of urgency. If the fashioning of this new judicial armoury has made judicial restraint in the pursuit of that kind of social justice seem quaint and old fashioned, that is all to the good. Be that as it may, if there is any one thing that recent

American experience teaches us, it is that courts *can* be effective in checking the excesses of majoritariansim, as our earlier sketch of a decently-restrained democratic rule tells us that they *should* be.

Yet there is an ambiguity in this entire case for judicial enforcement of constitutional rights. The argument presumes that when judges say what our fundamental rights are, they are right about that. This is a natural assumption to make, especially for the legal mind. We already have judicial review in a number of places in the Canadian legal universe, whether in garden-variety administrative law, or in the pitched battles that take place in our constitutional federalism. In each of these we tend to identify what the courts (especially the Supreme Court of Canada) have held to be the law with what the law really is meant to be. Thus, if we do locate in the courts the final authority to decipher our Bill of Rights, it will be just as easy to assume that when the judges say that our rights have been infringed upon, they really were. That is a fallacy nonetheless, nowhere better expressed than by Mr. Justice Jackson of the United States Supreme Court, when he confessed that "we are not final because we are infallible, we are only infallible because we are final!"

This is the third, and to me the most serious, dilemma in the case for a constitutional Bill of Rights. Assume, as I think we must, that the definition of the proper nature and limits of our rights is always an ambiguous and debatable matter, especially in the kinds of modern controversy which are grist for the judicial mill. These require social and philosophical sensitivity rather than narrow legal expertise. The third institutional question, then, is why we should believe that the judicial branch of government is the ideal source of wisdom on this subject, such that it should have the final, constitutionally enforceable say, as and when it differs with the political branch.

Certainly there are major virtues in the judicial setting. Judges see the conflict between individual right and social need in a realistic setting, and are able to proceed carefully, incrementally, in working out a decent solution. Judges also inhabit a relatively detached, unpressured environment, which is conducive to reflecting about and refining the enduring general principles to which a community should be held in concrete disputes about minority rights. Last, but not least, judges are duty-bound to answer the individual's claim on its merits. They cannot display the typical bent of the politicians in dealing with troublesome moral conflicts posed by dissenting outsiders: to pass the responsibility on someone else, or to sweep the entire problem under the rug because there are few voters interested in it.

There is one contrast between current Canadian and American law which has always brought that last point home vividly to me. The U.S. Supreme Court has fashioned a doctrine that evidence obtained as a result of unconstitutional police action is inadmissible in court. The Canadian Supreme Court refused to adopt that same doctrine under our Bill of Rights (nothwithstanding a biting dissent by Chief Justice Laskin).[21] A vigorous debate is going on in the United States about whether that rule really is an effective sensible deterrent to police illegality, this being the manifest rationale of the rule in the eyes of the current Court. But from a Canadian perspective, a major virtue of the American doctrine is the way in which it has brought into the light of day the entire array of police and prosecutorial practices in the administration of criminal justice. No longer can these be swept under the political rug. With an illegally-obtained evidence rule, the courts have provided a forum and an incentive to the legal profession to throw a searchlight on such issues as "stop and frisk" and border searches, to sift through the substance of the arguments for both police officer and private citizen, and then to develop a principled solution to each such conflict. Absolutely nothing like that takes place just across the border in Canada, where the Supreme Court has thrown the ball to Parliament, a body which will not, which cannot, take the responsibility for fashioning a decent jurisprudence for these low-visibility issues.

If the judicial forum has these virtues, it has the corresponding vices as well. The adjudicative format—with its presentation of oral testimony, under oath and subject to cross-examination conducted by opposing counsel under the watchful eye of the judicial umpire—is a powerful engine for accurately deciphering the *adjudicative facts* to which an established legal rule is to be applied; for instance, who did what to whom in a murder trial? That format is anything but ideal for dealing with *policy facts*, the patterns and ambiguities of social life which are relevant to debates about a legal-constitutional rule. Does the death penalty actually reduce the homicide rate so that it is not wantonly "cruel and unusual punishment"? Or does integrated schooling produced by mandatory busing actually improve the educational achievements of black children so that it is entailed by a constitutional right to equal educational opportunity? Of necessity a judge proceeds very differently from a social scientist in grappling with these questions. The latter spends years absorbed in specialized research in such a subject. He offers his findings only when he has accumulated proof which will satisfy his scholarly peers. For the rest, he

is content to say that he does not know. A judge does not have that luxury of time and experiment. He cannot be an agnostic. Ultimately he must commit himself to a verdict one way or the other, on the basis of a record which these parties and their counsel happen to have produced for him. There is nothing wrong with that. That is the judge's job, to settle this litigation between these parties. The question is whether the rest of us should be sufficiently trusting of that process to enshrine its product in *constitutional* jurisprudence, and thus make it immune from normal political avenues for policy change.

This empirical weakness is the flaw typically associated with judicial policy-making, constitutional or otherwise.[22] Perhaps of even greater concern is the way that judges may try to compensate for that deficiency. As I observed earlier, courts do have a natural aptitude for fashioning clear, resolute, legal principles to deal with claims of individual rights. That characteristic is applauded by most constitutional theorists in the United States. It is deplored by others, most prominently, I suppose, by Alexander Bickel, who devoted his entire career to attacking the assumption that tangled social conflicts can be adequately resolved by abstract principles which dictate across-the-board solutions and ignore the felt distinctions which appeal to the lay legislative temper.

I have already mentioned the starkest recent example of that set of mind: the abortion cases in which the U.S. Supreme Court embraced the absolute principle of a woman's freedom of choice about abortion, at least in the early months of pregnancy, and struck down the patchwork quilt of legislative accommodations of that value with the competing interest in fetal life. There are any number of controversies about civil liberties for which constitutional adjudication has produced clear-cut, single-minded solutions in the United States, while the legislative process in Canada has struck a rough balance with competing social interests without, to my mind at least, thereby compromising the central core of the fundamental right. Take these examples.

Does a rigid rule of near-mathematical equality for election districts really fit with party government selected on a single-member, first-past-the-post electoral system? Should freedom of speech entail a constitutional barrier to any legal limits on the amount of money which an individual can spend in his election campaign? Does public financial support of parochial schools, or of the parents who want that kind of education for their children, really produce an entanglement of religion and the state?

The point I raise by these examples should not be misunderstood. Each of these problems does involve important issues of principle. The availability of a viable judicial forum in the United States brings these issues of principle out into the open and generates a sophisticated dialogue about them. We need only compare the state of the debate about abortion in Canada, which has been largely defused because Parliament has delegated this issue to hospital committees and let the doctors bring about abortion on demand in their communities if they wish, with exactly the erratic and inequitable pattern that one might anticipate. The result is that there is a much richer appreciation of the meaning of these rights in the United States than now obtains in Canada. That is why the American model looks so attractive to us. But there are a great many Canadians—and I am frank to say that I am one of them—who intuitively share the discomfiture of such sophisticated theorists as Bickel with the legal temptation to formulate those rights as near-absolutes, occasionally to press their application to limits far removed from the central evil for which the right was designed, and to be impatient with, if not distrustful of, the political tendency to compromise with such practical realities as competing social interests, or costs, or even popular antipathy. I do not mean to imply that American courts see no limits to the logic of constitutional rights. Clearly they do. Debate about where to place the limit is the stuff of constititional litigation. We are told that the trouble with the Burger Court is that it places too much emphasis on the limits rather than on the rights (although this is the Court which has decided *Wade, Buckley, et al.*). Even in that endeavour and especially in recent years, the conceptual apparatus of constitutional adjudication may give a rather artificial cast to the scope and limit of those rights. For example, having seen no legitimate reason to withold massive bussing orders to achieve integration of big city schools, the U.S. Supreme Court eventually found a stopping point in the existence of school boundaries for the suburbs. Having formulated an absolute right of a woman to free choice about her abortion, the court found another sticking point in the claim that Medicaid should pay for those abortions for needy women. Understandably there is a legal logic to each of those distinctions. Understandably they appeal to a Court worried that the law was going too far. But neither of these are lines which would have appealed to any legislative policy maker, taking an overview of the entire problem area, and concerned about the acceptability and the equity of the legal program as a whole.

It is this concern about the quality, the wisdom, of the rights which judges may fashion for us—not the undemocratic character of judicial protection of a minority from the tyranny of the majority—which is the legitimate source of unease in Canada about constitutionalizing our own Bill of Rights.

Returning to the Canadian Scene

Still, there are significant differences between the Canadian and the American tradition which must be taken account of in translating the United States experience into our Canadian context. The most salient of these concerns the performance of the Canadian courts. Anyone informed about our current judicial attitude to our Bill of Rights would immediately remark that the concerns I have just expressed, my qualms about an aggressive, absolutist judicial interpretation of a constitutional Bill of Rights, are far-fetched in contemporary Canada.

I have observed several times that the Supreme Court of Canada has been anything but an over-zealous defender of Canadian civil liberties. Although I cannot document this here, suffice it to say that our Court has regularly rejected any significant civil libertarian claims which have been advanced under the present Bill of Rights during its twenty-year life.[23] Canadian civil libertarians were heartened at the start of the Seventies by the *Drybones* decision, which seemed to herald a change in judicial attitude and to give legal bite to our Bill. They rummaged through judicial precedents and scholarly journals across the United States border in order to construct ingenious challenges to governmental practices in Canada. But the Supreme Court majority, backpedalling from the intimidating prospect of *Drybones*, has been equally ingenious in finding ways to mitigate the assertion of various specific rights; a variety of legal formulae shifted the burden of judgment away from the Court and left the Canadian public with only the illusion of judicial restraint of Parliament. And a continuing theme of the Court has been that the current Bill is only a *statutory* document, and that it would be unseemly for Canadian judges to use that kind of legal instrument to restrict the prerogative of our sovereign Parliament—even though most of the time the judges have merely been invited to restrain officials in the federal administration. I must say that I have always considered that theme to be passing strange. I would think that it is under a constitutional Bill of Rights, which makes the judicial edict final and unalterable by the political process, that Canadian judges should rightfully be diffident about second-guessing Parliament. But

under a statutory Bill of Rights—especially one such as ours, which contains a *non-obstante* provision that allows Parliament to reenact a law and immunize it from the judicial interpretation of the Bill of Rights simply by doing so expressly—Canadian courts should be adventurous, should be ready to take some novel and risky steps in protecting individual rights; if only because the political process remains there as a backstop if they should miscue badly enough. This is a point to which I will return shortly.

What To Do: Change the Court?

The sad fate of our Bill of Rights at the hands of Canadian courts leaves those of us who are concerned with the state of civil liberties in Canada impaled on the horns of a dilemma. The shadowly legal status of the current Bill leaves it an inadequate instrument for protecting individual rights from the bureaucrats, let alone the politicians. A sound remedy for that deficiency would be to give the Bill explicit constitutional status, such that it could no longer be blithely ignored by our judges. But those of us who are also concerned with the appropriate distribution of government authority in this country are reluctant to hand our judiciary that kind of ultimate constitutional power. The recent performance of Canadian courts testifies how unsophisticated our current legal culture is, while the recent performance of the American courts shows how ambitious the legal profession can be as and when it becomes more sophisticated and self-confident in that task.

There is one plausible response to that dilemma. We are now reexamining *all* the elements of government in Canada, not just the status of fundamental rights. Why not undertake some major renovations on the other side of the ledger, on the design of the court which would have the final responsibility for these new constitutional rights? Perhaps we might even question the basic premise of Canadian constitutionalism, that we must give a *judicial* institution the final say in interpreting our fundamental law.

As a matter of fact, the Supreme Court of Canada has come in for rather thorough dissection in our current round of constitutional debates. So far that inquiry has focused exclusively on the Court's role as umpire of Canadian federalism.[24] Reformers have been preoccupied with refurbishing the legitimacy and impartiality of the Court in that role, whether by insuring a balanced regional representation in the Court's membership, or by giving provincial governments an effective say in the appointment of new members. Almost no attention

has been paid to structural changes which might improve the wisdom and the realism of the Court's elaboration of our federal constitution. So far as I know, no one has seriously analyzed the compatibility of a representative court with a new constitutional Bill of Rights, although both ideas are vigorously advocated at the same time and often by the same people.

I have alluded a number of times to the breadth of judgment and legal authority which is wielded by the body which has the last word in defining the reach of constitutional rights. It is not at all clear that such a role is best performed by a tribunal such as the Supreme Court of Canada. Our Supreme Court functions as the final court appeal over all the other courts in the land—with ultimate responsibility for our law of torts and of property, for instance, or for provincial labour statutes and federal tax legislation. In the absence of another available institution, it did seem sensible that the ordinary courts would take responsibility for enforcing the federal distribution of powers under the British North America Act, and for protecting civil liberties under the Bill of Rights. That was the path taken by the Americans early in the nineteenth century, and we followed suit seventy-five years later. In both countries that step was taken under the initial judicial assumption that a constitution was a "law" like any other. We are no longer under any illusion about the true dimension of constitutional interpretation. Canada has now embarked on a possible reconstruction of our entire constitution from its roots. A compelling case can be made for the alternative European model of a separate, specialized tribunal as the body with the last constitutional word in this country

If I were to design a constitutional court from scratch, a number of modifications would immediately occur to me regarding the methods of and checks upon appointments, having a fixed term instead of life tenure, about citizen access and standing, and about the way that the court can inform itself about the real dimensions of legal issues. Most important of all, I would want to think about the unthinkable: whether this tribunal with the final say about our fundamental rights should still be composed *solely* of lawyers.

This practical question of institutional design implicates one of the major theoretical debates now raging in contemporary American jurisprudence. Everyone recognizes that the Constitution is not a law like any other. Inevitably the formal legal materials afford spacious room for judgment by the courts. In exercising that judgment, is there a distinctive structure to legal reasoning which shapes that

judicial inquiry into at least a quasi-legal mold? If that is so, as American constitutional lawyers typically contend, the judicial institution does remain inherently different from the executive or the legislature.[25] There are other students of American constitutionalism, particularly within the political science profession, who believe this is no more than a legal facade. As far as they are concerned, in the controversial cases about abortion, the death penalty, police interrogation, and the like, judges do exercise discretion in the strong sense of that term, and fashion social policy in a manner closely analogous to the frankly political branches of government.[26]

If the latter view does capture the truth of the matter, there would be a powerful case for broadening the membership of our final constitutional tribunal beyond the narrow confines of the legal establishment. Personally, I am not prepared to subscribe to that rather cynical thesis as of yet. I do believe that there is some structure of legal principle to constitutional reasoning, and that judges exercise discretion only in a weaker sense than do legislators. Even granting that, rarely is there an obvious legal answer to the pressing moral dilemmas which are posed by constitutional cases. The external legal materials do not dictate that the court must clearly settle such "hard cases" one way rather than another. Thus, judicial definition of our rights is certainly a function of the personal talents and imagination of the judiciary, if not also (as the political scientist might assert) of their backgrounds and personal predilections.

Some Canadian readers might dismiss all of this as a problem only within the American legal culture, where prestigous law reviews paint the task of the judge as the "search for what is true, right, and just."[27] Surely we would like to believe that this job description could never become part of the Canadian legal philosophy. This, I fear, is no more than a comfortable illusion. There is no more telling evidence than the language of the proposed constitutional Bill of Rights itself. Prime Minister Trudeau's Constitutional Amendment Act contained this provision:

> Nothing in this Charter shall be held to prevent such limitation on the exercise or enjoyment of any of the individual rights or freedoms declared by this Charter as are justifiable in a free and democratic society in the interests of public safety or health, the interests of the peace and security of the public, and the interests of the rights and freedoms of others, whether such limitations are imposed by law or by virtue of the construction or application of any law.

This was a somewhat watered-down version of the "exceptions" clause contained in the Victoria Charter, which was actually agreed to by all our First Ministers in 1971.

> Article 3. Nothing in this Part shall be construed as preventing such limitations on the exercise of the fundamental freedoms as are reasonably justifiable in a democratic society in the interests of public safety, order, health and morals, of national security, or of the rights and freedoms of others . . . .

The assumption of that language is that the individual freedoms contained in a Bill of Rights cannot be given an absolute, unyielding interpretation. Even a right as important as "freedom of speech" must be accommodated to a vairety of competing interests: whether other individual rights which are themselves of a constitutional character (the right of a defendant to a fair trial which could be impaired by pre-trial publicity), or embodied in existing statutory or common law (the individual's right to privacy or to a good reputation, which could be tarnished by a free but reckless press), or by reference to a variety of community and social needs ranging from national security in wartime to the popular distaste for hard-core pornography.

One does not have to be enamoured of the open-ended language of Section 25 or its predecessor to appreciate its pertinence to the point that I am making. If such a Bill of Rights were to mean anything, it would be up to the courts to protect the integrity of our fundamental freedoms from erosion by too free a use by Parliament of this escape hatch. We would need close judicial scrutiny of the supposed need for such limits on our personal freedoms in order to preserve a decent balance. Unquestionably a Bill of Rights phrased along these lines would open up a broad sphere of judgment to Canadian courts in fashioning legal policy towards civil liberties in this country. No Canadian judge, reading Section 25 in conjunction with section 6 of the Constitutional Amendment Act, which declares that "in Canada every individual shall enjoy and continue to enjoy . . . freedom of opinion and expression," could ever take refuge in the thesis that, in appraising controversial legislation, he was simply interpreting the language of the constitution in order to decipher the historic intent of its authors.

Grant the truth of that, and this question naturally arises. Should we not expand the scope of the judicial dialogue about the nature of our rights? Unquestionably the perspective of the lawyers is indispensable in that task. Would it not also be valuable to have the

sights of the statesman and the social scientist, of the philosopher and the poet? One might argue, in response, that this smacks far too much of Learned Hand's Platonic guardians, a body which it would be unseemly to have policing the work of an elected Parliament. That is a claim which could be made by people who do not want a Bill of Rights at all, who are willing to trust their fundamental rights to the political process. That argument is not open to those who advocate a constitutional Bill of Rights for the kinds of reason I advanced earlier, as a principled limitation on the scope even of popular democracy, designed to protect those values whose intrinsic importance are such that they must not be exposed to political log-rolling and compromise. If we are going to have any guardians playing that role, I see no reason why the only guardians that we can trust are professional lawyers. Surely people like Lester Pearson, Eugene Forsey, and Claude Ryan would be perfectly capable, in non-partisan roles, of detached, objective, and impartial appraisal of civil rights cases, of working out the proper balance between individual right and collective need and embodying this in a principled jurisprudence.

I do not advance this rather eccentric suggestion with any expectation that it would be seriously entertained within the current parameters of constitutional politics in Canada. We might conceivably get a specialized constitutional tribunal. Serious proposals in this vein have been placed on the agenda by both Quebec and Alberta. We will not get a "court" with non-lawyers on it, at least not in this century. Even those insiders who might accept the logic of this argument would shy away from a step which could only convey to the general public some uncomfortable lessons about the nature of constitutional adjudication. The tacit implication that the judicial Emperor does not wear much in the way of legal garb would likely prove fatal to the prospects for any Bill of Rights. Still, speculation about this path is valuable insofar as it reveals what we do with the distribution of governmental power if and when we decide to constitutionalize our fundamental rights.

What To Do: Change the Bill of Rights?

With that long, winding preamble, I finally arrive at my own modest proposal for a change in the legal status of our Bill of Rights, a deliberately pragmatic response to both sides of the current dilemma in Canada. We should entrench our fundamental rights in the Canadian constitution in order to give them the legal and symbolic authority which would be conducive to their flourishing. But we

should include in the constitutional Bill of Rights the kind of *non obstante* provision now contained in our statutory bill, a provision which would allow Parliament to enact (or to re-enact) a statute which would then be legally valid irrespective of a judicial holding that it is incompatible with the Bill of Rights if and when Parliament states explicitly that this is what it is doing. In typical Canadian fashion, I propose a compromise, between the British version of full-fledged parliamentary sovereignty and the American version of full-fledged judicial authority over constitutional matters.

One argument which could be made for such a proposal is its greater political feasibility. No one can be certain in these matters, but there is real doubt that we will get the whole-hearted American version of constitutionally-entrenched rights. Might it not be better to settle for half a loaf rather than none at all: to win a constitutional Bill of Rights now, even with that concession to Parliamentary sovereignty as its price, in the hope that this *non obstante* clause might safely be deleted as and when the political climate changes?

That tack is a tempting one, but it is not the one I choose to take. I endorse this proposal on its intrinsic merits. This is the case for it.

I start from the premise that constitutionality, like law, is also a matter of degree. Indeed, with any spaciousness of vision, Canadian judges can and should treat the current Bill of Rights as having a marked degree of constitutional authority. True, the Bill was enacted by Parliament in separate statutory form through the standard legislative procedure. Presumably it could be repealed in precisely the same fashion. But the document is explicitly constitutive of the scope of governmental power vis-a-vis the citizen and was intended to override "ordinary" legislation in cases of conflict, or so the Supreme Court held in *Drybones*. By the fundamental conventions of the Canadian polity, Parliament could not blithely repeal the Bill of Rights, or even dilute it, despite a formal legal entitlement to do so; nor could Parliament abolish or hamstring the Supreme Court of Canada, whose legal existence also rests on an ordinary statute of Parliament.

I have always been persuaded by this case. I also recognize that there is an aura to our original constitutional document, the British North America Act, which, however hoary and Victorian, is seen by citizens, politicians and judges as containing the truly important elements of our constitution. Thus the fact that the Bill of Rights was not inserted in the BNA Act has helped incline judges to emphasize much more the "quasi" than the "constitutional" aspect of its

nature. And, in one sense at least, the way that judges treat a Bill of Rights is the acid test of how much constitutionality it has achieved.

That is why I propose that we do put our Bill of Rights squarely inside the document which we all agree is formally our Constitution; and that we do this visibly, after full and informed debate, so that it is clear that the Canadian people and their elected representatives have decided that the nation wants future governments to be restrained by these principles. If we do not want Canadian courts to shirk their responsibility in the future, as they have in the past, let there be no doubt about our intent to give a deeper legal status to our fundamental rights.

I am persuaded that this constitutional step would give us just about everything of value which the judicial branch has to offer in this area. It should embolden our judges to enforce seriously these individual rights against collective governmental incursions. Canadian citizens would have a legal vehicle through which they could be protected from oppresive officials, who typically act in this fashion under the guise of general legal directions without Parliament's having ever adverted to and authorized the specific judgment that has been made. And since I believe this instrument is especially important in restraining the governmental officials in our criminal justice system, I would provide the courts with power—though not, I think, with the automatic duty—to exclude evidence obtained in violation of the Bill of Rights, in order to give Canadian citizens the incentive to use and to put flesh on these rights. We would have a forum in which the lone dissenter could challenge even those oppresive public policies which are embodied in crystal-clear Parliamentary enactment. An individual such as Peter True would have the right to engage the Canadian government in a dialogue of principle about whether secret trials under the Official Secrets Act can ever decently be justified. He could not be fobbed off as a troublemaker who is raising issues too touchy to be handled by politicians, and who does not represent enough votes to carry political clout anyway.

Yet, once the judges have issued their verdict, I would leave Parliament, not the Supreme Court of Canada, with the final say. If Parliament wants to overturn such a judicial ruling, it will have to face the issue squarely and commit itself on the merits. There would be considerable political hurdles to any government choosing to take that step.

It is not at all uncommon for a troublesome intrusion on individual rights to find its legal source in language which has been quietly slip-

ped into a statute by a senior civil servant, and whose implications were never really adverted to by the Minister, the Cabinet, or, at least, Parliament. The provision is valid law nonetheless, and courts feel compelled to treat it with much the same legal authority as the central core of the statute. Suppose that the Supreme Court of Canada now feels confident enough with the Bill of Rights to strike the offensive provision down. If the government and its administration want it restored, they will have to do so in the full glare of publicity which would attend any effort to override a Supreme Court ruling about the import of our Bill of Rights. Indeed, the government could not achieve this even by re-enacting language which states its policy in explicit terms. It would have to ask Parliament to state candidly that its bill is to be valid law *notwithstanding* the Bill of Rights.

It is an understatement, surely, to observe that few Canadian governments would be prepared to take the flak for such a measure—especially given our recent penchant for minority government—unless one was throughly persuaded that the Court had erred and felt that there was widespread public support for that point of view. In fact, might we not expect, or at least hope, that the visible presence of this legislative back-stop would encourage a more adventurous approach by the Canadian judges to a new Bill of Rights for whose success they had been given only the front line responsibility?

In that sense, a Bill of Rights would be enshrined in the Canadian Constitution, although it would not be fully entrenched in the strong sense of the term. We should not overrate the practical significance of that remaining legal gap. It is rare to find constitutional guarantees, no matter how inalienable they may seem, which are entirely beyond legal amendment. The question is where we should locate the authority to approve such an amendment. I am prepared to trust Parliament with that role, at least as long as it does so in accordance with a procedure which clearly focuses political responsibility for such action. I am intrigued with the possibility of still another political hurdle to such a step. Perhaps a *non obstante* restriction on the operation of the Bill of Rights should only become valid law only if, after it is first passed, an election intervenes and a new Parliament re-enacts the law in the same terms. Surely this elaborate scenario would afford ample time for emotions to cool and for sober second thoughts to take hold.

I advance this proposal to define the relative responsibility for, and ultimate authority over, fundamental rights only as between Par-

liament and the Supreme Court of Canada in Ottawa. I do not endorse it as necessarily the ideal allocation of responsibility between the courts and the *provincial* legislatures. The proposal to entrench a Bill of Rights in a federal system such as Canada's raises a number of distinctive problems which I have not touched on, and ultimately the question of whether there should be a single, national Bill of Rights uniformly restraining all the regional governments. After all, the United States did not really accomplish that until the U.S. Supreme Court began systematically, after World War II, to incorporate the original Bill of Rights into the Fourteenth Amendment which binds the states. On the other hand, it is by no means clear that provincial legislatures are worthy of the same trust in dealing with their minorities as is our national Parliament. Still, Canadians concerned about this issue can take some comfort in this fact. Much of the business which occupies federal courts in controlling state governments in the United States assumes a different hue under Canada's federal constitution. Ottawa, not the provinces, has jurisdiction over both criminal law and criminal procedure. Thus the tension between due process and crime control has already been nationalized in Canada, it is worked out in the details of a single criminal Code, and would be subject to the partnership between Parliament and the Supreme Court along the lines which I recommend.

Conclusion

There will be true believers in the cause of civil liberties who will still object that I have not provided fool-proof guarantees for their cause. On its face the Canadian Constitution would still invite Parliament to cave in to an intolerant majority and run roughshod over the rights of the minority. The landscape of Canadian history is littered with melancholy examples of just such oppressive action. A half-way measure is not enough to ensure that this can never happen again.

My response to that objection is implicit in my entire line of argument. We do not enjoy the luxury of embracing a system which will perfectly guarantee fundamental rights in Canada. The Parliament of Canada can, and has, done injustice to individuals and minority groups. So has the the Supreme Court of Canada. We must eventually choose between these only too frail human institutions, locating the final authority in that forum where we anticipate it will do the most good and the least damage.

These judgments have to be related to a country's own traditions, its own culture, its own evolving institutions. The United States has

chosen to place its bet on its courts. Great Britain, as yet, prefers its legislature. My inclination is *not* to assume that we are locked into such an either-or choice. Our current priority must be to induce the Canadian judiciary, led by the Supreme Court of Canada, to become an active collaborator in the cause of protecting Canadian civil liberties from the often unthinking, and occasionally unfeeling, intrusion by government. I believe that if we were to write these fundamental rights into a new Canadian Constitution, we would elicit such a response from the Supreme Court, especially as its composition gradually changes over the next decade. Frankly I agree with those Premiers such as Allan Blakeney who are not prepared to trust our courts to be the senior partner in that enterprise. That final responsibility I would still confer on Parliament, while carefully hedging its use in the manner that I have sketched. Our fundamental liberties, even if enshrined in a contitutional Bill of Rights, are simply too important to be left, ultimately, to *our* judges.

NOTES

1. A concise historical narrative of "The Rise of Interest in Civil Liberties in Canada" is contained in Tarnopolsky, The *Canadian Bill of Rights* (1975) at pp. 3-28.
2. *Regina vs. Drybones* (1970) S.C.R. 282.
3. That still left Parliament with the right to reenact the statute by "expressly declaring . . . that it shall operate notwithstanding the Canadian Bill of Rights". That *non obstante* option was specifically inserted in our statutory Bill of Rights. From the point of view of legal logic, then, the *Drybones* decision gave the Diefenbaker Bill a quasi-constitutional status, one which would govern and might over-ride ordinary legislation, but which was itself subject to avoidance or even total repeal by an Act of Parliament designed for that precise purpose.
4. It is not really true that Canada inherited from Great Britain its full-blown notion of parliamentary sovereignty. We have long been accustomed to judicial review of legislative action in order to enforce the distribution of federal authority under the BNA Act. True, it is often asserted that the distribution of parliamentary sovereignty is exhaustive as between the two levels of government in Canada. If the courts hold that a law is invalid when enacted by the one level, then, *ipso facto*, it is permitted to the other. Thus, it is assumed, our courts merely assess the pedigree rather than the virtue of statutory enactments under our federal constitution. But even that claim is too broad. There are, in the BNA Act, a limited number of guarantees of minority rights against legislative action—most prominently in terms of language (and/or religion). Indeed at this very time, one facet of those constitutional language guarantees is being considered by the Supreme Court of Canada in a challenge to parts of the Parti Québecois' language charter, Bill 101. Still, that point should not be pressed too strongly. The examples one can find of constitutionally entrenched rights in Canada are few and far between. They are really apt illustrations of the exception that proves the rule of parliamentary sovereignty in this country. Indeed, on the face of Sections 91 (1) and 92 (2) of the BNA Act itself, there is embodied the theory that constitutional guarantees written into that Act can be unilaterally changed by ordinary legislative action of the government of the day. That is the very argument being relied on by the Parti Québecois in defense of Bill 101's erosion of the English language rights supposedly protected by Section 133 of the BNA Act. Undoubtedly the doctrine of parliamentary sovereignty remains a powerful principle within the Canadian constitutional policy, even if it is not an absolute one. See Lyon, "The Central Fallacy of Canadian Constitu-

tional Law", (1976) 22 *McGill Law Journal* 40 for further exploration of this issue.

5. Among the better critiques of the Court's performance are Tarnopolsky, "A New Bill of Rights in the Light of the Interpretation of the Present One by the Supreme Court", in Law Society Special Lectures, *The Constitution and the Future of Canada*, (1978), and Maloney "The Supreme Court and Civil Liberties", (1976) 18 *Criminal Law Quarterly* 202.
6. Weiler, "The Defender of our Civil Liberties", ch. 7 of *In the Last Resort: A Critical Study of the Supreme Court of Canada* (1974).
7. See Castanguoy, "Why Hide the Facts? The Federalist Approach to the Language Crisis in Canada", (1979) 5 *Canadian Public Policy* 4.
8. For example, Ely, "The Wages of Crying Wolf: A comment on Roe v. Wade", (1973), 82 *Yale Law Journal* 920.
9. Compare Tribe, "Toward a Model of Roles in the Due Process of Life and Law", (1973) 87 *Harvard Law Review* 1, with Tribe, *American Constitutional Law*, 921-934.
10. Kommers, "Abortion and Constitution: United States and West Germany", (1977) 25 *American Journal of Comparative Law* 255.
11. *Morgentaler v. the Queen* (1975) 53 D.L.R. (3d) 161.
12. Dickens, "The *Morgentaler* Case: Criminal Process and Abortion Law", (1976) 14 *Osgood Hall Law School* 229 canvasses these issues in detail.
13. *Miller and Cockriell v. the Queen* (1976) 70 D.L.R. (3d) 324.
14. For a detailed development of this case in the context of American constitutional language see Ely, "Constitutional Interpretivism: Its Allure and Impossibility," (1978) 53 *Indiana Law Journal* 399.
15. Choper, "The Supreme Court and the Political Branches: Democratic Theory and Practice", (1974) 122 *Univ. of Pennsylvania Law Review* 810 is an excellent account of this process.
16. See Glazer, "Towards an Imperial Judiciary?", (1975) 41 *The Public Interest* 104.
17. Fiss, *The Civil Rights Injunction* (1978) is book-length treatment of this development.
18. I have found these to be the most useful treatments of these innovations in the judicial institution: Chayes, "The Role of the Judge in Public Law Litigation", (1976) 89 *Harvard Law Review*, 1281, Eisenberg and Yeazell, "The Ordinary and the Extraordinary in Institutional Litigation", (1980) 93 *Harvard Law Review 465; and Cox, "The Effect of the Search for Equality Upon Judicial Institutions"*, (1979) *Washington Univ. Law Quarterly* 795 (together with the Commentary by Gunther at 817 ff.).
19. See Frug, "The Judicial Power of the Purse" (1978) 126 *Univ. of Pennsylvania Law Review* 715.
20. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker", (1957) 6 *Journal of Public Law* 279; compare Casper, "The Supreme Court and National Policy Making", (1976) 70 *American Political Science Review* 50.
21. *Hogan v. the Queen* (1975) 2 S.C.R. 574.
22. Horowitz, *The Courts and Social Policy* (1977) is a provocative treatment of this topic.
23. I have referred earlier to several examples of restrictive Supreme Court interpretation of the Bill of Rights and our civil liberties generally; e.g. *Morgentaler* and abortion, *Miller and Cockriell* and the death penalty, *Hogan* and illegally-obtained evidence. Other episodes in that distressing history . . . include *Lavell* (1974) S.C.R. 1349, *Burnshine* (1975) 1 S.C.R. 693, reducing to a nominal level the requirement of "equality before the law," and *Prato*, (1975) 50 D.L.R. (3d) 383 and *Mitchell*, (1976) W.W.R. 577, denying even minimal procedural safeguards to persons who are being deported or whose parole is being revoked. I must also mention *Rourke*, (1977) 76 D.L.R. (3d) 193 and *Martineau*, (1977) 74 D.L.R. (3d) 1, which reduce to a vanishing point any judicial responsibility for the integrity of the administration of criminal justice, whether by prosecutor or penitentiary service.
24. I have dealt with this issue in detail in my as yet unpublished 1980 *Ladner Lecture* at the University of British Columbia: "What the Supreme Court is Doing to Our Constitution; and What Constitutional Reform May do to the Court".
25. A classic treatment of this point of view is Dworkin, *Taking Rights Seriously* (1978), including his Ch. 5 on "Constitutional Cases".
26. Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* is as good an account as any of this persuasion.
27. Fiss, "The Forms of Justice", (1979) 93 *Harvard Law Review* 1, at p. 9.