THE NEW CANADIAN JURISPRUDENCE: *Canadian Journal of Law and Society/Revue canadienne de droit et société*, 1-2

David Howes*

In this essay my aim is to map some of the directions taken by Canadian socio-legal research in recent years. The terrain of my investigations is bounded by the covers of the first two volumes of the *Canadian Journal of Law and Society* (*CJLS*), a relative newcomer on the legal publishing scene.

It is significant that the *CJLS* first appeared in the same year, 1986, as the *Canadian Journal of Women and the Law*. What this proliferation of fora imports is that the nation's law professors have lost their monopoly over thinking and writing about law. This is precisely the revolution, or revision of intellectual boundaries, that was called for in *Law and Learning*, the 1983 Report of the Consultative Group on Research and Education in Law.[1] The dynamics of debate within law schools, and perhaps even the legal profession itself, can only be enhanced as a result of this refiguration, for as Harry Arthurs points out in "Every Whichway: New Directions for Canadian Socio-Legal Research," the strength of socio-legal studies is "its ability to generate 'basic' insights about law by mobilizing the diverse methods and insights of [such disciplines as linguistics, sociology, political science and philosophy] in a new attempt to understand legal assumptions and events."[2]

While the appearance of the *CJLS*, with its emphasis on interdisciplinary research, might seem to mark a new departure, it also represents a return to the ethos of an earlier epoch of Canadian intellectual history, the period before knowledge came to be fragmented along disciplinary lines.[3] This point is nicely illustrated by Peter Russell's highly stimulating article on the birth of Canadian political science. According to Russell, "Canadian 'political science' in the late nineteenth and early twentieth century was primarily a rubric for a cluster of subjects comprised of political philosophy, economics, constitutional history and con-

---

* Department of Sociology and Anthropology, Concordia University.

[1] *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: SSHRC, 1983).

[2] H.W. Arthurs, "Every Whichway: New Directions for Canadian Socio-Legal Research" (1986) 1 Cdn. Jnl. of Law and Soc. 1 at 2. The title of this essay reminds one of Stephen Leacock's proverbial constable, who leapt on his horse and rode off in all four directions at once. This image is symbolic of one of the principal dangers of "interdisciplinary research"--namely, that it can provide an excuse for undisciplined thought. See e.g. A. Kroker, "Migration from the Disciplines" (1980) 15(3) Jnl. of Cdn. Studies 3.

[3] For an excellent account of the range of subjects once deemed essential to the proper formation of a lawyer's intellect (and the decline of such cosmopolitanism as a result of the departmentalization of knowledge in Canadian universities around the turn of the century) see G.B. Baker, "The Juvenile Advocate Society: Self-Proclaimed Schoolroom for Upper Canada's Governing Class, 1821-1826" [1985] *Historical Papers*, Canadian Historical Association (1986). See further A.B. McKillop, *Contours of Canadian Thought* (Toronto: University of Toronto Press, 1987); D. Howes, "The Origin and Demise of Legal Education in Quebec (or Hercules Bound)" (this volume).

stitutional law."[4] Thus, law and political science were one, or rather, the prevailing assumption was that the political science scholar could understand how a country was governed by knowing the rules of its constitution. There was no space within this schema for the empirical, or "social scientific," study of law and legal institutions, or for that matter, of the processes of government (i.e., what we now understand by the term "politics"). As Russell observes, it was only by rejecting this highly formal schema, according to which law is the governing political variable, that political science could come into its own; but the ironic consequence of this rejection, which took place in the mid 1930s, is that "for a long time after the end of law's imperialism Canadian political scientists tended to swing 180 degrees and accept the opposite formalism--namely, the assumption that laws and the courts are not significant political phenomena."[5]

Interest in legal phenomena was finally rekindled in the latter half of the 1960s as a result of the emergence of constitutional reform as a major political issue. It was in the late 1960s that political science scholars began to analyze the political impact of constitutional decisions. Still more recently, they have started to investigate how the sentencing practices of certain courts may reveal a systematic racial and class bias. In both these ways, political scientists are transcending the second kind of legal formalism mentioned above -that is, the notion of law and legal reasoning as politically neutral. Now, however, with the advent of the *Charter of Rights and Freedoms*, and the "judicialization of politics" which the latter has entailed, constitutional studies have again come to occupy such a dominant place in political science scholarship that, Russell warns, there is "some important empirical research to be done by political scientists if Canadians are to have a sound knowledge base for appraising the real as opposed to the imputed impact of the *Charter*."[6]

Within the framework of the broad shifts in attention described above, Russell also notes the occasional appearance of alternative theoretical paradigms advanced by individual scholars. The insights of these scholars were never incorporated into the mainstream of either law or political science because of the emphasis on doctrinal production in the former and empirical research in the latter. The judicial realism of John Willis, the behaviouralism of Sidney Peck, the "principled jurisprudence" of Paul Weiler (and Russell's own brand of political economy, I would add) are cases in point. Each of these scholars succeeded in straddling the division between law and political science. By positioning themselves thus (between the disciplines) they were able to achieve insights which are now destined to loom very large indeed, given the general refiguration of social and legal thought that is heralded by the appearance of such journals as the *CJLS*.

While political science scholars are reasonably advanced insofar as overcoming the legal formalism that gave rise to their discipline is concerned, the same

---

[4] P.H. Russell, "Overcoming Legal Formalism: The Treatment of the Constitution, the Courts and Judicial Behaviour in Canadian Political Science" (1986) 1 Cdn. Jnl. of Law and Soc. 5 at 6.

[5] *Ibid.* at 25.

[6] *Ibid.* at 23-24.

cannot be said of legal scholars. Witness the publication of David Jones and Anne de Villars' *Principles of Administrative Law*. This book is the subject of an excellent review by Wesley Pue. Pue acknowledges that this treatise is a very real achievement (one of the first of its kind in Canada), but proceeds to take the authors to task for their non-complex, judge-centred functionalist model of the legal process. This model is "founded in a sociology of consensus in which 'our' values are protected by the judges who, of course, share fundamental values with the population at large."[7] As Pue points out, judges are drawn from perhaps the least representative echelon of society. This makes it difficult to see how their judgment could "reflect" the values of the wider, more diverse community. Equally problematic is the manner in which Jones-de Villars advance various positions, such as the non-desirability of legislative attempts to preempt judicial review, in classic Diceyan terms and without any sort of genuine policy analysis in defence of their assertions. The publication of reviews the calibre of this one bodes well for the development of a more reflexive and articulate Canadian treatise literature, providing such reviews are heeded.[8]

The most theoretically sophisticated essay in the first volume of the *CJLS* is Maryse Grandbois' analysis of the reconstitution of space and the multiplication of the state's powers of surveillance and social control under Quebec's environmental and land use planning and development law. Grandbois begins by showing how the conceptual scheme behind the province's environmental law lacks adequacy from an ecological perspective. For example, whereas the protection of the environment must be global, since what affects the part affects the whole, the law divides the environment into sectors and establishes norms for each sector (in consultation with *industry representatives* of all people) based on the maximum capacity of the rivers, the lakes, the air, etc., to absorb pollutants. By adopting such an approach, which leads to the splitting up of social problems into sectorial policies and to their *travestissement* (or getting dressed up) as technical questions, it is apparent that the State is not responding genuinely to what it itself represents as the pressures of "public opinion" in favour of a "healthy environment" (*environnement saine*).[9] Indeed, what Quebec's environment protection law seems more designed to do is establish a regime the function of which is to absorb and neutralize public pressure. This in turn frees the State to continue to pursue its age-old objective of organizing the exploitation of the environment.

---

[7] W. Pue, "Review of D. Jones and A. de Villars, *Principles of Administrative Law*" (1986) 1 Cdn Jnl. of Law and Soc. 167 at 169.

[8] See further W. Pue, "The Law Reform Commission of Canada and Lawyer's Approaches to Public Administration [:] A Review Essay" (1987) 2 Cdn. Jnl. of Law and Soc. 165. See also Flanagan's incisive critique of the lop-sided polemicism and unadulterated liberal legal universalism of the essays contained in a recent book on equality rights and the *Charter*. T. Flanagan, "Review of A. Bayefsky and M. Eberts (eds.), *Equality Rights and the Canadian Charter of Rights and Freedoms*" (1986) 1 Cdn. Jnl. of Law and Soc. 174.

[9] M. Grandbois, "Le Droit de l'Aménagement du Territoire et de l'Environnement" (1986) 1 Cdn. Jnl. of Law and Soc. 81 at 90. One of the few problems with Grandbois' essay is that "public pressure" is left undefined, and there is no inquiry into how it is mobilized or the forms it takes. On this question see M. Douglas and A. Wildavsky, *Risk and Culture: An Essay on the Selection of Technological and Environmental Dangers* (Berkeley: University of California Press, 1982).

Of particular interest is Grandbois' analysis of the logic behind the repartition of space under Quebec's land use planning and development law. This regime was inspired by the dream or project of the *réappropriation du monde* which took shape during the Quiet Revolution; it is informed throughout by the unifying concept of *l'action rationnelle légale*. One manifestation of this rationality consists in the division of the province into ten equal administrative units or regions. What such a division masks is the more "natural" metropolis/hinterland division (i.e. Montreal/the rest of the province), which is anything but equal.

Another manifestation of this rationality consists in the multiplication of bureaucratic structures. For example, whereas municipalities once enjoyed considerable autonomy, that autonomy is now severely limited as a result of their incorporation within the hierarchy of the newly established regional county municipalities.

> Au fur et à mesure qu'on descend dans l'échelle hiérarchique de ces institutions, la marge d'initiative et de responsabilité des fonctionnaires se restreint, alors que la part de simple exécution s'accroît. Les surveillants sont à leur tour surveillé et veille 'l'Etat militaire.'[10]

The discourse of "decentralization" is thus a gigantic ruse. What it facilitates is the penetration of the entire territory by the State. In short, there is no more free space, and the aspirations of individual localities become subordinate to the "general interest."

> En aménageant, l'Etat unifie ses politiques et camoufle les contradictions. En aménageant, l'Etat se donne le territoire qu'il veut et partant, un ordre spatial qui entraîne et mantient l'ordre social dominant. L'Etat cimente cet ordre social par le droit qui l'établit.[11]

Such is life under "the rule of law," as opposed to mere men: the administrative dream of perfectly quadrillated space is every citizen's nightmare. I doubt even Kafka could have imagined so duplicitous and totalizing a scheme as the Quebec land use planning and development regime (as exposed by Grandbois).[12]

The most theoretically unsophisticated essay in the first volume is Carl Baar's "Using Process Theory to Explain Judicial Decision Making." Baar begins by criticizing both doctrinal (or legal) and behavioural (or realist) approaches to the explanation of judicial decision making. These approaches, which he groups under the label "variance theory," err by focussing exclusively on the variables determining an "individual unit"--"the judge's vote" (the "variables" being law in

---

[10] *Ibid.* at 97.

[11] *Ibid.* at 98.

[12] What this leads me to conclude is that only the most politically naive could think that the rule of law is what we are fitted for as human beings. See e.g. P. Romney, "Very Late Loyalist Fantasies: Nostalgic Tory 'History' and the Rule of Law in Upper Canada" in W. Pue & B. Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988).

the first case and values or background in the second). Baar argues that what we ought to be concentrating on is "the court decision"--an "organizational unit," and that the best approach to such a unit is "a process theory approach that emphasizes how a set of probabalistic processes in a sequence of events leads to a particular outcome."[13]

What "process theory" is in fact is American style judicial journalism parading as theory.[14] This becomes apparent when one considers the sensational but unconvincing way in which Baar "explains" why the Supreme Court of Canada decided *Lavell* differently from the Federal Court of Appeal (as well as apppear to go back on its decision in *Drybones*). The difference, accorrding to Baar, was due to a combination of "bureaucratic politics, interest group organizing and the subtleties of timing," all of which resulted in some twenty-two additional parties being involved in the dispute (as intervenants) by the point it came before the Supreme Court.[15] This build-up "would have left no doubt in the justices' minds that they were dealing with a major policy issue," and so in the result "the pull of legal caution--the principle of *stare decisis*--[proved] not as strong as the pull of political caution--the principle of judicial restraint."[16] If this explanation of the outcome in *Lavell* as a reflex response (on the part of the justices) to the build-up of interest group pressure sounds hopelessly reductionistic and anti-intellectual, that is because it is.

Baar is certainly correct in suggesting that we concentrate on process rather than outcome. The problem is that his notion of process is so wide-open that it fails to illuminate anything. The disorderliness of Baar's narrative or "story telling" approach to the analysis of legal process highlights the strength of what John Hagan calls the "structural approach." What is of central concern to the "pragmatic tradition of empirical legal scholarship" as represented by Hagan, is the specification of the structural conditions under which cases do or do not move up the so-called "dispute pyramid" to litigation.[17] The strength of this new tradition is its ability to explain variations in substantive law as a function of, for example, variations among the cost, fee and financing rules (or "structural incentives") that shape case selection in different jurisdictions.[18] Other factors include plea bargaining, negotiated settlements, and lawyer-client relationships, all of which

---

[13] C. Baar, "Using Process Theory to Explain Judicial Decision Making" (1986) 1 Cdn. Jnl. of Law and Soc. 57 at 62.

[14] *Ibid.* at 60 and 62. (Baar himself describes what he is doing as "systematic story telling"). This style of writing appears, regrettably, to be gaining ground. See G. Parker, "Review of M.L. Friedland, *The Case of Valentine Shortis: A True Story of Crime and Politics in Canada*" (1987) 2 Cdn. Jnl. of Law and Soc. 187.

[15] *Ibid.* at 69. No such publicity attended the *Drybones* affair.

[16] *Ibid.* Baar runs a school of court administration. See Russell, *supra*, note 4 at 17. Baar's approach tends to bring court management down to the level of hotel management or business administration. For a corrective see M. Douglas, *How Institutions Think* (Syracuse: Syracuse University Press, 1986).

[17] J. Hagan, "The New Legal Scholarship: Problems and Prospects" (1986) 1 Cdn. Jnl. of Law and Soc. 35 at 36.

[18] Thus, as J.R.S. Prichard has shown, the availability of contingent fees in America but not in England results in more low probability cases being litigated, some of which even succeed, and thus introduce novel legal principles into subsequent juridical discourse. *Ibid.* at 41.

have implications for whether a case will go to trial, never mind appeal. Needless to say, doctrinal analysis is quite unable to explain these variations in substantive law, the reason being that it confines its attention to legal sources, and thus ignores the "structural sources" that in a very real sense *produce* the legal sources. Of course, Hagan is not saying that doctrinal research is pointless, merely that it must be supplemented by empirical research. It is in this respect that his approach differs from Baar's; the latter simply ignores the doctrinal dimension.[19]

Another major focus of research for the "new legal scholarship" is patterns of movement within the legal milieu, and between it and the corporate sector. Thus, Hagan discusses the structural sources of division within the legal profession itself--in particular the core/periphery disjunction (i.e. mega-law firms with a few big corporate clients/small law firms with many individuals and businesses as clients), and goes on to note how this division, which appears to derive from a like division in the larger economy, may influence patterns of entry and advancement in the profession (especially insofar as the selection of women is concerned).

The drift of the "new legal scholarship" is best summed up as follows: "outward and downward from 'law at the top.'"[20] In other words, the concern of traditional legal scholars with ordering appellate and (at the lowest) trial court decisions, is being expanded (or more accurately, dispersed) to include the policeman on his beat, and gender in the corridors of the mega-law firm. A related drift is apparent in the two very fine essays in legal history to be considered here, John McLaren's "Chasing the Social Evil,"[21] and Philip Girard's "From Subversion to Liberation."[22] The genre in which these essays are written is best styled "history from beside." They provide a most refreshing respite from both the traditional "history from above" and the current crop of "histories from below" (or simply, "low history").[23]

Both essays concern what may be described as marginal groups within society: women and children in the first case, homosexuals in the second. Neither author writes history from the perspective of these groups, however; their concern is rather to describe how these groups were constituted or constructed by the social imaginary as potential victims of "white slave traders" or "vice czars" in the

---

[19] This is not to say that Hagan has elaborated a research programme which is entirely adequate to enucleating the relationship between legal doctrine and the social context (or structures) out of which it grows. The most glaring ommission from his otherwise brilliantly conceived research agenda is the study of the "symbolic struggle" (*lutte symbolique*) between the corps of legal theoreticians (law professors) and the corps of legal practitioners (judges and lawyers), the dynamics of which have been so beautifully elucidated by P. Bourdieu, "La force du droit: éléments pour une sociologie du champ juridique" (1986) 64 Actes de la recherche en sciences sociales 3.

[20] *Ibid.* at 36.

[21] J.P.S. McLaren, "Chasing the Social Evil: Moral Fervour and the Evolution of Canada's Prostitution Laws, 1867-1917" (1986) 1 Cdn. Jnl. of Law and Soc. 125.

[22] P. Girard, "From Subversion to Liberation: Homosexuals and the Immigration Act 1952-1977" (1987) 2 Cdn. Jnl. of Law and Soc. 1.

[23] See D. Howes, "Review of P. Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet and Legislature 1791-1899*" (1987) 79 Ont. Hist. 278.

former case and as "security risks" in the latter (it being the cold war period). In both instances, this imagery is shown to have invaded the Canadian social imaginary from abroad (the U.K. and U.S. respectively), to have had little or no empirical basis, to have completely misconstrued "the problem,"[24] and to have resulted in stiffer legislative provisions to eradicate "the evil" as well, ironically enough, as laxer efforts to enforce the legislation than in the countries where "white slave hysteria" and the idea of the homosexual as a "danger to the national interest" originated.[25]

There are many important morals to be drawn from the essays by McLaren and Girard, but no space to discuss them. Let me simply retain the following methodological point (on which, I think, we are all agreed): Canadian law is not necessarily a reflection of the concerns, attitudes or structure of Canadian society. It is as, if not more, likely to be related to American or British (or French) society.[26] This renders the relationship between law and society in Canada entirely problematic. The only solution to this problem is to study not only law, but the society as well, "externally," which is to say, "from beside."[27] The theoretical position of the Canadian legal scholar is always "bordering on."[28]

While the essays by McLaren and Girard complement each other nicely and point in the same direction (sideways), other essays are at loggerheads. Such is the case with the essays by Sussel and Manley-Casimir and MacKay and Krinke on special education and the *Charter*. The former argue that an "activist" interpretation of section 15 of the *Charter* ("equal benefit of the law" as entailing a generalization of educational services so as to include in an appropriate manner, rather than exclude, the handicapped) could be used to correct deficiencies in educational statutes. The latter take them to task for assuming that the right to education derives from statute (and not something more "basic"--the social contract, section 7 of the *Charter*) in the first place.[29]

---

[24]Thus, according to McLaren, *supra*, note 21 at 130-31 and 154, "the uncautious use and affirmation of the term ["white slavery"] was to leave the indelible impression on the minds of the reformers that entry into a life of prostitution was not a matter of free choice, or explained by social or economic deprivation, but was caused by the dastardly wiles of a clandestine and vile league of exploiters." As there was no space within this symbolic system for an understanding of female agency or routine oppression to emerge, the reform of Canada's prostitution laws degenerated into an exercise in "spectral rather than rational law reform." Witness the fact that no one ever pressed for criminalization of the customers of prostitutes, and few pressed for an enlargement of women's economic opportunities--the two most "rational" solutions to "the problem."

[25]Thus, homosexuals were named in and banned by a 1952 amendment to the *Immigration Act* to mollify American (and RCMP) paranoia over gay civil servants as security leaks, but this provision was never enforced in a concerted fashion, nor was there ever a homosexual "witch hunt" in Canada (unlike the U.S.) despite the explicitness of the ban. Indeed, only twelve years later, "no one was quite sure why the ban on homosexuals as such had been included in the *Act*" and shortly thereafter it was struck. Girard, *supra*, note 22 at 13. Girard concludes by relating this lack of commitment to continuing Canadian/American divergence at the public policy level vis-à-vis homosexuality.

[26]The relation in question may be derivative (a case of borrowing) or dialectical (a case of distancing) or both.

[27]See D. Howes, "Property, God and Nature in the Thought of Sir John Beverley Robinson" (1985) 30 McGill L.J. 365; H.P. Glenn, "Persuasive Authority" (1987) 32 McGill L.J. 261.

[28]See. R. Lecker, "Bordering On: Robert Kroetsch's Aesthetic" (1982) 17 Jnl. of Cdn. Studies 124.

[29]T. Sussel & M. Manley-Casimir, "Special Education and the Charter: The Right to Equal Benefit of the Law" (1987) 2 Cdn. Jnl. of Law and Soc. 45; A.W. MacKay & G. Krinke, "Education as a Basic Human Right: A

Such is also the case with the articles by Manfredi and Gochnauer, both of which centre on the subject of "respect for the person" or "human dignity" but with the former approaching this subject from a kind of critical legal studies perspective and the latter from the perspective of analytic philosophy. The former seeks to expose the contradiction involved in the U.S. Supreme Court using the assumptions of psychology (that most determinist of disciplines) to uphold "freedom of the will" in *Miranda*, the well-known custodial interrogation case.[30] The latter, in the course of elaborating "a theory of respect for the person," argues for the exclusion from the ranks of the competent vis-à-vis the refusal of medical treatment those with "value impairment" (meaning those who fail to rationally integrate their "values," or simply do not value autonomy as defined by Gochnauer to the same extent as Gochnauer).[31] Just as *Miranda* appears to encourage respect for human dignity or freedom, but in fact undermines it, so does Gochnauer's argument--not because he relies on psychology but because his notion of rationality and the autonomy which goes with it is so limited, so modern.[32] It must be admitted, however, that while I think Gochnauer's argument is fundamentally mis-directed, it is very difficult to refute.[33]

There are two essays I would like to signal in closing. The first is by Brickey and Comack. They ask whether a "jurisprudence of insurgency" is possible. What is meant by a jurisprudence of insurgency is the use of law by groups to (eventually) overthrow capitalist social relations. The first problem the authors encounter is that Marxism has not, traditionally, viewed law as an agent of social transformation. Rather, law has been viewed either as operating at the behest of capital (the "instrumentalist" position) or on behalf of capital (the "structuralist" position).[34]

Response to Special Education and the Charter" (1987) 2 Cdn. Jnl. of Law and Soc. 73. My sense as far as this debate is concerned is that it is not provincial educational statutes that need to be reformed so much as the "language of rights" in which the debate is carried on. A "language of needs" would be more fitting. See M. Ignatieff, *The Needs of Strangers* (Harmondsworth: Penguin, 1986).

[30] C. Manfredi, "Human Dignity and the Psychology of Interrogation in Miranda v. Arizona" (1986) 1 Cdn. Jnl. of Lawand Soc. 109. Thus, according to Manfredi at 118-19, "*Miranda*'s effect was not to expand the scope of the Fifth Amendment's protections, but to narrow understanding of the human capacity for free will" (and thereby hinder the cause of human dignity) in that Warren C.J. "failed to recognize that the psychological underpinnings of his suspicions about the impact of custodial interrogation on free will are themselves based on doubts about the existence of free will"--namely, psychology's discovery of certain definite stimulus-response types of sequences to human behaviour.

[31] M. Gochnauer, "Refusal of Medical Treatment: Taking Respect for the Person Seriously" (1987), 2 Cdn. Jnl. of Law and Soc. 121.

[32] See A. MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1986) by way of contrast.

[33] As I have found in the course of attempting to do just that: D. Howes, "Clinical Conversation: A Critique of Recent Developments in the Rhetoric of Informed Consent" (Paper presented at Social Sciences Look at Medical Ethics Conference, McGill University, June 4, 1988 [submitted to the *CJLS*]).

[34] S. Brickey & E. Comack, "The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?" (1987), 2 Cdn. Jnl. of Law and Soc. 97 at 99.

The latter approach certainly has more merit to it than the first, but "structuralists" have generally contented themselves with demystifying the law, rather than figuring out how it can be used to bring about substantive social change. For example, "structuralists" have shown how "the 'appearance' of equality in the legal sphere is a necessary requirement for capital accumulation."[35] This appearance is achieved through the elaboration of such doctrines as the "rule of law" with its broad claims to treating everyone the same (i.e. as "legal equals") and to appply to everyone (including capitalists). Nevertheless,

> While the pivotal point in the rule of law is 'equality of all before the law,' the provision of formal equality in the legal sphere does not extend to the economic sphere. It is in this sense that only the 'appearance' of equality is maintained; the unequal and exploitative relation between capital and labour is never called into question.[36]

Bickey and Comack theorize their way out of this impasse in a singularly interesting fashion, which owes much to E.P. Thompson. They observe that in order to maintain the appearance of equity and fairness, and thus perform its "legitimating function," the law must live up to its own claims. There is therefore an inherent tension in law, and the question thus becomes how to exploit this tension to advantage, or as they put it, how to "push the 'democratic' sense of the rule of law to its full limit."[37]

Brickey and Comack go on to discuss various reforms which have the potential to bring about the desired change, such as basing sentencing law solely on the principle of deterrence,[38] or criminalizing employer violations of workplace health and safety: "Defining the violence which occurs in the workplace of capitalist societies as criminal would have the potential of not only holding employers more accountable for their actions but raising the consciousness of workers as well."[39] Above all Bickey and Comack advocate fighting legal issues from a collective rather than an individual basis--that is, redressing the *manner* in which legal issues have traditionally been handled by the courts (as disputes involving two individuals the race, class or sex of whom is irrelevant). They are therefore *for* class action suits, the "systematic" litigation of human (or women's) rights cases, and affirmative action: "Both affirmative action and the principle of equal-pay-for-work-of-equal-value [which women's groups have struggled for] are *potentially* insurgent because they use a contradiction within legal ideology to push the law and the state past the limits established by the legal system."[40]

---

[35] *Ibid.* at 100.

[36] *Ibid.*

[37] *Ibid.* at 106.

[38] As opposed to varying punishment according to the offender's "character" (educational attainment, employment record, "good standing in the community")--i.e. according to class.

[39] *Ibid.* at 108.

[40] *Ibid.* at 113.

I find Brickey and Comack's discussion highly stimulating, although I do have serious reservations about their functionalist approach to law,[41] and I also wonder whether they are correct in assuming that the end of human existence is a sort of "We Are The World" condition in which all difference (or contradiction) has been eradicated. Contradictions can be constructive as well as debilitating, and there have been some very constructive theories of justice proposed of late which take difference and its preservation (rather than sameness) as their endpoint.[42] "Proportionality before the law" would not be such a bad principle, if only we could work out how to apply it properly.[43] So long as we remain preoccupied with equality, however, such an understanding will elude us.

A greater concern with "proportionality before the law" might also help us to see law in proportion, rather than as a panacea, agent of transformation, or whathaveyou. This is, I think, the point of Jim Hackler's essay on "Stealing Conflicts in Juvenile Justice."[44] His point is that some disputes, particularly those involving juveniles, are best left raw, or without the law. The progressive legalization of conflicts involving juveniles, particularly now with the *Young Offenders Act*, has resulted in these youths losing any control over the processes in which they are implicated and the net effect is a decline in responsibility (lawyers "solve" their conflicts for them). "Is it possible that the juveniles themselves, along with family, victims and neighbours, might work out ways of resolving conflicts, possibly with the invited help of some professionals, that would be more effective than our current procedures?"[45]

To conclude, legal scholarship in Canada is headed in a number of different directions: outwards, downwards, sideways.[46] In only two of the cases considered here do the directions taken appear to be dead-ends. Indeed, with the exception of the contributions by Baar and (possibly) Gochnauer, the pages of the *CJLS* open up many novel and exciting paths of investigation, the further exploration of which is surely destined to bring law into closer unison with society.

---

[41] See Howes, *supra*, note 23 at 365-70.

[42] See e.g. M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

[43] The way Aristotle did, for example. See MacIntyre, *supra*, note 32.

[44] J. Hackler, "Stealing Conflicts in Juvenile Justice: Contrasting France and Canada" (1987) 2 Cdn. Jnl. of Law and Soc. 141.

[45] *Ibid.* at 150.

[46] Personally, I would like to see backwards added to this list. See "The Origin and Demise of Legal Education in Quebec (or Hercules Bound)" in this volume.