

# THE POLITICS OF POVERTY: WHY THE CHARTER DOES NOT PROTECT WELFARE RIGHTS

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Canada's *Charter of Rights and Freedoms* ("Charter") contains no explicit right to welfare;<sup>1</sup> yet in recent years, the *Charter* has become a principal site of struggle for state support of persons in poverty. Those who advocate recognition of an entrenched right to welfare argue that, based upon a jurisprudence that identifies human dignity as the fundamental value underlying *Charter* rights and freedoms, it is indefensible to leave the right to basic necessities of life outside the realm of *Charter* protection.<sup>2</sup> This claim is both legal, in that their conclusion is reached through deductive reasoning based upon legal principles such as substantive equality and security of the person, and deeply political, because their understanding of human dignity is informed by their politics. However, the political claim upon which the legal arguments are founded is subsumed within and disguised by court decisions that must be articulated in terms of facts and law.

Welfare rights advocates' conception of human dignity is founded upon a particular understanding of the nature and causes of poverty and the proper relationship between citizens and the state. This conception is out of step with the dominant political consensus. Welfare rights advocates believe that poverty exists because of social and economic factors beyond the individual's control.<sup>3</sup> From this perspective, they argue that the state has a responsibility to provide the resources necessary to ensure that everyone has the means to provide for basic food, housing and shelter, and they seek to strengthen this responsibility by making it a legal obligation.

Though this understanding of poverty may once have been dominant, political trends over the last twenty-five years have influenced Canadians' ideas about poverty and about what the state can or should be expected to do about it. Current welfare policies reflect the presump-

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

2 See Gwen Brodsky & Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 C.J.W.L. 185; See also Martha Jackman, "What's Wrong With Social and Economic Rights?" (2000) 11:2 N.J.C.L. 235.

3 I use the term "welfare rights" to refer to an individual's right to sufficient food, shelter, clothing, education, health care, and the corresponding positive obligation on the state to ensure to provide these things directly or sufficient money to buy these things to those who do not have them.

tion that people should be able to provide for themselves, and that if welfare programs are too generous or easily accessible, people will not have sufficient incentive to do so. From this perspective, unconditional welfare rights under the *Charter* are undesirable because they limit government's ability to effectively investigate and police undeserving claims.

Unless this political conflict is resolved in favour of the perspective of welfare rights advocates, legal claims for a *Charter* right to welfare are likely to continue to fail. Moreover, even if these claims were to succeed, they would be unlikely to result in substantial improvement in the material circumstances of the poor in the face of strong opposition from voters and governments. Ultimately, the only guarantee of adequate welfare is popular support, which can be won only if the logic of neo-liberalism is rejected in favour of a perspective that takes into account the structural causes of poverty. I will begin by saying something more about these competing ideological perspectives on the nature of poverty, and move on to consider the role they play in *Charter* jurisprudence on welfare rights. Finally, I will argue that the same factors that prevent the Court from entrenching welfare rights would prevent their realization even if entrenched.

## THE NATURE OF POVERTY

Where one falls on the question of whether the *Charter* should protect a right to an adequate level of state support is likely to depend on whether one views poor people predominantly as victims of circumstance, and therefore deserving of assistance, or as being responsible for their own circumstances, and therefore undeserving. Welfare rights advocates generally take the former position. They view poverty as the product of social and economic forces largely beyond the individual's control.<sup>4</sup> Consequently, society, through government, is seen to bear responsibility to alleviate the resulting need in a manner that addresses the physical needs, psychological vulnerability, disengagement from broader society, low self-esteem, and feelings of dependency that accompany it.<sup>5</sup> Though it did not conceive of welfare as an individual right, the Canadian welfare state at one time operated in a manner largely consistent with this view of poverty.

In the decades leading up to the entrenchment of the *Charter*, Canada developed a generous system of social programs informed by reform liberal principles and Keynesian economics.<sup>6</sup> The welfare state was founded upon a "postwar consensus [that] held that the public could enforce limits on the market ... and that the national community was responsible for the basic well-being of its individual members".<sup>7</sup> Bruce Porter provides an illuminating comparison of indicators of poverty in pre-*Charter* Canada and today:

If our parliamentarians at that time had gone to the Parliamentary Library [in 1980/81] to look into the problem of "homelessness" in Canada they would have found only a couple of reports dealing with transient men in larger cities living in inadequate rooming houses. ... They would not have imagined that after twenty years of unprecedented economic prosperity, there would be thousands in Canada who sleep on the streets or in grossly inadequate shelters for the homeless. Most parliamentarians would have had no idea what a "food bank" was. The first food bank only opened in Edmonton in 1981. It would have been unimaginable to them that twenty years later three quarters of a million people, including over 300,000 children, would rely every month on emergency assistance from a national net-

4 Carl Wellman, *Welfare Rights* (New Jersey: Rowman and Littlefield, 1982) at 4.

5 Ian Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988) 46 U.T. Fac. L. Rev. 1 at 8.

6 Reform liberalism is a variant of liberalism that conceives of a larger role for the state in creating equality of opportunity.

7 Janine Brodie, "Restructuring and the New Citizenship" in I. Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press) 126 at 130.

work of over 615 food banks and over 2,000 agencies providing limited emergency food.<sup>8</sup>

The welfare state of the 1970s and early 1980s largely reflected the view of poverty held by welfare rights advocates today, one that conceived of welfare as a societal obligation rather than charity. This is no longer the dominant way of understanding poverty. In recent decades, ideological shifts and government policies have led to an emphasis on the responsibility of individuals for their own circumstances, and suspicion of claims to state assistance.<sup>9</sup>

By the 1980s and 1990s, increasing national debt, recurring budget deficits, economic globalization, and privatization moved to the top of the political agenda. In response, governments cut spending on social programs. The year 1996 witnessed the end of federal funding of provincial programs under the *Canada Assistance Plan* ("CAP").<sup>10</sup> Under CAP, the federal government paid fifty per cent of the cost of welfare and certain social services on the condition that provinces provided individuals with social assistance sufficient to provide for basic needs regardless of the cause of the need. When CAP ended, cash-strapped provinces tightened eligibility requirements and reduced benefits.<sup>11</sup> There has since been significant reinvestment in social programs that have broad middle class support, such as health care, but funding for social programs used exclusively by the poor has not been similarly restored.<sup>12</sup>

Given meagre levels of social assistance, and the imposition of conditions that make it harder to qualify, it is difficult to escape the conclusion that not just governments, but the citizens who elect and re-elect them, hold different opinions about the nature and causes of poverty and about our collective obligations to the poor than they did twenty-five years ago.<sup>13</sup> What has come to be the dominant view of poverty reflects neo-liberal ideas that emphasize individuals' responsibility for their own circumstances and view the state as having a limited role with respect to the provision of financial support. Janine Brodie argues that

[t]he rights and securities guaranteed to all citizens of the Keynesian welfare state are no longer rights, universal, or secure. The new ideal of the common good rests on market-oriented values such as self-reliance, efficiency, and competition. The new good citizen is one who recognizes the limits and liabilities of state provision and embraces her obligation to work longer and harder in order to become more self-reliant.<sup>14</sup>

From this perspective, welfare cannot be seen as a right, at least for those deemed employable. Welfare rights advocates argue that it leaves "the most vulnerable of our fellow citizens, neighbours, and community members [to] face a political environment that writes off the injustice in their lives as personal failings, as inconsequential, and as of no public concern or responsibility".<sup>15</sup>

8 Porter, Bruce. "ReWriting the Charter at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada," (April 2001) *Plenary Presentation, The Canadian Charter of Rights and Freedoms: Twenty Years Later* Canadian Bar Association, online: Centre for Equality Rights in Accommodation, <<http://www.equalityrights.org/cera/docs/charter20.rtf>>.

9 Brodie, *supra* note 7 at 133.

10 *Canada Assistance Plan Act*, R.S.C. 1985, c. C-1, as rep. by *Budget Implementation Act*, 1995, S.C. 1995, c. 17, s. 32. This change was effective March 31, 2000.

11 For an extensive analysis of welfare reforms over the 1990s see: "Another Look at Welfare Reform" (Autumn 1997) online: Another Look at Welfare Reform – National Council of Welfare Canada <[http://www.ncwcnbes.net/htmldocument/reportanook/repanook\\_e.htm#\\_britishcolumbia](http://www.ncwcnbes.net/htmldocument/reportanook/repanook_e.htm#_britishcolumbia)> [Another Look at Welfare Reform].

12 See "Federal Health Investments" (5 February 2003) online: Fact Sheet – Federal Health Investments (2003 Health Accord) <[http://www.hc-sc.gc.ca/hcs-sss/delivery-prestation/fptcollab/2003accord/fs-if\\_2\\_e.html](http://www.hc-sc.gc.ca/hcs-sss/delivery-prestation/fptcollab/2003accord/fs-if_2_e.html)>.

13 I do not wish to over-emphasize the significance of this shift. People's perspective on welfare rights will generally reflect the extent they are favourably disposed to a market economy. This was equally true in 1980 as it is today.

14 Brodie, *supra* note 7 at 131.

15 Margot Young, "Section 7 and the Politics of Social Justice" (2005) U.B.C.L. Rev. 539 at 558.

Before proceeding to consider the implications of these political shifts for welfare rights litigation, I note that there is a third perspective that locates hostility to welfare rights not in politics but in an innate human tendency to make distinctions between the deserving and undeserving poor. This position is advanced by Amy Wax, who traces hostility to unconditional welfare rights to “fundamental and innate attitudes, which have evolved over millennia to facilitate group sharing and cooperation”.<sup>16</sup>

She begins by drawing an analogy between welfare and nineteenth and early twentieth century private mutual insurance funds in which “workers raised money by collecting a small sum from each individual in the group. Each member then became entitled to draw from the pool of resources upon the occurrence of an event that deprived the person of an independent means of livelihood”.<sup>17</sup> Since the success of the fund depended on each member contributing his or her share, rules were required to address the free rider problem. Members who failed to contribute their share were excluded from drawing on the fund in time of need. Wax suggests that similar logic would have operated to exclude free riders in the more informal systems of group cooperation that “may have carried a distinct adaptive advantage” in the period before central government.<sup>18</sup>

It is in these early informal arrangements of group cooperation that Wax locates our propensity to distinguish between deserving and undeserving poor. This propensity may in some respects have outlived its usefulness because legally compelled contribution means that the stability of the system no longer depends directly on excluding all free riders. However, it continues to operate to undermine public support for any welfare program or constitutional protection of welfare rights that is not seen to exclude the undeserving poor. Thus, she argues that constitutional guarantees of welfare rights are futile because there is

historical evidence suggesting that [they] are ultimately powerless against some entrenched social values to which they are opposed...Although the law's ability to influence attitudes undeniably varies with the attitudes at issue ... deep-seated notions of fairness would appear to be among the least promising candidates for circumvention by law.<sup>19</sup>

Wax makes a persuasive argument regarding the tenacity of the practice of distinguishing between the deserving and undeserving poor. It is not clear, however, that under circumstances of widespread agreement that poverty is a structural and inevitable phenomenon, the fact that a few undeserving individuals also benefit would undermine support for the right itself. However, in the absence of such consensus, it is critical to focus on the political factors that influence where the line between deserving and undeserving poor is drawn.

History reveals that this line is not written in stone. It was present and shifting in the seventeenth and eighteenth centuries; “woodcuts, etchings and engravings [of the period] mirror [a] drastic change in social policy, with the emphasis changing from indiscriminating alms-giving to an enforcement of social discipline via poor relief”.<sup>20</sup> It has shifted over the last twenty-five years, and this shift can be seen in the deterioration of social programs over that time. The fluidity of the distinction is also evident in changing views about single mothers. Both Wax and Evans note that whereas single mothers used to be categorized as deserving of state support, society has more recently categorized them as employable and has expected them to undertake

16 Amy L. Wax, “Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes and the Political Economy of Welfare Reform” (2000) 63 *Law & Contemp. Probs.* 257 at 263.

17 *Ibid.* at 263.

18 *Ibid.* at 267.

19 *Ibid.* at 291.

20 Robert Jutte, *Poverty and Deviance in Early Modern Europe* (Cambridge: Cambridge University Press, 1994) at 19.

paid work to support themselves.<sup>21</sup> The critical questions, then, are in which direction the line will shift next, and what is the best way to influence that shift in a direction that improves the lot of the poor?

One avenue through which welfare rights activists have attempted to influence this shift is litigation. In particular, they have attempted to expand the interpretation of *Charter* rights to life, liberty, security of the person, and equality to include protection for welfare rights.

## SECTION 7

Section 7 of the *Charter* provides that “[e]veryone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.<sup>22</sup> Poverty rights advocates take the position that s. 7, and in particular the right to security of the person, should be broadly interpreted to protect the right to social assistance at a level that is sufficient to provide, at the very least, the basic necessities of life.<sup>23</sup> One variant of this argument relies on a disjunctive reading of s. 7 that protects a freestanding right to life, liberty, and security of the person. According to this interpretation, s. 7 imposes a positive obligation upon government to ensure that no one is without those goods and services necessary to survival. Hence, this right would be enforceable even in the absence of a government action that deprives someone of security of the person.<sup>24</sup> A second position contends that once a government has chosen to enact a welfare benefits scheme, it must do so in a manner consistent with security of the person and thus cannot reduce benefits below the level needed to secure the basic necessities of life.<sup>25</sup>

Lower courts have generally been unreceptive to these arguments. For example, in *Masse v. Ontario (Ministry of Community and Social Services)*, the complainants challenged the Ontario government's decision to reduce welfare benefits by 21.6 per cent.<sup>26</sup> They argued that the reduced welfare payments were insufficient to provide for the basic necessities of life and that this constituted a violation of the s. 7 right to security of the person. In finding against the claimants, the Ontario General Division Court held that s. 7 did not impose positive obligations on government and therefore there could be no s. 7 right to an adequate level of social assistance.

The Supreme Court of Canada has also had occasion to consider the question of whether s. 7 imposes positive obligations on government, but has not thus far provided a definitive answer. *Gosselin v. Quebec (Attorney General)* was a challenge to a Quebec program that provided for substantially reduced welfare benefits for persons under the age of thirty, unless they participated in job training, community work, or remedial education.<sup>27</sup> On behalf of 75,000 affected persons, Ms. Gosselin argued that the program constituted a violation of ss. 7 and 15 of the *Charter*. With respect to s. 7, she contended that welfare benefits of \$170 per month were insufficient to provide for basic food, clothing and shelter, and that the benefit scheme therefore constituted a violation of the right to security of the person.

21 Wax, *supra* note 16 at 275, and Patricia Evans, “Single Mothers and Ontario's Welfare Policy: Restructuring the Debate,” in Janine Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996) 151-171; See also Another Look at Welfare Reform *supra* note 11, which details changing expectations with respect to mothers on social assistance.

22 *Charter*, *supra* note 1.

23 See e.g. Jackman, *supra* note 2; See also Porter, *supra* note 6; See also Arbour J.'s reasons in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 221 D.L.R. (4<sup>th</sup>) 257, 2002 SCC 84, [*Gosselin*].

24 See Arbour J.'s discussion of the textual interpretation of s. 7 in her dissenting reasons in *Gosselin*, *ibid.* at paras. 334-341.

25 Johnstone, *supra* note 5.

26 *Masse v. Ontario Ministry of Community and Social Services* (1996), 134 D.L.R. (4<sup>th</sup>) 20, 89 O.A.C. 81 (Ont. Ct. Gen. Div.), leave to appeal to Ont. C.A. refused, (1996), 40 Admin. L.R. (2d) 87, leave to appeal to the S.C.C. refused, (1996), 39 C.R.R. (2d) 375 [*Masse*].

27 *Gosselin*, *supra* note 23.

Although Gosselin's s. 7 claim failed because the majority held that there was insufficient evidence to support it, it is important to recognize the Court's implicit acceptance of the legitimacy of a government choosing to define a particular class of persons as undeserving, in this case welfare recipients under thirty who did not participate in job training, community work, or education. However, the Court did not foreclose the possibility that s. 7 might in future be interpreted to impose positive obligations on government. In the majority's reasoning, Chief Justice McLachlin wrote:

One day s. 7 may be interpreted to include positive obligations. ... [T]he *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits". ... [I]t would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. ... The full impact of s. 7 will remain difficult to foresee and assess for a long while yet.<sup>28</sup>

Though the scope of s. 7 remains open, the Chief Justice's choice of words suggests that any recognition of a positive legal right to adequate social assistance benefits remains in the distant future. I argue that there will be no such recognition unless Canadians come to view poverty as primarily a product of systemic factors rather than individual choice.

## SECTION 15

Subsection 15(1) of the *Charter* provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex age or mental or physical disability.<sup>29</sup>

Though s. 15 has been successfully used to challenge discriminatory treatment of social assistance recipients, courts have generally been unreceptive to the argument that poverty or receipt of social assistance itself constitutes a prohibited ground of discrimination.<sup>30</sup> Thus, s. 15 claims with respect to welfare rights are often linked to an enumerated ground, as in *Gosselin*, which unsuccessfully argued that payment of reduced benefits to persons under thirty constituted discrimination on the basis of age.<sup>31</sup> However, poverty rights advocates argue that s. 15 should provide a right to the basic necessities of life regardless of whether there is any link to an enumerated or analogous ground because poverty is itself an analogous ground that should be recognized as such. In the leading case on the interpretation of s. 15, *Law v. Canada (Minister of Employment and Immigration)*, Iacobucci J. stated the following with respect its purpose:

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.<sup>32</sup>

28 *Ibid.* at para. 82.

29 *Charter*, *supra* note 1.

30 See *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2002), 212 D.L.R. (4<sup>th</sup>) 633 (Ont. Div. Ct.); *Masse*, *supra* note 26; *Polewsky v. Home Hardware Stores Ltd.*, (2003), 229 D.L.R. (4<sup>th</sup>) 308 (Ont. Div. Ct.); See also *Federated Anti-Poverty Groups of B.C. v. Vancouver (City)*, [2002] B.C.J. No. 493 (B.C.S.C.).

31 *Gosselin*, *supra* note 23.

32 *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R.497, 170 D.L.R. (4<sup>th</sup>) 1 at para. 51 [Law].



Poverty rights advocates argue that in order for people to participate meaningfully in Canadian society, or to benefit from other Charter rights, they must have access to adequate income, food, shelter, education, and medical care.<sup>33</sup> Where people do not have the means to provide these themselves, the government's failure to do so is construed as a failure to treat them with the dignity and equal concern and respect that s. 15 demands.<sup>34</sup>

Thus, there are solid legal arguments in favour of finding that governments have positive obligations to provide adequate levels of welfare under ss. 7 and 15. However, these arguments rest upon an ideologically informed understanding of poverty that the courts must either reject or accept but can never explicitly confront. As I have argued above, one's position on welfare rights is affected by whether one views poverty as a product of social and economic circumstances or as attributable to choices taken by the individual, a largely political question. Legal arguments in favour of entrenched welfare rights and the court decisions that refuse to recognize them inevitably gloss over this ideological conflict.

Though unacceptable to welfare rights advocates, the political view that has thus far factored into the refusal to read positive rights into the *Charter* is the one most consistent with what is now the dominant view of the nature of poverty. It may also be one that is consciously consistent with democratic values, reflecting the Court's own sense that it does not have the mandate to read rights into the *Charter* that do not have democratic support.

## EFFICACY OF ENTRENCHED WELFARE RIGHTS

The political nature of the debate over welfare rights affects not only the likelihood that the Court will recognize positive rights but also the role entrenched welfare rights could play if the courts were to recognize them. If the community does not perceive welfare as a right, it is doubtful that a court pronouncement on welfare rights could stop or reverse their erosion in the absence of a political movement back towards recognizing the social and structural causes of poverty.

There are several compelling reasons to believe that entrenched welfare rights could not play this role. In "The Error of Positive Rights", Frank Cross evaluates the efficacy of a hypothetical constitutional right to welfare in the United States and concludes that it would do little to address the needs of the poor.<sup>35</sup> He argues that it is futile to expect courts to aggressively enforce positive rights in a hostile political climate. He observes that courts are rarely radically out of step with public opinion or the other branches of government and identifies a number of possible reasons for this. First, courts may fear retaliation from Congress. Second, they may restrain themselves out of awareness that they have no power to ensure that their rulings are implemented and out of concern about the effects that legislative non-cooperation may have on their authority. Third, judges are embedded within the wider community and are therefore unlikely to depart significantly from strongly held public opinion.<sup>36</sup> For these reasons he concludes, quoting from Holmes and Sunstein, that "the level of protection welfare rights receive is determined politically, not judicially, whether such rights are officially constitutionalized or not".<sup>37</sup> Cross' arguments here depend on the premise that the political climate is hostile to the

33 Jackman, *supra* note 2 at 243.

34 It is not clear that the *Law* framework can accommodate this argument. However, there is a compelling argument that government treatment that leaves some individuals without access to basic goods in an area in which a government has chosen to legislate (social assistance) is a violation of section 15 regardless of whether one can identify a comparator group that the law treats differently. See Sophia R. Moreau, "The Wrongs of Unequal Treatment" (2004) 54 U.T.L.J. 291.

35 Frank Cross, "The Error of Positive Rights" (2000-01) 48 UCLA L. Rev. 857.

36 *Ibid.* at 888.

37 *Ibid.* at 889, quoted from Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: Norton & Co., 1999) at 121.

recognition of welfare rights. It could be suggested that Canadians are generally more receptive to social democratic principles and that his arguments therefore do not hold true for Canada. But if my arguments above regarding the shift toward neo-liberal ideology are sound, Cross' arguments will also be applicable in the Canadian context.

Cross goes on to address the potential consequences if the courts were to attempt to vigorously enforce welfare rights. He suspects that a conservative court would be unlikely to interpret positive rights to effect a redistribution of wealth in favour of the poor. He thinks it more likely that it would use positive rights to, for example, strike down minimum wage legislation or collective bargaining laws on the grounds that these lead to unemployment. He is no more optimistic about the outcome under a liberal judiciary. He doubts that judges, who tend to be even less representative of the electorate than legislators, would be sufficiently responsive to the needs of the poor. He also thinks that even if a liberal court were to attempt to advance welfare rights, there would be a significant risk of it doing more harm than good.<sup>38</sup> This is a variant of an argument often presented as a reason why the court should *not* read positive rights into the *Charter*—that courts are institutionally incapable of making the complex policy choices demanded by welfare programming.<sup>39</sup>

Finally, Cross argues that if the courts were to vigorously enforce welfare rights, there is risk of significant public backlash that would ultimately operate to cripple progressive court decisions. In short, if the public has a strong aversion to welfare rights, democratic pressures will prevent their realization. Gerald Rosenberg makes the same argument with respect to equality rights in the United States.<sup>40</sup> In a detailed analysis of whether the U.S. Supreme Court decisions in *Brown v. Board of Education (Brown)* played any significant causal role in the desegregation of American schools, he finds that ten years after the decisions, school districts in the Southern states had not taken any substantial steps toward desegregation.<sup>41</sup> He argues persuasively that the real trigger for desegregation was the *Civil Rights Act* passed ten years after the decision in *Brown* in 1964.<sup>42</sup> Rosenberg goes so far as to suggest that by stiffening the resistance of those opposed to desegregation, *Brown* may have even delayed the achievement of civil rights. This leads him to conclude that courts "can almost never be effective producers of significant social reform".<sup>43</sup>

Some might object that the analogy between racial segregation in the United States and poverty in Canada is inappropriate. Not only is neo-liberal aversion to welfare rights less entrenched than the racism behind opposition to equal rights for blacks in the United States, but the flagrant disregard for the decision in *Brown* seems foreign to us. Canadians and their governments have, on balance, been quite comfortable with judicial supremacy and activism with respect to *Charter* rights. However, welfare rights are different from the Court's other *Charter* work for at least two reasons. First, unlike equality or democratic rights, there is no democratic consensus that welfare rights should exist as enforceable legal rights. In this respect, welfare rights in Canada are more analogous to equality rights in the mid-twentieth century Southern states.

Second, welfare rights are different because they are positive rights. In a sense we perceive the state to be acting as our agent when dispensing benefits in a way that we do not with respect to negative rights (in which case we view it more like an adversary). This has important

38 Cross, *supra* note 35 at 910-920.

39 See F. L. Morton and Rainer Knopff, *The Charter Revolution & the Court Party* (Peterborough: Broadview Press, 2000).

40 Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

41 *Ibid.* at 52; *Brown v. Board of Education*, 347, U.S. 483 (1954); *Brown v. Board of Education*, 349 U.S. 294 (1955).

42 *Civil Rights Act of 1964*, 42 U.S.C. §2004 (1964).

43 Rosenberg, *supra* note 40 at 199.



ramifications for the strength of feeling with which we respond to court decisions that do not accord with our own sense of what governments' obligations should be. Moreover, this identification with the state with respect to positive rights probably reinforces the sense that positive rights should entail corresponding obligations on welfare recipients.

For these reasons, it is at least possible that government and public reaction would be similar in principle to the reactions (or non-action) provoked by *Brown*. Recognition of this possibility reinforces the point that a robust welfare state ultimately depends on democratic approval. And to the extent that neo-liberal ideology is responsible for the welfare state's decline, a robust welfare state also depends on reversing that ideological trend. Unless that happens, there is little to be gained from court recognition of a right to state support.

## IMPLICATIONS FOR WELFARE RIGHTS LITIGATION

The failure to attend to deeper political and philosophical conflicts in the welfare rights debate causes a sense of disorientation when considering the literature on social and economic rights because those on either side of the debate often do not appear to be engaged in the same conversation. Those who oppose *Charter* protection of these rights base their argument on the grounds of democracy and institutional competence. Those who argue in favour base their claims on deductive reasoning from *Charter* jurisprudence and Canada's international human rights commitments. Both sets of claims are internally coherent, yet they are irreconcilable because they proceed from different assumptions about the nature of poverty. Once we recognize the battle over welfare rights as deeply political, we can see that it is not the role of the courts to resolve the battle by challenging the political consensus.

Even if the courts were to interpret the *Charter* to include welfare rights, in the absence of democratic support welfare rights are unlikely to result in substantial improvement in social programs. It is therefore critical to reassess the value of attempting to realize welfare rights through litigation.