ANNUAL SURVEY OF CANADIAN LAW

JURISPRUDENCE

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I. INTRODUCTION

Since the last jurisprudence survey was published,[1] two important developments have taken place in the field of basic Canadian legal theory. These have determined both the scope and the outline of the present survey.

First, work in law reform has led to changes in the various "black letter" areas of academic law. This was a logical, although by no means a

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[1] Lewis, *Annual Survey of Canadian Law: Jurisprudence*, 8 OTTAWA L. REV. 426 (1976).

necessary, step forward for academic lawyers to have taken. For if, to quote from an early report of The Law Reform Commission of Canada, the means of reforming Canadian law must include "discussing with the public the values which they think law should enshrine, the functions it should perform [and] the aims it should pursue",[2] it follows that academics should participate in such discussions as well. In fact, they have, with the result that jurisprudence no longer tends to be a law school subject isolated from the rest of the curriculum. In saying this, I am mindful of former Dean Arthurs' assertion that "Canadian legal education remains a fragile, almost ephemeral, enterprise".[3] Nonetheless, the academic lawyers' interest in what Arthurs calls the "intellectual viability of [basic legal] concepts"[4] has caused a growing number of them to attack the issues within their specific areas of expertise at the jurisprudential level. In the last several years, Canadian writings dealing with jurisprudential aspects of criminal law, torts, contracts and especially administrative law have been published.[5] Because they contain deep, sustained jurisprudential analyses of their topics, however, it would take someone of the stature of the late Dean Pound of Harvard to discuss and assess them in a more than superficial way. I shall, therefore, only exceptionally survey articles which deal formally with these topics.[6]

In addition to the heightened jurisprudential character of academic law, the second and related development is that increasingly lawyers are concentrating their efforts on purely philosophical matters. My saying this presupposes a distinction between legal philosophy and jurisprudence. The distinction is not an easy one to draw, both because it is difficult to acquire an understanding of the essence of philosophy,[7] and also because one who operates jurisprudentially is also philosophizing. For the purpose of setting the limits to this survey, however, I would propose the following: legal philosophy, whether practised by a lawyer or a philosopher, concerns only core issues, namely those that arise simply from the fact that human beings have created something they call "the institution of law".[8]

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[2] LAW REFORM COMMISSION OF CANADA, A TRUE REFLECTION, THIRD ANNUAL REPORT 4 (1973-74), quoted in Lewis, *supra* note 1, at 439.

[3] Arthurs, *Paradoxes of Canadian Legal Education*, 3 DALHOUSIE L.J. 637, at 658 (1976-77).

[4] *Id.* at 645.

[5] *See, e.g.*, the work of P. WEILER, especially IN THE LAST RESORT (1974) (*see* text accompanying notes 162-70 *infra*); M'Gonigle, *The Bill of Rights and the Indian Act: Either? Or?*, 15 ALTA. L. REV. 292 (1977); Steiner, *Economics, Morality and the Law of Torts*, 26 U. TORONTO L.J. 227 (1977).

[6] In any case, this REVIEW surveys these fields separately.

[7] The reason for this is clearly set out in J. PIEPER, LEISURE: THE BASIS OF CULTURE 69 (A. Dru transl. 1952): "When a physicist sets out to define his science . . . he is posing a preliminary question. . . . But for anyone to ask, What does philosophizing mean? is quite certainly philosophy."

[8] *See* Hacker, *Hart's Philosophy of Law*, in LAW, MORALITY AND SOCIETY 1, at 2-12 (P. Hacker & J. Raz ed. 1977).

These issues will be both methodological and substantive. Can the methods of the linguistic or "analytical" philosopher shed light on the philosophical and jurisprudential aspects of law, or will such methods necessarily lead to the myopic view that what we call "law" can be fruitfully analyzed only as a system of rules and not as a type of purposive activity? Is Kelsen's "pure science" of law possible?[9] These are methodological questions, from the substantive questions that legal philosophers ask: What is law? (The corresponding methodological question is: Does it make sense to ask what law is, if what is being requested is a definition that yields the "essence" of law?)[10] What is the foundation of legal obligation? What criteria should be employed in deciding whether to legislate moral matters? Ought, for example, homosexual acts between or among consenting adults in private be criminalized? Why, or why not? The issues raised by such basic questions characterize what I regard as legal philosophy.

Jurisprudence (in the common law sense of the word)[11] is obviously a broader discipline. Its aim, as I am construing it for the purpose of this survey, is, in Mark MacGuigan's words, to "apply the insights and techniques of other disciplines... for *legal* purposes".[12] Unlike the philosopher, then, the jurisprude[13] seeks to deepen his philosophical insights by applying his understanding of what law is to what Huntington Cairns calls "the events of the legal process".[14] Due to the current complexity of Canadian jurisprudential literature, I have singled out for analysis and criticism only those works that are either centrally or substantially philosophical.

On occasion, however, authors of the materials surveyed below have attempted to apply philosophical insights to the "events of the law" before the insights themselves were actually secured. The theoretical difficulties which this sort of lapse creates will be discussed as they are encountered.

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[9] This may seem an odd question to the philosophically uninitiated. Kelsen has written that as a theory the exclusive purpose of the pure theory of law is "to know and to describe its object. . . . It is called a 'pure' theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law...". H. KELSEN, PURE THEORY OF LAW 1 (2d ed. M. Knight transl. 1970). What more could one ask?

[10] *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW ch.I (1961); Hacker, *supra* note 8.

[11] It is common knowledge that *la jurisprudence* focuses on case law and is thus rather a source than a study of law. The French-Canadian jurisprudence that I have surveyed is that defined in the common law sense of the term.

[12] M. MACGUIGAN, JURISPRUDENCE: READINGS AND CASES 4 (2d ed 1966). This topic is elaborated upon in Lewis, *supra* note 1, at 430-31.

[13] This term seems awkward in English; nevertheless it was good enough for Karl Llewellyn. *See, e.g.*, K. LLEWELLYN, JURISPRUDENCE 129, 140, 161 (1962). R. A. Macdonald uses "jurisprudent". *See, e.g.*, Macdonald, *Social and Economic Control Through Law: A Review of Karl Renner's The Institutions of Private Law and Their Social Functions*, 25 CHITTY'S L.J. 7, at 9, 13 (1977).

[14] H. CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 5 (1949)

II. THE LITERATURE

On the evening of 24 January 1977, The Honourable Samuel Freedman, Chief Justice of Manitoba, delivered an address entitled *Law and Justice — Two Concepts or One?*[15] I refer to it here, by way of introducing the surveyed literature, because it so clearly reflects the range of topics with which the literature deals. As one who prefers the "concrete to the abstract", the Chief Justice dealt with his topic by examining cases in three areas: human rights (*Dred Scott v. Sanford*,[16] *Christie v. York Corp.*[17] and the "Padlock Case", *Switzman v. Elbling*[18]), legal technicalities (*Little v. The Queen*[19]), and women and the law (*Murdoch v. Murdoch*[20] and *Morgentaler v. The Queen*[21]). He concluded that law and justice are in a very real way one concept. He based this conclusion on the grounds that, as cases such as *Switzman v. Elbling*[22] and *Little v. The Queen*[23] show, "those who form... the legal system recognize its imperfections and actively seek to make the law a better thing".[24] Indeed, that is the very requirement the Chief Justice set for the law at the outset of his lecture.[25]

Clearly there is a theoretical problem here. Chief Justice Freedman began his lecture by saying that his theme centred "upon the *concepts* of law and justice" and asking "whether these concepts are two in number or one".[26] But taken on its face, that is to ask whether "law" and "justice" mean the same thing. Given the history of western jurisprudence, one might have expected that the Chief Justice was about to discuss, as Laval's J.-Maurice Arbour has,[27] whether legal and moral justice are identical or whether, in more ancient terminology, "an unjust law is no law". In fact,

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[15] Freedman, *Law and Justice — Two Concepts or One?*, 7 MAN. L.J. 231 (1977). The occasion was the Twelfth Annual Manitoba Law School Foundation Lecture.

[16] 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857).

[17] [1940] S.C.R. 139, [1940] 1 D.L.R. 81 (1939).

[18] [1957] S.C.R. 285, 7 D.L.R. (2d) 337.

[19] [1976] 1 S.C.R. 20, 52 D.L.R. (3d) 1 (1974). The issue before the Supreme Court of Canada was whether the misnaming of a jewellery store in a charge of theft by wrongly adding "Limited" was sufficient grounds for acquittal of the accused. The Court held that it was not.

[20] [1975] 1 S.C.R. 423, 41 D.L.R. (3d) 367 (1973).

[21] [1976] 1 S.C.R. 616, 53 D.L.R. (3d) 161 (1975).

[22] *Supra* note 18.

[23] *Supra* note 19.

[24] Freedman, *supra* note 15, at 231.

[25] This is also indicated by the demand for legislation which followed the *Murdoch* and *Morgentaler* decisions. "I need hardly remind you that the *Murdoch* case has brought in its wake a demand for legislative action...". Freedman, *supra* note 15, at 245. "[I]n response to the tremendous public agitation against a court convicting a person of a charge on which a jury had already acquitted him, parliament amended the law by removing that power." *Id.* at 246, referring to *Morgentaler*.

[26] *Id.* at 231 (emphasis added).

[27] Arbour, *L'obéissance à la loi*, 17 CAHIERS 563 (1976) (*see* text accompanying notes 245-51 *infra*).

however, Chief Justice Freedman was not interested in such conceptual issues, but rather in the factual question of whether our federal and provincial legal systems can be labelled "just". He concluded that they can be. His audience no doubt discerned very quickly his intention to eschew the philosophical, conceptual aspects of his subject matter, in favour of its factual realities. "The law", he said, early in his lecture, "must be measured by its performance, that is to say, by the quality of the cases and decisions to which it gives rise".[28]

From a philosophical point of view, three other statements by the Chief Justice call for comment. In summing up his reaction to the *Dred Scott* case, he described it as a decision "rooted in bigotry, deriving from prejudice, and flowing from narrow-minded intolerance. It pays no respect whatever to the dignity of human personality."[29] In the context of a popular lecture, one would not necessarily expect, and certainly not require, an exposition on what constitutes that dignity and why it requires respect. Yet the Chief Justice's statement is precisely the sort that needs theoretical justification. Happily, this is occupying the attention of an increasing number of academic lawyers.[30]

A second statement of philosophical interest is found in Chief Justice Freedman's discussion of justice and legal technicalities. Technicalities are "not easy to define with precision", he admits, but their "dominant characteristic is an exaltation of form over substance" and their employment "emphasizes formal legalism even at the expense of the right and justice of the case".[31] Thankfully, he adds, "the present-day approach to the treatment of technicalities is more sensible and more realistic" than in the past.[32] One must admit that there does seem to be something wrong with a legal system in which, for example, a man accused of rape escapes conviction because Crown counsel has forgotten to establish that the victim was not the wife of the accused.[33] On the other hand, as Stein and Shand point out in their insightful and readable *Legal Values in Western Society*,[34] the temptation to secure "poetic justice" (hanging a person for doing B when you can't get him for doing A) is a well-known phenomenon. It is, therefore, extremely important to the ongoing life of the law, not to say of the intellect, that the relationships between formal and substantive justice be the subject of philosophical investigation. The number of formalistic approaches to that relationship, from Austin to Kelsen, attests to the fact that Chief Justice Freedman's

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[28] Freedman, *supra* note 15, at 232.

[29] *Id.* at 233.

[30] *See, e.g.*, Conklin, *The Utilitarian Theory of Equality Before the Law*, 8 OTTAWA L. REV. 485 (1976) (*see* text accompanying notes 43-63 *infra*); Deleury, *Naissance et mort de la personne humaine ou les confrontations de la medecine et du droit*, 17 CAHIERS 265 (1976) (*see* text accompanying notes 64-70 *infra*).

[31] Freedman, *supra* note 15, at 239.

[32] *Id.* at 240.

[33] Example given by Freedman, *id.* at 239.

[34] *See* P. STEIN & J. SHAND, LEGAL VALUES IN WESTERN SOCIETY 82 (1974)

strong misgivings about "form over substance" are not necessarily well-placed. In the Canadian jurisprudential literature surveyed here, however, one will find no more cogent support for those misgivings than the sustained and at times highly intricate work of Professors Smith (Law) and Coval (Philosophy) of the University of British Columbia.[35]

Finally, Chief Justice Freedman offered a description of law that summarizes the basic assumption underpinning the work of all but a few Canadian writers. Law, he concluded, is "a medium for the realization of the ideal of the free man in a free society".[36] The remainder of this survey offers an illustration of how this description has been elaborated upon in Canadian literature. One is drawn to suggest that, although those who sit on the bench may sometimes take positions that are "entirely natural" to common law judges but "particularly irritating" to academic philosophers, as E.V. Rostow said in speaking of Lord Devlin,[37] this may be because the philosophers have some catching up to do.

The literature reviewed below falls into two categories: the first focuses on specific practical problems, the other on historical and more abstract philosophical matters.

A. *Law and Morality*

In many jurisprudence textbooks and books of philosophical readings[38] it is erroneously stated that the debate over legislating morality was launched in 1859 with the publication of John Stuart Mill's essay *On Liberty*. In fact, the literature of the high Middle Ages abounds with materials on the topic, and even fifteen hundred years before, Plato himself formulated a particular version of the question. Anticipating one of the central issues in *Shaw v. Director of Public Prosecutions*,[39] he asked rhetorically, "Shall we simply allow our children to listen to any stories that anyone happens to make up, and so receive into their minds ideas often the very opposite of those we think they ought to have when they are grown up?"[40] One of the important features of current Canadian literature dealing with the legislating of morals is that it seeks to escape the

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[35] *See* pp. 752-54 *infra*. The same theme is addressed by Johnson, *Toward a Cautious Return to Natural Law: Some Comments on Moral and Legal Obligation*, 14 WESTERN ONT. L. REV. 31 (1975) (*see* text accompanying notes 231-42 *infra*), and by Machan, *Law, Justice and Natural Rights*, 14 WESTERN ONT. L. REV. 119 (1975) (*see* text accompanying notes 243-44 *infra*).

[36] Freedman, *supra* note 15, at 248.

[37] Rostow, *The Enforcement of Morals*, [1960] CAMB. L.J. 174, at 177.

[38] *See, e.g.*, Wasserstrom, *Introduction*, in MORALITY AND THE LAW 1 (R. Wasserstrom ed. 1971).

[39] [1962] A.C. 220, [1961] 2 All E.R. 446 (H.L.).

[40] PLATO, THE REPUBLIC, Book II, 377 A-B (F. Cornford transl. (1941) at 69). As Cairns points out, Plato's "legal and moral views are so intertwined as to be inseparable". Cairns, *Plato's Theory of Law*, 56 HARV. L. REV. 359, at 361 (1942).

philosophically restrictive confines of the debate's frame of reference as established by Mill's essay and continued in our own time, principally by Lord Devlin[41] and Professor Hart.[42]

By virtue of its depth of historical research and its attempt to widen the perspective of the law/morality debate, while retaining a uniquely Canadian perspective, the most ambitious work is Professor Conklin's *The Utilitarian Theory of Equality Before the Law*.[43] As if to pick up on Chief Justice Freedman's statement that the task of making law and justice one belongs to many people, including judges and lawyers, teachers and students,[44] Conklin begins his article by asserting: "Recent Canadian Supreme Court decisions have reflected a grave uncertainty as to what meaning and scope the Court should give to the terms of the Canadian Bill of Rights."[45] As his somewhat pejorative phrasings indicate,[46] the aim of Conklin's essay is to "expose the political presuppositions underlying the judicial interpretation of 'equality before the law' and to provide an alternative perspective that is more consistent with democratic political theory".[47] To this end, he demonstrates how, historically, the notion of "equality before the law" has been increasingly seen to be in need of substantive content that might complement the purely formal character Dicey claimed it had. As might be expected in a research paper, Conklin includes a wealth of theoretical and case material designed to lend support to such strong statements as the following: "One need not examine the complex philosophical and psychological aspects of the nature of rationality to foresee that the legal requirement of 'reasoned considerations' could become the pretext for the imposition of arbitrary value judgments."[48] This statement is all the more radical given its use as a basis for his adverse criticism of the Supreme Court of Canada decision in *Regina v. Burnshine*,[49] that the "emptiness of the 'reasonable classification' test was apparent".[50]

Densely packed with research materials, Conklin's paper is impossible to summarize. Its general flavour, however, can be indicated by remarking that his conclusions are so radical — radical in the etymological sense of reaching to the roots of the issue — that he can even criticize Professor Tarnopolsky's view, that the limitations of freedom must be consistent with a liberal, democratic society,[51] as being one that "simply

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[41] *See* P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).

[42] *See* Hart, *Immorality and Treason*, in MORALITY AND THE LAW, *supra* note 38, at 49 (reprinted from THE LISTENER, July 30, 1959, at 162-63).

[43] Conklin, *supra* note 30.

[44] Freedman, *supra* note 15, at 248.

[45] Conklin, *supra* note 30, at 485.

[46] *E.g.*, "[T]he Court has fallen back upon antiquated legal notions such as Dicey's 'rule of law'". *Id.*

[47] *Id.*

[48] *Id.* at 498.

[49] [1975] 1 S.C.R. 693, 44 D.L.R. (3d) 584 (1974).

[50] Conklin, *supra* note 30, at 499.

[51] W. TARNOPOLSKY, THE CANADIAN BILL OF RIGHTS 316 (2d ed. 1975).

begs the question''.[52] Indeed, if one ''wishes to take equality and liberty seriously'', he writes, ''one must begin from a very different perspective'' than the utilitarian one made so popular by Bentham and Mill.[53] This, I think, is what makes a reading of Conklin's paper so valuable: his attempt to ground the value of human personality in a refreshingly non-utilitarian way.[54] The reader might be baffled by the specific theoretical line that he pursues, with its reference to the sanctity of the individual person's ''daimon'',[55] and be startled by his philosophical assumption that if ''one professes to be a democrat one must start from the norm — admittedly arbitrary — of respect for human dignity''.[56] But, in my view, these statements serve only to advance the relatively weak claim that, as a basis for analyzing human rights in Canada, it is no more arbitrary to talk about respecting human dignity than it is to talk about the ''equally empirically non-provable norm'' of the utilitarians' ''greatest happiness of the greatest number'' principle.[57] His far stronger claim — in fact the heart of the article — is that ''by enacting the Canadian Bill of Rights in the way it has, Parliament has expressly directed our courts to define the nature and scope of our rights and freedom from a democratic rather than a utilitarian perspective. If the courts do not face this challenge, they violate the notion of legislative supremacy itself.''[58]

Conklin next details how this thesis has been at least partially reflected by judicial decisions in both the United States[59] and Canada. The Canadian Bill of Rights, he argues, reflects Parliament's acknowledgement that the basic human freedoms (speech, assembly and religion) are ''fundamental conditions for the full development of the spontaneous,

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[52] Conklin, *supra* note 30, at 503.

[53] *Id.* at 504.

[54] *See* especially *id.* at 504-07.

[55] *Id.* at 506. This is a concept referred to in Norton & Norton, *From Law to Love: Social Order as Self-Realization*, 6 J. VALUE INQUIRY 91, at 92 (1972): ''The ideal possibility which each individual bears within him and which it is his destiny progressively to actualize.'' Socrates had a better idea here. He thought of his ''daimon'' as a power that is not subjective, as Norton and Norton would have it, but external to him, divine and to be acknowledged with awe. *See* PLATO, APOLOGY, 31 D. His ''demonic'' element seemed to counsel him. On this notion, *see* P. FRIEDLANDER, 1 PLATO ch. 2 (H. Meyerhoff transl. 1958).

[56] Conklin, *supra* note 30, at 507. In his conclusion Conklin writes that he has in his article ''attempted to enunciate the *political* presuppositions underlying the judicial interpretation of equality before the law''. *Id.* at 516 (emphasis added). Thus it could be that he did not intend his remarks about ''respect for human dignity'' to be interpreted philosophically at all.

[57] *Id.* at 507.

[58] *Id.*

[59] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 58 S. Ct. 778 (1938). This is the ''suspect doctrine'' case. The doctrine is a step, but only a step, in the ''right direction''. Conklin, *supra* note 30, at 508. It allows, however, for ''judicial arbitrariness [in] ascertaining which classifications are inherently discriminatory and which interests are fundamental ones''. *Id.* at 510.

fully-integrated, total self" calling for "a new judicial outlook on the meaning and scope of equality before the law".[60]

Professor Conklin's argument for grounding judicial decision-making and parliamentary action on " 'the dignity and worth of the human person' — to use the very words of the Canadian Bill of Rights"[61] — warrants close scrutiny by political and legal philosophers. For if his assumption, that it is "arbitrary"[62] to think of human personality as having absolute value, can be shown to be sound, the Canadian Bill of Rights will be exposed as being a merely ideological document.[63]

Other recent Canadian jurisprudential writings tend to illustrate this problem. An article by Professor Deleury, *Naissance et mort de la personne humaine ou les confrontations de la médecine et du droit*,[64] is an example. In it, Deleury raises the issue of human dignity in a realistic and specific way. The article is, however, mainly a summary of the literature dealing with the status of the unborn child, including a review of Canadian cases such as *Langlois v. Meunier*,[65] and of the American cases on abortion. Professor Deleury's point is that the lawyer today finds himself facing new situations in the areas of human birth and death, the implications of which have shaken traditional legal concepts.[66] She realizes that such turmoil raises extra-legal questions of a philosophical, moral and religious nature[67] because society has to struggle in its attempt to set the precise limits to the principle that the human person is inviolable.[68] Furthermore, the life sciences are not so much incapable of determining those limits as they are, through their advances, giving rise to the problems.[69] Unfortunately, however, Professor Deleury's suggestions here are not as helpful as her clear insights into the issue of human inviolability might lead readers to expect. Despite her realization that contemporary medical and biological science has prompted new moral questions, she deliberately seeks to avoid metaphysical speculation, contenting herself with the proposal that we ask sociologically whether the

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[60] *Id.* at 512. Conklin draws implications from this need for a new judicial outlook. With particular reference to techniques of judicial analysis, he shows the significance of cases such as Roncarelli v. Duplessis, [1959] S.C.R. 121, 16 D.L.R. (2d) 689, and Attorney General of Canada v. Lavell, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 (1973). In the latter case, his own approach would have led to a different conclusion. *See* Conklin, *supra* note 30, at 514-15.

[61] *Id.* at 516.

[62] *Id.* at 507.

[63] Even if, by hypothesis, the Bill of Rights were shown to reflect certain fundamental realities of "human nature", there would, of course, still remain an open question as to whether or not it ought to be entrenched constitutionally.

[64] Deleury, *supra* note 30.

[65] [1973] Que. C.S. 301.

[66] Deleury, *supra* note 30, at 267.

[67] *Id.* at 287.

[68] *Id.* at 267-68.

[69] *Id.* at 268-69. Deleury cites Nerson, *L'influence de la biologie et de la medecine modernes sur le droit civil*, 68 REVUE TRIMESTRIELLE DE DROIT CIVIL 661 (1970)

rights of the unborn should be recognized[70] — a proposal whose appeal to the reader will depend on his acceptance of the thesis that the value placed on human dignity is arbitrary.

That it is not arbitrary is implied, although not formally defended, in Professor L.C. Green's *"Civilized" Law and "Primitive" Peoples*.[71] Green shares Professor Conklin's worry that too often the form of Canada's various legal systems are in many ways determined by the assumption that what is good for the local or regional majority is good for Canadians as a whole. He argues that this assumption is often reflected in judicial decisions, and asserts that the time is long overdue to teach magistrates who deal with native Canadian matters "some of the folk lore and folkways of the people concerned".[72] Better still, he writes, "would be to encourage members of the 'primitive' community to make themselves acquainted with the requirements of the 'civilized' system of law and enable them to qualify for judicial office".[73] Then, Professor Green concludes, they will be able "to temper... 'black letter' law with an equitable understanding of native needs".[74] This would seem to be all the more important if, as Professor Wexler states, most of the decisions that "affect a person's legal rights and duties are not made in [the] courts".[75]

Wexler has also addressed himself to the topic of the interrelationship of law and morality.[76] He argues that there is a very real sense in which the current debate, initiated by Lord Devlin, is miscast and artificial. He agrees with much of the criticism of Lord Devlin and states that his "argument was muddled and that his conclusions were wrong".[77] However, he goes further and insightfully claims:

> [I]n their rush to defend liberty against what they saw as neanderthal puritanism, Devlin's critics ignored the solid emotional ground of his lecture.[78]
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> The people who criticized Devlin forgot that the logical relationship between law and morals is not the same as the psychological one... [I]f immorality is not a *logically* necessary condition of legality, thinking an act is immoral is a *psychologically* necessary condition for punishing someone who has done it.[79]

Wexler's point is that Devlin confused the two.[80]

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[70] Deleury, *supra* note 30, at 301.

[71] Green, *"Civilized" Law and "Primitive" Peoples*, 13 OSGOODE HALL L.J. 233 (1975).

[72] *Id.* at 248.

[73] *Id.* at 248-49.

[74] *Id.* at 249.

[75] Wexler, *Non-Judicial Decision-Making*, 13 OSGOODE HALL L.J. 839 (1975).

[76] Wexler, *The Intersection of Law and Morals*, 54 CAN. B. REV. 351 (1976).

[77] *Id.* at 351.

[78] *Id.*

[79] *Id.* at 352-53.

[80] "[F]rom the sensible claim that there can never be *any* reason to get into the business of punishment *unless* immorality is present, Devlin slid to the claim that there is *always* at least *some* reason to get into the business of punishment *whenever* immorality is present." *Id.* at 353.

In my judgment, this line of argument has indeed recast the central issue in the law/morality debate. For the fundamental problem becomes not so much whether, or under what conditions, a society's legal system can justifiably limit the freedoms of individual persons, but rather that "[i]f a society is to function, the people who are subject to its criminal laws must feel that the law makes a moral, and not just a legal claim on them".[81] Otherwise, community life will break down or be held together only as a police state. This, as Wexler says, is a way to understand "Devlin's feeling that a society could be destroyed if its criminal law were precluded from reflecting its morality".[82]

In addition to his identification of the real issue that Devlin has raised, Professor Wexler has managed to explain its significance. Starting from the premise that only a society whose members are convinced of the "moral charge" of the law can afford to "allow that some of its morality is not the business of the law",[83] Wexler argues that Lord Devlin fears that our own western society may not be strong enough to take the chance. Since Devlin did not inquire into this, the remainder of Wexler's article is given over to the question. To that end, he explains the various ways in which the intersection of law and morals has been "eroded",[84] concluding that the "[t]remendous expansion of non-moral criminal law — of amoral order — weakens people's perceptions that the law can and does sometimes make serious moral claims" and breaks down their desire and ability "to distinguish between what is *technically* wrong and what is *morally* wrong".[85]

Wexler's distinction between acts that "are illegal but not bad",[86] examples of which are traffic laws and regulations and "the rules regulating commerce",[87] is, of course, the distinction between human acts that are *mala in se* and those that are *mala prohibita*. This distinction, familiar to mediaeval canon and civil lawyers, only became a part of the conceptual framework of today's common law with Blackstone's interpretation of it.[88] I must question, however, Wexler's argument that one of the reasons why the moral claim that the law makes on people is so weak is that they sense that there are, increasingly, acts rendered illegal that are not

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[81] *Id.*

[82] *Id.* at 354.

[83] *Id.* at 356. The lineage of this idea traces back to Plato. *See* PLATO, *supra* note 40, Books III & IV, 412B-421C; 427C-434D (F. Cornford transl. (1941) at 102-11, 119-29).

[84] Society requires criminal regulation because of its complexity, not because of moral badness; many immoralities are not illegal. Wexler, *supra* note 76, at 356-57 "It is not illegal to profiteer. . . . to risk disastrous and statistically certain oil spills . . . to build or sell cars which can exceed all speed limits. . . . [T]he private morality which the law does embody is often not the morality of the society." *Id.* at 357-58.

[85] *Id.* at 359. *Cf.* Chief Justice Freedman's concern over legal technicalities at pp. 737-38 *supra*.

[86] Wexler, *supra* note 76, at 356.

[87] *Id.* at 357.

[88] *See* W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 57-58 (1765)

immoral.[89] Indeed, I would argue that the basic problem may instead be that the ordinary citizens in our society have been led to believe that it is perfectly acceptable from a practical point of view, and reasonable from an academic one, even in a society wherein law and justice are one (in Chief Justice Freedman's sense), to admit the existence of laws that bind only through the potential effect of their penalizing power, but not in conscience. Such laws are traditionally called "purely penal laws"[90] and, unless I misunderstand him, are the sort that Wexler thinks govern acts that are "illegal but not bad". "[N]o one", he writes, "says that it is wrong to drive on the left hand side of the road."[91] Now, if, on the one hand, he means that to drive on the left is not wrong *in se* (as murder for example, is), that is true. Drivers in England do it every day. If, on the other hand, he means that, *given* the requirement of driving on the right, it is not wrong to drive on the left, clearly he is wrong. Thus the question: do traffic regulations require us to do things that because, and only because, of the regulations themselves, it is illegal to not do them (*mala prohibita* in Blackstone's sense), or because failing to do them is "bad" (in Wexler's sense)?

The very fact that Professor Wexler's work on the intersection of morality and the law prompts discussion of this issue is enough to commend it. That he has made so important a contribution to the character of the debate over limiting individual freedom by law is a sufficient reason for requiring it. Until now, that debate has swung, without any sign of abatement,[92] between Mill's (and Hart's) liberal insistence that individual freedom is a primal value, and the relatively conservative view of Lord Devlin that in morals, as in the central branches of the common law, the "reasonable man" is the proper norm for delineating rights and duties. Professor Wexler's refreshing new approach shifts the focus of the debate.

B. *Legal Education*

It belabours the obvious to say that jurisprudes have not devoted themselves to the topic of legal education. The assumption seems to be that it is merely an administrative matter. With so little literature on legal education having jurisprudential import,[93] one is especially grateful to

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[89] *See* Wexler, *supra* note 76, at 356-57.

[90] The single most helpful introduction to the doctrine of *lex pure poenalis*, the purely penal law, and the distinction between *malum in se* and *malum prohibitum* is D. BAYNE, CONSCIENCE, OBLIGATION, AND THE LAW (1966). Interestingly, Father Bayne's specialty is corporation law.

[91] Wexler, *supra* note 76, at 356.

[92] Refinements of the original positions abound. *See, e.g.*, the readings in MORALITY AND THE LAW, *supra* note 38.

[93] Although not jurisprudential in character, Barnes, *The Department of Law, Carleton University, Ottawa*, 3 DALHOUSIE L.J. 814 (1976-77), and Fraser, *The Faculty of Law at the University of Victoria*, 3 DALHOUSIE L.J. 828 (1976-77), will interest readers of this survey. Carleton's is an undergraduate program, a department within the social sciences faculty, and Barnes reports on its operation and the problems faced in offering law

H. W. Arthurs for his *Paradoxes of Canadian Legal Education.*[94]

Arthurs' initial observation is that today's law students and their professors have "reverted" from the legal, social and political idealism of the 1960's and early 1970's to the goal of maximizing their job prospects.[95] One cannot say whether that shift is permanent. However, by examining certain paradoxes in legal education, one might be able to speculate on its future direction.

Five paradoxes are examined by Dean Arthurs.[96] First, in admitting candidates to law school there seems to be a return to "social stratification" and a turn away from special consideration being given to "disadvantaged groups". This comes at a time when the opposite is true in other fields. Second, in spite of curricula and methodological changes, there is, at present, a failure "to alter fundamentally the intellectual and social perceptions of most students".[97] Third, in spite of extremely high admission standards, law school is not as yet "the home of excellence". Fourth, in spite of the increase in the number of teachers the level of research is as low as it was in 1950. Although it is no longer the heresy that it was at that time to think that findings in the social sciences can have an effect on the analysis of legal systems, little is being done in that area. (This is not completely true. The literature covered by this survey demonstrates the interest of Canadian academics in the insights of certain social theorists, especially Marxists.[98] Also, the appropriateness of social science methodology to the study of law and, even, of specific legal systems, seems to be on the wane.[99] I think McGill's Professor Slayton, whose writings on methodology were reviewed in the previous survey,[100] offers a good explanation of this decline.) The final paradox is the fact that, in spite of the crucial importance of the law schools to the profession at large, they have failed to play a role in the legal system.

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courses outside the professional schools. There is no need to justify such programs, he writes, because the "fundamental social importance of legal structures speaks plainly for extending understanding of the working of the legal process in every available way". Barnes, at 814. Victoria's faculty, on the other hand, operates at the post-graduate level. It began in 1975 with 72 students. Dean Fraser comments on its objectives and the problems that it has encountered. He makes special reference to the experiment of offering "semesters" to a selected dozen students who concentrate for fifteen weeks in one area, such as criminal or family law. Of interest, too, is the fact that students are required during their last two years to select a "legal perspectives" seminar, such as jurisprudence. Fraser, at 834.

[94] Arthurs, *supra* note 3.

[95] I say "reverted" because Dean Arthurs refers to the 1960's and early 1970's as the "golden age" of academic law in Canada. *Id.* at 640.

[96] *See id.* at 640-41, where these are summarily stated.

[97] *Id.* at 640.

[98] *See* pp. 766-69 *infra* where, for example, R.A. Macdonald's work is surveyed.

[99] An exception is found in D'Amato, *Towards a Reconciliation of Positivism and Naturalism: A Cybernetic Approach to a Problem of Jurisprudence*, 14 WESTERN ONT. L. REV. 171 (1975) (*see* text accompanying notes 262-72 *infra*).

[100] Lewis, *supra* note 1, at 457.

Anyone concerned with the overriding aims and philosophy of a law school programme, will find Dean Arthurs' article a provocative one. Indeed, his judgment that we "cannot speak accurately of a 'Canadian school' of jurisprudence, of a 'Canadian tradition' of scholarship in particular areas, [or] of a 'Canadian contribution' to the development of legal education"[101] is, I think, meant to provoke the reader. In rebuttal, one may suggest such names as Smith and Coval, Samek, Clarence Smith, and Arthurs himself. Although Smith and Coval[102] may appear to be doing jurisprudence in the English vein, if a closer look is taken, it is clear that they are not. Professor Samek's work[103] is "European" only in a classical sense of being heavily systematic and doctrinal. Professor Clarence Smith[104] has extended his earlier interest in conflicts to the study of comparative law in Canada.

Finally, it is inconceivable that Dean Arthurs does not realize how it would revolutionize Canadian legal education were his proposal accepted that in order to attract well-qualified and deserving potential lawyers "we should be able to devise a system of part-time education which meets the needs of these individuals, without compromising our professional standards".[105] There is, one suspects, a strong link in his mind between this appeal and his interest in educating lawyers to serve the "clientele of conscience".[106] The only more radical proposal would be to "stream" legal education in such a way that students could choose between studying law as a theoretical science and studying it as a practical art.[107]

C. *Law Reform*

Since Professor John Swan's editorial observation, in 1971, that Canadian jurisprudence is divided into two unrelated strands, "one aiming to make the law work in society", the other concerned only with ivory tower speculation,[108] important jurisprudential work pertaining to law reform has been published by the Law Reform Commission of Canada under the chairmanship of Mr. Justice Hartt. Academics are now focusing critically on that work in order to articulate the issues that derive from

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[101] Arthurs, *supra* note 3, at 650.

[102] *See* notes 155, 156, 163 *infra*.

[103] *See* notes 273, 274 *infra*.

[104] *See* note 150 *infra*.

[105] Arthurs, *supra* note 3, at 644.

[106] This is a new type of legal clientele envisioned by Arthurs. It is composed of people seeking help from the law in order to bring about social, cultural and economic change. *See* Arthurs & Verge, *The Future of Legal Services, Juridiques de l'avenir*, 51 CAN. B. REV. 15 (1973).

[107] One is reminded here of Sir Frederick Pollock's observation that "law is neither a trade nor a solemn jugglery but a science". F. POLLOCK, JURISPRUDENCE AND LEGAL ESSAYS x (A. Goodhart ed. 1961).

[108] Swan, *Annual Survey of Canadian Law: Jurisprudence*, 4 OTTAWA L. REV. 540 (1971).

certain of the Commission's fundamental assumptions about the nature and function of the institution of law in Canadian society.

A good example is M. R. Goode's comment on the Law Reform Commission's attitude to reform of the criminal process.[109] The Commission's approach to this matter, Professor Goode writes, is "avowedly philosophical".[110] He attempts to reveal the Commission's "political ideology" concerning social deviation and to examine it critically.

According to Goode, the Commission's own political ideology — by which he means its "political philosophy as to the ideal nature of society"[111] — is "liberal-positivist".[112] Thus oriented, the Commission fails to uncover the basic assumptions behind criminal processes in our "democratic capitalist society" and fails to discuss the faiths underlying them.[113] This has led to a "naive political equation" between "society" and "state",[114] and to the assumption that the central purpose of criminal law "is to protect [certain already established] core values".[115]

Unfortunately, in Goode's view, the Commission "has not explained . . . why it adopts this philosophy, and its implications, nor has it considered in print the reasons for its rejection of alternative models of society, both real and ideal".[116] Instead, it has merely posited, as its conceptual framework for the reform of criminal law, the "so-called value-consensus model of society" in which it is assumed that individuals in society are in basic agreement as to the values they want to uphold, and that that agreement is reflected in the "law making, law applying and law interpreting practices of political authority".[117] It may well be the case, says Goode, however, that this model is no longer applicable to Canadian society and that the "value-antagonism model" which highlights clashes of interests in community life is more realistic.[118] Goode concludes that the work of the Commission "has been, to date, profoundly unsatisfactory".[119] It has not engaged in any "real philosophical enquiry", but has

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[109] Goode, *Law Reform Commission of Canada — Political Ideology of Criminal Process Reform*, 54 CAN. B. REV. 653 (1976).

[110] *Id.* at 653.

[111] *Id.* at 657. Philosophers make the distinction that philosophers like what they see, ideologists see what they like. "Ideological" is used in that sense in the text accompanying note 63 *supra*.

[112] *Supra* note 109, at 655. Goode uses this phrase "to emphasize the relationship between a political view of the basis and nature of society and a discipline of criminology based upon that view". *Id.* at 659.

[113] *Id.* at 655.

[114] *Id.* at 656.

[115] *Id.* at 654, quoting LAW REFORM COMMISSION OF CANADA, RESTITUTION AND COMPENSATION, WORKING PAPER 5, at 17 (1974).

[116] Goode, *supra* note 109, at 664.

[117] *Id.* at 657.

[118] *Id.* at 664.

[119] *Id.* at 669.

been content with the "*a priori* adoption of a particular ideology of criminal process reform".[120]

Professor Goode's concern here is to some extent a legitimate one. One wonders, however, whether he has not been too selective in the reports of the Commission that he has chosen to examine. This is especially so in connection with his claim that the Commission has uncritically settled on a "value-consensus model" of society as the underpinning of its work in the area of criminal law. I am thinking here, for example, of a statement made by Mr. Justice Hartt: "I do not believe it is possible, or desirable, to *impose* traditional values on the generation that is entering this post-industrial age. . . . We now have the possibly unique opportunity to assist in adapting the social force of the law to the minimum needs of a *new* society. . .".[121] In any case, Goode is right to hope that the issues which he has raised "will spark further public and academic debate".[122]

The advent of the post-industrial age seen by Mr. Justice Hartt has prompted another writer to argue for the revision of the content and scope of Quebec civil law. In *Le droit et les juristes dans la société post-industrielle,*[123] Maître Jean-Marc Audet lays bare certain implications contained in a 1976 sociological study by Andrée Lajoie and Claude Parizeau.[124] He argues that, given the civil law's inevitable narrowing in relation to the growth of public law, the profession itself will have to change if it hopes to adapt to this fact of life. His one specific recommendation is that traditional legal programmes will have to be expanded from their relatively narrow traditional base, so as to make room for para-legals.

More pointed is Professor Pierre-André Côté's assertion that the time has come to rework the fundamental principles of administrative law in Canada because it may well have begun to be "un régime de privilège pour la puissance publique".[125] To illustrate his point, he examines *Welbridge Holdings Ltd. v. Greater Winnipeg,*[126] a case which has been criticized adversely, he notes, by both common and civil lawyers.[127]

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[120] *Id.* at 670. Two results of this are first, that the criminal law is thought of as "ours" whereas the transgressors are "them", and secondly, that the Commission sees no need to delineate public morality even while favouring the enforcement of moral values. *See id.* at 670-73.

[121] Hartt, *Transitional Man: A Hundred Years and A' That,* 4 CAN. B.J. 29, at 31-32 (1973). Emphasis added to "new".

[122] Goode, *supra* note 109, at 674.

[123] 79 R. DU N. 477 (1977).

[124] A. LAJOIE & C. PARIZEAU, PLACE DU JURISTE DANS LA SOCIÉTÉ QUÉBECOISE (1976).

[125] Côté, *Droit civil et droit administratif au Québec,* 17 CAHIERS 825, at 829 (1976).

[126] [1971] S.C.R. 957, 22 D.L.R. (3d) 470.

[127] Côté, *supra* note 125, at 828.

A sustained jurisprudential consideration of sovereign immunity is found in an article by M. L. Marasinghe.[128] He reviews the legal developments leading to the English decisions in *Philippine Admiral v. Wallem Shipping (Hong Kong) Ltd.*[129] and *Trendtex Trading Corp. v. Central Bank of Nigeria*,[130] "concentrating particularly on the question of the immunity of trading vessels in a sovereign state".[131] He argues that the time has come for Canada herself "to adopt a restrictive view of sovereign immunity".[132]

Like Conklin's work,[133] Marasinghe's article is a distillation of research and thus is difficult to summarize. It traces the doctrine of sovereign immunity from its philosophical origins in the views of Bodin, Austin and Hegel, through a brief consideration of the five theories designed "to explain and justify the grant of immunity by domestic courts to foreign sovereigns",[134] to analyses of the "absolute view" of sovereign immunity found in the American case, *The Schooner Exchange v. M'Faddon*,[135] and in the English Admiralty case, *The Prins Frederik*.[136] This review prepares the way for Marasinghe's close analysis of *The Parlement Belge*,[137] a case seen as the "starting point" for many of the difficulties concerning sovereign immunity. Certain courts failed to uphold the traditional distinction between armed and unarmed ships under a sovereign's control and instead substituted the factors of ownership and control in determining whether immunity applied. Gradually, the trend in English law has moved toward a "restrictive theory of sovereign immunity",[138] chiefly on the grounds that the courts must at any given time apply the prevailing international law and that international law itself has shifted "from the absolute to a restrictive doctrine of sovereign

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[128] Marasinghe, *A Reassessment of Sovereign Immunity*, 9 OTTAWA L. REV. 474 (1977).

[129] [1977] A.C. 373, [1976] 1 All E.R. 78 (P.C. 1975) (Hong Kong).

[130] [1977] 1 Q.B. 529, [1977] 1 All E.R. 881 (C.A.).

[131] Marasinghe, *supra* note 128, at 477.

[132] *Id.* at 504.

[133] *Supra* note 30.

[134] Marasinghe, *supra* note 128, at 477. The five theories were catalogued by D. O'CONNELL, 2 INTERNATIONAL LAW 842-44 (2d ed. 1970), as follows:

1. The theory of independence. Since states are equal in sovereignty, one cannot be subjected to the jurisdiction of another.
2. The theory of dignity. Were a sovereign to submit to another, it would be an affront to him.
3. The theory of extraterritoriality. Tangible property remains under the sovereign's jurisdiction wherever it may be located.
4. The theory of comity. Immunity is conferred as a matter of goodwill among sovereigns.
5. The theory of diplomatic function. This theory views sovereignty as a function of international diplomacy.

[135] 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812).

[136] 2 Dods. 451, 165 E.R. 1543 (H.C. of Adm. 1820).

[137] 5 P.D. 197, 42 L.T. 273 (C.A. 1880).

[138] Marasinghe, *supra* note 128, at 487.

immunity".[139] The United States has made "significant strides" here too,[140] but Canada's position, writes Marasinghe, is still unsettled and "awaits a fundamental restatement".[141]

D. *The History of Law*

Legal history, of course, is neither legal philosophy nor jurisprudence. I include it in this survey, however, for three reasons. First, today's law is the product of the past and can only properly be understood in its historical perspective. A study of the past is especially necessary if one is engaged in the reform of the law.[142]

Second, of all the formalities used to study law, legal history is the most akin to legal philosophy. Both are pure liberal arts, engaged in for their own sakes, with no view toward the practice of law. Unlike the "black letter" subjects, neither need strive to be practical in order to merit study.[143]

My third reason for including legal history in this survey is to focus attention on it. The anemia that Dean Arthurs detects in the Canadian tradition of scholarship[144] threatens, in the case of legal history, to become terminal. In one respect it already has. Sad to report, the Canadian Society for Legal History was recently disbanded. It began as the idea of Professor Richard Schoeck, then of Saint Michael's College, Toronto. It was created informally in 1970, held its first annual meeting in 1974 (Toronto), successfully applied for membership in the Association Internationale d'Histoire du Droit et des Institutions, and even began collecting and cataloguing legal materials pertaining to the legal history of Western Canada that were in danger of being lost or destroyed. In spite of the need for "enlightened Legal History... the history of all aspects of a legal system viewed within the framework of society as a whole with particular emphasis on social and economic themes",[145] Canadian law schools conspicuously failed to perceive the importance of the Society and its purpose.[146] When the Society was forced to disband, its members were

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[139] *Id.* at 491. This reflects the views of Lord Denning and Shaw L.J. *See* Trendtex Trading Corp. v. Central Bank of Nigeria, *supra* note 130, at 554-58, [1977] 1 All E.R. at 889-92 (*per* Lord Denning M.R.) and at 576-79, [1977] 1 All E.R. at 908-11 (*per* Shaw L.J.).

[140] *See* Marasinghe, *supra* note 128, at 492-95.

[141] *Id.* at 501.

[142] *See* Windeyer, *History in Law and Law in History*, 11 ALTA. L. REV. 123 (1973).

[143] I am explaining here how legal history might be thought to be *different* from other law subjects. I am not saying that it is somehow "better".

[144] Arthurs, *supra* note 3, at 650.

[145] From an address to the members by Dr. David Flaherty at the Learned Societies meetings, Toronto, June 5, 1974, on the prospects for Canadian legal history. *See* CAN. SOC'Y LEGAL HIST. NEWSLETTER No. 4, at [4] (1974-75).

[146] *See* Parker, *The Masochism of the Legal Historian*, 24 U. TORONTO L.J. 279 (1974), reviewed in Lewis, *supra* note 1, at 459-61.

urged to take the only avenue left open to them — to join the American Society for Legal History.

The loss of a formally defined framework within which Canadian legal historians can work is all the more regrettable, given the history of Canadian law itself; for, as H.R. Hahlo has commented, "[t]he story of the civil and the common law in Canada is one of confrontation and conciliation. They started off as rivals and ended up as friends who, while they do not always understand each other's language, respect each other, and try to learn from each other."[147] The historians' role in that process is indispensable. It was through them — certainly not through the efforts of social scientists[148] or politicians — that the prevailing view in the legal profession at the turn of this century, namely, that there was an unbridgeable gap between the common law and civilian systems, has largely been overcome. "It is being increasingly realized", Professor Hahlo continues, "that English and continental laws are products of the same, western European civilization, and have influenced each other throughout their development."[149]

In connection with this point, Volume I, the general introduction to *Private Law in Canada: A Comparative Study*, by J. Clarence Smith and J. Kerby[150] ought at least to be mentioned, although I am not qualified to handle it critically. So too should J.E. Cote's article, *The Reception of English Law*, although it purports not to be a work of legal history.[151] Its purpose is to investigate the influence that British constitutional law has had on common law jurisdictions other than the United States and the Indian subcontinent.[152] It is not an historical piece, however, because the rules of law discussed are current ones, many of which are continually being applied today, especially in Canada. Nevertheless, because the reception of English law is similar to the process that "took place at the end of the Middle Ages when European countries chose to adopt large segments of Roman law",[153] some knowledge of the various ways in which English law was introduced into a colony, what parts of it are in principle still in force, the lines along which the current debate over the cut-off date for its reception has been conducted, and how it has been received in the various provinces in Canada, is important to constitutional and, especially, comparative lawyers.

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[147] Hahlo, *Two Legal Systems in Canada*, in PROCEEDINGS OF THE TWELFTH INTERNATIONAL SYMPOSIUM ON COMPARATIVE LAW 149 (1976). This symposium was held in Ottawa, Oct. 3-4, 1974. The topics covered were: federalism and post-industrial society; federalism and ethno-cultural pluralism; the umpire in a federal system; and federalism and the accommodation of regionalism.

[148] I am aware that in some quarters the study of history is regarded as a social science.

[149] Hahlo, *supra* note 147, at 152. In saying this he does not mean to minimize their differences, which are discussed at 153-55.

[150] J. CLARENCE SMITH & J. KERBY, 1 PRIVATE LAW IN CANADA (1975)

[151] 15 ALTA. L. REV. 29, at 31 (1977).

[152] *Id.* at 30.

[153] *Id.* at 31.

E. *The Philosophy of Law*

In the first jurisprudence survey undertaken by this Review, Professor Swan wrote that the "interesting jurisprudential inquiries in the overall problems of law seem to have moved from a focus on what may be called legal philosophy to a focus on the legal process".[154] While, as this survey shows, the interest in that process remains unabated, during the past several years there has also been a profusion of more explicitly philosophical work in Canada.

As to philosophical analyses of both the concept of law itself and the nature of legal systems, the most important work has been done by J.C. Smith, often in helpful collaboration with his philosopher-colleague, Sam Coval. In the last survey, I commented on their work, *The Causal Theory of Rules*.[155] They have since published *The Completeness of Rules*,[156] in which they critically analyze J. Steiner's thesis that in judicial decision-making "the judge retains a field of choice".[157] This is especially significant in light of Steiner's review of Professor Smith's book, *Legal Obligation*,[158] wherein he asserts that "Smith's theory of legal obligation, and the model of judicial decision-making based upon it, cannot provide us with an adequate account of the development of the common law".[159] In fact, Steiner takes issue with the very fundamentals of Smith's book, charging that "it incorporates and builds upon controversial value judgments while treating them as being matters of logical entailment"[160] and refers to the "cornerstone" of his work as a "fog-shrouded, even mystical, teleology of the law".[161]

One might well have anticipated this in noting the contrasting responses that Steiner and Smith, with Coval, had to Professer Weiler's book, *In the Last Resort*.[162] That work was a critical study of the Supreme Court of Canada, developed partly around the thesis that if the Court is to function well it must have, in Coval's and Smith's words, "a general theory of inference (and decision)".[163] Concerning Professor Weiler's attempt to develop that thesis, Steiner said that his "failure adequately to

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[154] Swan, *Annual Survey of Canadian Law: Jurisprudence*, 3 OTTAWA L. REV. 591 (1969).

[155] Lewis, *supra* note 1, at 448-49. The paper has since been published: Coval & Smith, *The Causal Theory of Law*, 36 CAMB. L.J. 110 (1977).

[156] 36 CAMB. L.J. 364 (1977).

[157] Steiner, *Juridical Discretion and the Concept of Law*, 35 CAMB. L.J. 135, at 157 (1976).

[158] J. SMITH, LEGAL OBLIGATION (1976).

[159] Steiner, Book Review, 15 OSGOODE HALL L.J. 275, at 288 (1977).

[160] *Id.* at 281.

[161] *Id.* at 288.

[162] *Supra* note 5.

[163] Coval & Smith, *The Supreme Court of Canada as "Architect of the Common Law"*, 13 OSGOODE HALL L.J. 321 (1975).

elucidate a concept of 'law' "[164] has led him "to measure consistency of Court performance in the wrong dimension".[165]

The philosophical source of Professor Steiner's dissatisfaction with Weiler's work seems clearly to stem from his judgment that Weiler's concept of a legal system is "befuddled by a vague notion of legal principle".[166] Yet, it is precisely by focusing on that principle, Smith and Coval think, that legal philosophers can accurately understand the essence of a "rule" of law.[167] This is not to say that they agree with Weiler's analysis of the "legal inferential process" anymore than Steiner does. They state: "It is probably . . . worth suggesting to Weiler that that part of his view which adducts [*sic*] legal principle as a contra-distinct element from rules as part of the judge's drawer of allowable premises is not where he may want or need to go."[168] They give him a more sympathetic reading, however, and that enables them to make a positive contribution, in this case to the rule theory of law. Their point is this: Weiler sees that "the valuable and daily business of the law cannot be carried on without the addition to . . . 'bare rules' of what he calls 'legal principles', a concept [that] he thinks is non-rule-like and (therefore?) anti-positivist . . .".[169] These are, in his view, very different in *kind* from, for example, statutes, and allow "the judge to 'appraise the fitness of the [bare] rules [presumably positivist] that are available and [anticipates] the policy results of the one that is selected'. This implies that legal principles for Weiler, are perhaps among other things, the statement of legal policies."[170]

None of this, in Smith's and Coval's opinion, necessarily runs counter to positivist doctrine,[171] and it is in the reconciliation of the two ideas that they begin to break new ground. Their insight here comes through a point suggested by Weiler: that legal principles (aims) are rule-like. If they were not, of course, there would be a "real danger that they [would be] at the mercy of the judge's discretion and not as Weiler really wants it, as much a part of the Law as the 'bare rules' ".[172] This is not the case, however. For aims and rules are related in rule-like fashion, and to see this is to gain a "fuller, more accurate notion of what a rule actually is".[173] The suggestion by Coval and Smith, which they do not

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[164] Steiner, *The Defender of Our Civil Liberties*, 13 OSGOODE HALL L.J. 329, at 329-30 (1975).

[165] *Id.* at 331.

[166] *Id.* at 333.

[167] Coval & Smith, *supra* note 163, at 323.

[168] *Id.* at 322.

[169] *Id.* at 321.

[170] *Id.* at 322.

[171] *Id.* The sentence beginning "There seems to be an obvious reason. . " should, on Smith's and Coval's authority, read "There seems to be no obvious reason. . ".

[172] *Id.*

[173] *Id.* at 323.

defend in their symposium paper, is that there may not actually be, and probably are not, such things as "bare rules".

> There may be that part of a rule which "prescribes" a standard of conduct ("bare rules") and that part of a rule which states the aim of the prescription. What exactly the relations must be between these two parts of a rule would be interesting to see, especially since these relations must preserve a rule-like link between the two. If this were possible, then the positivist would have his legal certainty and the anti-positivist his rectitude.[174]

Transcending that particular positivist-idealist dispute and effecting a synthesis of the best of those two schools, is something to which one hopes Smith and Coval will attend.

Another approach to the concept of law is taken by D. Warner, Jr. in his *Contract and Our Concept of Legality*.[175] Warner's thesis is that "contract is a micro model of the duty/right social control mechanism of which our [western] concept of legality is the macro."[176] Professor Warner chose to develop this idea by using Gilmore's provocative statement, that "contract is dead", as a foil. In fact, however, he misuses it outrageously;[177] and I can only suggest that anyone who reads Warner's article, should read Gilmore as well. But Warner is worth reading nonetheless. His assumption, that "western law has developed a peculiar notion of legality, and [that] it is [within] this context that the concept of contract becomes fundamental",[178] leads to some valuable suggestions about the relationship among the concepts of law, rule of law, rights, duties and contract.

Three recent articles[179] have dealt with the idea of law regarded as a system of rules. One, by T. Benditt, entitled *A Functional Theory of Law*,[180] asks, as did Coval and Smith, "what makes principles part of the legal system, [and] what [is] the theoretical underpinning for them?"[181] He answers that they "constitute or are implied by the moral criteria that are implicit in the concept of a legal system".[182] In reaching this conclusion, Benditt develops a theory of law that is "new", but which connects with natural law theory, or at least with his version of its various

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[174] *Id.*

[175] 25 CHITTY'S L.J. 44 (1977).

[176] *Id.* at 48.

[177] *See, e.g.*, "If contract is dead, so then must be law": *id.* A cursory reading of G. GILMORE, THE DEATH OF CONTRACT (1974), shows that this inference has no basis therein.

[178] Warner, *supra* note 175, at 44. Warner asserts that the "western family of law" has two branches, common and civil law. *Id.* It is not clear why he excludes canon law.

[179] Benditt, *A Functional Theory of Law*, 14 WESTERN ONT. L. REV. 149 (1975); Kearns, *Legal Normativity and Morality*, 14 WESTERN ONT. L. REV. 71 (1975); Reynolds, *The Concept of Objectivity in Judicial Reasoning*, 14 WESTERN ONT. L. REV. 1 (1975).

[180] Benditt, *supra* note 179.

[181] *Id.* at 150.

[182] *Id.* at 168

schools.[183] He does this primarily through analysis of Hart's and Fuller's understanding of the relations between legal and moral validity.[184] While agreeing fully with neither, Benditt stands closer to Fuller, chiefly because, unlike Hart, Fuller "treats the concept of law as a functional concept".[185] By this Benditt means that the criteria for evaluating something are contained within the concept itself.[186] In the case of law, this means that "thinking of . . . a legal system involves thinking of it as satisfying certain evaluative criteria. [T]hose standards have something to do with conflict resolution [*cf.*, Wexler, Smith, Coval] and with what the beings who are the subjects of the laws of the system can accept . . .".[187] Ultimately, this means that the system must (rationally) aim at promoting what Benditt variously calls "the human good" and "the common good".[188] If it does not, "then it can't rationally be accepted . . . . [And] if a system of rules can't rationally be accepted, then it fails in its function, and is thus not a legal system at all".[189]

A corollary to Benditt's functional theory of law is the proposition that the notion of validity does not apply to the principles that "constitute or are implied by the moral criteria that are implicit in the concept of a legal system".[190] In other words, one must agree that "validity and morality are distinct",[191] yet this can be done only by restricting the concept of validity to its purely formal aspects. I realize that this is commonly done today, and not only by positivists. But that means only that it is time to reopen discussion on the matter.

T. Kearns' interest in law, as a system of rules, focuses on the concept of legal normativity, which to him means "the ultimate grounds of legal rights and obligations of both officials and non-officials in a legal system".[192] Like Benditt, he works within the context of the Hart-Fuller exchanges on the nature of the relation between law and morality, and concludes that the legally, as opposed to morally, binding status of the

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[183] It is to Benditt's credit that he recognizes that natural law theory is not monolithic. On the other hand, if he thinks the "Thomistic form of Natural Law theory" faces the problem of the uncertainty whether killing in self-defence can be justified (*id.* at 152), one wonders to what his "new" theory of law actually relates.

[184] Benditt, *supra* note 179, at 153-57, 159-62.

[185] *Id.* at 159.

[186] *Id.*

[187] *Id.* at 162. Therefore, "[a] legal system is . . . a set of rules, including a rule of recognition . . . which regulates the conduct of the ordinary individuals to whom the rules apply in such a way that the system itself can be accepted by those individuals". *Id.* at 163.

[188] *Id.* at 164, 165. Benditt uses this expression to stand for promoting justice, promoting the good of people (oneself and others) and promoting personal or social ideals. *Id.* at 164. A question which arises over Benditt's principle of logical division is: how are these reasons for accepting a legal system exclusive of each other?

[189] *Id.* at 164.

[190] *Id.* at 168.

[191] *Id.* at 166. *But see* Machan, *supra* note 35.

[192] Kearns, *supra* note 179, at 72.

principles of legality, can be demonstrated by showing that "in no other way could the legal obligations of non-officials be satisfactorily accounted for".[193] This is, he argues, primarily because neither they, nor the officials themselves, have "any legal obligation whose content is not wholly determined by the critically supported behavior of officials".[194]

N. Reynolds, in his article, *The Concept of Objectivity in Judicial Reasoning*,[195] attempts to get beneath the issues arising out of the decision to regard law as a system of rules, by examining the concept of "objectivity" itself as it functions in theories of judicial activity. His interest here was generated by Dworkin's lament that it is rather judicial discretion that characterizes the legal process today.[196] Reynolds' aim is to formulate a concept of objectivity that "will incorporate both the realists' doctrine of judicial discretion [namely, that it is not used "objectively"] and the new analysts' belief in pervasive restraints on judicial reasoning, while at the same time rejecting both the cynicism of the former and the myth-making of the latter".[197] This is a difficult task, given his own admission that the "reality of judicial discretion and the ideal of justice requiring objective judicial reasoning seem to be irreconcilable."[198] Nevertheless, he attempts to do it by changing the classical idea of objectivity as the "absence of contamination from the prejudices, beliefs, or perspectives of individual judges"[199] into a basis for judicial activity which is guided by the assumption that judges "have an obligation to maintain continuity and pursue justice in this world".[200] What recommends this version of objectivity, he says, is that it takes "the real world seriously [thus portraying] the law as being more objective than do the positivist theories".[201]

One wonders, however, how Reynolds means to be understood in saying that judges have an obligation to pursue justice. What his revised concept of objectivity would do is involve the judge in "trying to make his judgments morally comprehensible within the belief system accepted by his audience".[202] In other words, his shift in the meaning of objectivity entails a shift in the meaning of justice from the normative to the factual level of law. Reynolds realizes this, of course, and seems content with it even though it would bring about the loss of the "guarantee of . . . impartial justice in individual cases".[203] This, I suggest, is no loss at all,

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[193] *Id.* at 101.

[194] *Id.* at 87. This is an argument which Kearns borrows from Fuller. *See id.* at 90 *et seq.*

[195] Reynolds, *supra* note 179.

[196] *Id.* at 2, noting Dworkin, *Judicial Discretion*, 60 J. PHILOSOPHY 624 (1963). Also noted is Kavanagh, *Judging as an Act of Will*, 120 NEW L.J. 529 (1970).

[197] Reynolds, *supra* note 179, at 4.

[198] *Id.* at 18.

[199] *Id.* at 19.

[200] *Id.*

[201] *Id.* at 20.

[202] *Id.* at 24 n. 74.

[203] *Id.* at 27.

for, as Chief Justice Freedman explained,[204] there never has been a guarantee that impartial justice would be done. Nonetheless, it would formally deny impartial justice as an ideal to be striven for.

Frederick Sharp, on the other hand, is of the view that the classical notion of justice could fruitfully be employed in contemporary legal systems, specifically in the area of torts. In his article, *Aristotle, Justice and Enterprise Liability in the Law of Torts*,[205] Sharp explains that for Aristotle, the idea of "justice-as-impartiality", involved not so much the subjective, psychological lack of bias to which Reynolds refers, but a kind of objective equality in which equals are treated equally and "unequals unequally, but in proportion to their relevant differences".[206] Sharp applies this conception of justice, specifically as it takes the forms of distributive and corrective justice,[207] to the sort of problem exemplified in *Rylands v. Fletcher*;[208] namely, "who is going to bear the loss caused to the plaintiff by the defendant's enterprise?"[209] His conclusion, supported by applying a brief but clearly presented analysis of Aristotelian doctrine to the tort problem, is that the "desirability of insurance can be justified by extending corrective justice to the realm of injuries caused by industrial accidents. . . . Nevertheless the basic issue remains the same: what is the fair solution to a dispute, given the relevant distinguishing features of the parties?"[210] In cases like *Rylands*, he insists, enterprise liability does a better job of accounting for them than would the concept of fault.[211]

Justice as fairness continues to be discussed in Canadian literature within the context of John Rawl's work.[212] As usual, opinion is divided.

In *Justice: An Un-Original Position*,[213] Neil MacCormick gives a sympathetic reading of Rawls, yet goes beyond him. Instead of the "social contract" framework within which Rawls works, and which prompts him to ask what basic rules for society's governance would be arrived at by

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[204] *See* Freedman, *supra* note 15, at 231.

[205] 35 U. TORONTO FAC. L. REV. 84 (1976).

[206] *Id.* at 87.

[207] That the core of this concept is restitution is clear from Sharp's quote (*id.* at 88) from ARISTOTLE, NICHOMACHEAN ETHICS, Book V, 1132[a] 24-26: "Now the judge restores equality; it is as though there were a line divided into unequal parts, and he took away that by which the greater segment exceeds the half, and added it to the smaller segment."

[208] L.R. 3 H.L. 330, 37 L.J. Exch. 161, [1861-73] All E.R. Rep. 1 (1868).

[209] Sharp, *supra* note 205, at 89.

[210] *Id.* at 92.

[211] For a discussion of the philosophical issues in tort theory, *see* Coleman, *Justice and Reciprocity in Tort Theory*, 14 WESTERN ONT. L. REV. 105 (1975). Coleman states that, in order to maintain that "compensation is not just an instrument of the social good but a legitimate right of plaintiffs in both strict and conditional liability", one needs a "principle of justice that explains why compensation is a plaintiff's right and why, in order to secure it, a plaintiff in conditional but not strict liability must establish the fault of the defendant". *Id.* at 118.

[212] J. RAWLS, A THEORY OF JUSTICE (1971). For a brief discussion of Rawls' book, *see* Lewis, *supra* note 1, at 450-51.

[213] 3 DALHOUSIE L.J. 367 (1976-77).

free, reasonable, equal, self-interested people seeking to make up a community, Dean MacCormick starts from the proposition that human societies

> are not voluntary associations. At least as far as concerns national societies and states, most human beings do not have a choice to which one they will belong, nor what shall be the law and the constitution of that to which they do belong; especially, their belonging to a given state is not conditional upon their assenting to the basic structure of its organization.[214]

Needless to say, this assumption causes him to take an approach quite different from that of Rawls to the question, "what are the forms of social organization which deserve approval as just and well-fitted to the human condition?"[215] To answer that question, he adds, "is to advance a theory of justice."[216]

In this connection, MacCormick is convinced that Rawls' sole purpose in *A Theory of Justice* was to examine the consequences of accepting impartiality as a basic value; he did not "assume the value of impartiality in order to prove it".[217] But, MacCormick writes, even "while defending the value of Rawls' . . . procedure for some purposes, I nevertheless say of it as of other forms of hypothetical reasoning that the ultimate test is that of criticizing the results derived from it".[218] One of the two principles comprising Rawls' "special conception" of justice is that "[s]ocial and economic inequalities are to be arranged so that they are both (a) to the greatest advantage of the least advantaged, consistent with the just savings principle,[219] and (b) attached to offices and positions open to all under the conditions of fair equality of opportunity".[220] MacCormick suggests that there are "formidable difficulties" in determining how to apply this principle. Nevertheless, he does agree that "we should so adjust our legal, economic and social systems"[221] as to defend against undue inequalities; all the more so given that human societies are not voluntary organizations. For, if societies were developed along the lines suggested by Rawls, they would become "more worthy of the consent of all their members".[222]

For his part, P. Boynton argues that "Rawls' contractual fiction works in neither its analytic nor its justificatory capacity".[223] He believes that the significance of *A Theory of Justice* lies in the fact that it "seems to

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[214] *Id.* at 367.

[215] *Id.* at 368.

[216] *Id.*

[217] *Id.* at 373. *See also id.* at 377.

[218] *Id.* at 379.

[219] With the just savings principle, "investment is to be pursued to the extent acceptable to the least fortunate of the present generation in view of the advantages which it will confer on the least fortunate of the next." *Id.* at 382.

[220] *Id.* at 379, quoting RAWLS, *supra* note 212, at 302.

[221] MacCormick, *supra* note 213, at 384.

[222] *Id.* One is certain that Chief Justice Freeman would agree. *See* pp. 736-38 *supra*.

[223] Boynton, *The Season of Fiction is Over: A Study of the "Original Position" in John Rawls' A Theory of Justice*, 15 OSGOODE HALL L.J. 215, at 248 (1977).

mark something of a return from moral philosophy's 'academic' preoccupation with semantic and analytical matters to the normative issue of the right and wrong way to behave".[224] After summing up Rawls' philosophy of the hypothetical "original position",[225] however, Boynton offers a critical analysis of Rawls' attempt to establish an "objective theory of justice and [its] relationship . . . to the general issue of justifying moral judgments of all kinds".[226] He concludes both that Rawls has described the fictional "parties in the original position" in ways that simply cannot be reconciled with contemporary psychological and philosophical concepts of human personality,[227] and that his theory of moral objectivity is actually based on a form of intuitionism — "in direct contradiction of his express intention".[228] In formulating these conclusions, Boynton leans heavily upon Barry's *The Liberal Theory of Justice*,[229] a work that is also respected by Dean MacCormick, although he at times disagrees with it.[230]

Attempts at normative legal philosophy have also been made recently by writers working within natural law frameworks. After disclaiming that they are not natural lawyers in the usual sense, C. D. Johnson, in *Toward a Cautious Return to Natural Law: Some Comments on Moral and Legal Obligation*,[231] and T. R. Machan, in *Law, Justice and Natural Rights*,[232] argue that the concepts of legal validity and obligation have inherent moral aspects to them.

Professor Johnson's thesis is that to be "under a legal obligation is to be under a requirement that is — somewhat broadly conceived — a [moral] obligation".[233] Unfortunately, he never becomes more specific. He says that "legal obligations are, or are matched by, moral obligations",[234] that "a legal obligation to do *X* involves a moral obligation to do *X*",[235] and that "there is no sharp distinction between legal obligations and moral obligations, much in the same way that there is no sharp *borderline*

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[224] *Id.* at 215. This point is usually expressed by saying that Rawls has made room for normative as well as analytic and semantic matters, not that he has replaced one with the other. Further, Boynton's notion (*id.* at 215 n. 6) that the aim of normative ethics is to provide "guidance" in moral matters is not correct. The science of ethics is not the same as the virtue of prudence or practical wisdom.

[225] Wherein men are free, equal, rational, self-interested and desiring to enter into social relationships.

[226] Boynton, *supra* note 223, at 218.

[227] *Id.* at 222-30. In developing this line of adverse criticism, Boynton makes not a few unsupported (and unsupportable) statements. *E.g.*, "From the perspective of determinism, upon which all modern science is based, [!] there can be no justification for suggesting that the attributes a person acquires through his social experience are any less necessary than those with which he is born." *Id.* at 230.

[228] *Id.* at 243.

[229] B. BARRY, THE LIBERAL THEORY OF JUSTICE (1973).

[230] *See* MacCormick, *supra* note 213, at 374 *et seq.*

[231] Johnson, *supra* note 35.

[232] Machan, *supra* note 35.

[233] Johnson, *supra* note 35, at 31.

[234] *Id.* at 32.

[235] *Id.* at 34.

between baldness and non-baldness or between day and night".[236] In light of his statement that "there are two central components of a full-fledged legal obligation", namely a moral obligation coupled with "the existence of outside parties who stand ready to enforce that obligation",[237] the last point is one which Johnson cannot possibly mean.[238] On the other hand, he has illuminating things to say about several varieties of legal positivism in the course of defending his somewhat unfocused thesis. Especially well-handled is Sartorius' notion that "whether or not one has a legal obligation depends merely upon whether or not one is a citizen subject to a valid rule of law, the validity of a legal rule depending neither upon its content nor upon the consequences of obedience to it, but simply . . . upon its formal origin".[239] In response to this, Johnson argues, first, that there are ways in which one may come to have obligations imposed on one other than by one's consent or by the authorization of a legislative agent, and secondly, that if no basis exists for imposing a genuine moral obligation, there can be no basis for imposing a corresponding legal one.[240] Indeed, Johnson writes, "moral and legal obligations differ in that the latter involves the existence of parties who stand ready to enforce the obligation, using publicly knowable procedures. . .".[241]

An interesting implication of this view for legal education, is that if "questions about legal and moral obligation are not fully separable", it follows that normative studies of morality and politics, as well as jurisprudence, "should be as much a part of legal education as is the study of judicial decisions and legislative acts".[242]

Professor Machan's aim is to determine in what sense a system of law, thought of as resting on natural rights, "may be construed as both just (therefore essentially tied to morality) and dynamic (therefore workable as an ongoing system)".[243] The significance of what he is doing becomes apparent with the realization that even if it be granted that "empiricist based positivism" has been discredited in such a way that moral considerations could now be reintroduced as the "foundation of a sound legal system",[244] Kelsen's *Pure Theory of Law* still stands as a formidable barrier to doing this. For Kelsen's is not an empirical positivism at all; it is a theory of law and morality in which the two are conceived of as radically different, law being "dynamic", morals being "static". The heart of Machan's paper consists of showing that there is both a static aspect to law

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[236] *Id.* at 42.

[237] *Id.* at 43.

[238] Although non-baldness shades off into baldness and day into night, neither non-baldness nor day is thought to be accompanied by or found with baldness or night — unless one holds to a Platonic theory of Forms.

[239] R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 89 (1975).

[240] Johnson, *supra* note 35, at 35.

[241] *Id.* at 42.

[242] *Id.* at 49.

[243] Machan, *supra* note 35, at 126.

[244] *Id.* at 120.

and a dynamic side to morality. His method relies upon the complex proposition that "human nature", although a principle of order and stability, is continually changing. Although Machan provides no evidence to support this, he provides reasons for inquiring whether such evidence exists.

In addition to interest in legal obligation and validity in the context of the legal system itself, there are also writers asking what, from the citizen's viewpoint, are the requirements for creating a moral obligation to obey the rules of law.

J.-Maurice Arbour takes up this matter in response to the 1976 law pertaining to essential educational services in Quebec[245] and the intentional violations that followed its passage. In *L'obéissance à la loi: Réflexions en marge d'un récent conflit scolaire*,[246] he points out that that situation illuminates one of the great problems in contemporary law; namely, how fragile law in a modern democratic society is, and how acute the problem of civil disobedience has become. Arbour then takes his reader through a quasi-Thomistic analysis of conscientious objection to law, based on Aquinas' use of the distinction between just and unjust laws[247] in order, finally, to assert that

> la justice des moralistes et la justice des juristes sont deux notions distinctes. . . Pour l'homme de loi, la justice est la justice telle que formulée dans les textes de droit et appliquée par les tribunaux; c'est une justice légale. La justice des moralistes, elle, sauf dans la mesure où elle est reflétée dans des textes de droit, est une justice non sanctionnée par le juge.[248]

As Arbour realizes, this is not so much Aquinas as Kelsen. In any case, he contends that the Thomistic conception of the unity between positive and moral law has been breaking up for a very long time and that, in societies such as ours, the legislator sometimes has to choose between social order and justice.[249] When this happens, social order must take precedence.[250]

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[245] An Act respecting the maintaining of services in the sector of education and repealing a certain legislative provision, S.Q. 1976, c. 38.

[246] Arbour, *supra* note 27.

[247] *Id.* at 563-64. Arbour points out that for Aquinas, if disobedience would cause a "scandal" out of proportion to the moral good accomplished, then that disobedience is unjustified. *Id.* at 564. An explanation of what "scandal" meant to Aquinas would have been helpful. It is not a sociological or psychological concept as it is today ("What would one's peers think?"), but a theological one ("What will God think?"). In other words, mediaeval "scandals" were not occasions for embarrassment but causes of profound alienation from one's fellows and from God.

[248] *Id.* at 565. Translation:

> [T]he justice of the moralists and the justice of the jurists are two distinct notions . . . . For the legal man, justice is that which is formulated in legal texts and applied by tribunals; it is legal justice. The justice of the moralists, except insofar as it is reflected in legal books, is not one sanctioned by the judge

[249] *Id.*

[250] In stating this, Arbour makes one of the unfortunately very few references to the work of Maurice Hauriou. (For another, *see* Rooney, *Introduction*, in THE FRENCH INSTITUTIONALISTS I (A. Broderick ed. 1970)). Of course Arbour is writing, at least partly, in a civil law context and Hauriou is better known in civil law jurisdictions.

Given this assumption, the moral and theoretical problems surrounding conscientious objection to law are today more complex than they were in the Middle Ages.[251]

Finally, Canadian jurisprudential literature contains some philosophically oriented treatments of problems arising out of the attempt to relate law to education. Often the problem is "reverse discrimination", as in A.E. Wingell's *Reverse Discrimination in Academic Competitions*,[252] although Leslie Armour has examined the problem of the "right to education" itself, prompted by the fact that in our society education, although limited in its availability, has become "the principal determinant of access to preferred places . . .".[253] He asks what sort of right it is that persons have to an education under these circumstances, and concludes that, although there "are many special rights which bear on education in one way or another, there is not a general 'right to an education' ".[254] He arrives at this position by looking closely at the "hard core" difficulties raised by the American case, *DeFunis v. Odegaard*,[255] by the Canadian question of language rights[256] and by educational "rationing" of certain specific subjects, for example, Canadian philosophy, in Canadian universities.[257]

Professor Wingell, on the other hand, concentrates exclusively on the problem of reverse discrimination in education, arguing that in academic and professional situations it is "unreasonable".[258] He develops his argument in terms of Mill's utilitarianism, claiming that it offers "the best hope of coming to a conclusion" on the issue, since it was "formulated by its founders precisely with a view to the rational reform of public policy and the segregation of good from bad legislation in that light".[259] The importance of Wingell's contribution is that he develops his stand on reverse discrimination in the light of Mill's distinction between short-term and long-term interests, modified by an appeal to Aristotle's contrast between "the real and the apparent good".[260] This instills an objectivity

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[251] An attempt to resolve the theoretical problems is reported by Adell, Book Review, 3 DALHOUSIE L.J. 318 (1976-77), in his review of M. KADISH & S. KADISH, DISCRETION TO OBEY (1973). The thesis of Kadish and Kadish is that a legal system is not only rules, principles and policies, but includes as well a mix of legal roles, the role of the official and that of the citizen. They use the "role" concept to bridge the "is-ought" gap in the context of a legal system, thus paving the way for the anti-positivist conclusion that when his role as a citizen requires it, the ordinary person may disobey a law even without official permission. The radical implication here is that this disobedience is not only morally justifiable, but legally justifiable as well.

[252] 14 WESTERN ONT. L. REV. 61 (1975).

[253] Armour, *Social Principle, Law and Education*, 14 WESTERN ONT. L. REV. 131 (1975).

[254] *Id.* at 132.

[255] 82 Wash. 2d 11, 507 P. 2d 1169 (1973). Armour, *supra* note 253, at 133-36.

[256] Armour, *supra* note 253, at 137-40.

[257] *Id.* at 141-42.

[258] Wingell, *supra* note 252, at 61, 69.

[259] *Id.* at 62.

[260] *Id.* at 63. Wingell says that contrast is "suggested" by Mill in his "appeal to the 'higher faculties' in Utilitarianism". *Id.*

into discussions of the issue, an objectivity that is lacking when the issue is debated exclusively in terms of certain contemporary notions of "individual rights". For it means that in order for a person "to maintain that his failure in a competition has done damage to his real or long-term interests, he would have to do more than simply refer to his own hopes or desires".[261] Wingell's use of this principle is worth a closer look.

F. *Jurisprudence, Methodology, and the Social Sciences*

With the exception of D'Amato's essay, *Towards a Reconciliation of Positivism and Naturalism: A Cybernetic Approach to a Problem of Jurisprudence*,[262] the Canadian literature pertaining to law and the social sciences is about the relationship between these fields rather than an application of social science methods to theoretical or practical legal problems. One reason for the decline in "scientific" approaches to law can be found by looking at Professor D'Amato's article itself. It concludes simply, that

> although positivist theory can account for the vast majority of cases which happen to be uncontroversial, naturalist theory concerns itself with the more contested controversies. Most importantly of all . . . the naturalist model [*sic*] must be used in making the decision whether a given case falls into the uncontroversial (and hence positivistic) category or whether an argument exists that can move it into some other part of the internal wiring [*sic*] of the naturalist model.[263]

Surely, all this can be determined without a "cybernetic approach" to the relative merits of positivistic and natural law theory. Indeed, D'Amato himself says that it simply provides pictures that might clarify issues.[264]

D'Amato also states that the "science of jurisprudence might just possibly be in its infancy".[265] If he means that jurisprudence can mature only to the extent that it becomes a social science, that is plainly false. "Jurimetrics" was precisely such an experiment in that direction,[266] and the reasons for its failure are such that they would be common to all similar scientific attempts in the field of jurisprudence. If, however, D'Amato means that by translating jurisprudential theories and the problems they are designed to solve into the sort of diagrams found useful in cybernetics, one will be better able to distinguish substantive issues from semantic ones,[267] then he may be correct. On the other hand, he may not be, for it is precisely by stripping his article of its diagrams and references to specific

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[261] *Id.* *See also id.* at 64.

[262] D'Amato, *supra* note 99.

[263] *Id.* at 199.

[264] *Id.* at 172.

[265] *Id.*

[266] *See, e.g.*, Slayton, *New Approaches to Legal Study*, 1 DALHOUSIE L.J. 163 (1973); Slayton, *Quantitative Methods and Supreme Court Cases*, 10 OSGOODE HALL L.J. 429 (1972).

[267] This is implied by D'Amato, *supra* note 99, at 172.

cybernetic theoretical findings that the reader is able to gain some good insights into the nature of the positivist-naturalist debate. It is not necessary, for example, to know that in cybernetic theory a "system" is a "well defined collection of things that are connected together"[268] in order to profit from Professor D'Amato's discussion of the nature of positivism as a movement in legal philosophy,[269] or to appreciate the significance of Gray's thought in relation to the overall development of modern jurisprudence in common law jurisdictions,[270] or, finally, to understand why "naturalism"[271] is better able than the varieties of positivism to explain why we, as citizens, are "creators" of law.[272] D'Amato's article does not represent a "scientific" approach to jurisprudence, but is rather jurisprudence couched in scientific terms.

In one respect, the most significant article considered in this survey is Professor Samek's *Beyond the Stable State of Law* even though, as he admits, it is a "rather curious patchwork".[273] If one had used his book, *The Legal Point of View*,[274] as a frame of reference, one would not have easily guessed that several years later he would write that, although to "a lawyer, law is stable, . . . the stable state of law is an illusion".[275]

Professor Samek's point is that, whatever theoretical misgivings one may have, the fact of the matter is that law has become an instrument of the state.[276] The assumption that "law is objective" is a mythical one.[277] Technology, by which Samek means "systems of means employed by men living in a given society to satisfy their social objectives",[278] has become, if not an end in itself,[279] the medium in and through which society's structure and values are developed.[280] In turn, the specialist who selects those techniques is, if one may put it this way, our new high priest. He acts in conjunction with state officials to organize "previously uncoordinated techniques"[281] and to organize them in such a way that their actual social costs are camouflaged even while, through the use of propaganda, economic benefits are translated into alleged "real benefits".[282]

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[268] *Id.* at 173.

[269] *Id.* at 174 *et seq.*

[270] Gray's model is an example of an "extreme logical position" as well as a reminder of the positivists' difficulty in handling the court's role in a legal system. *Id.* at 185.

[271] Which D'Amato finally, albeit reluctantly, calls the "natural law approach". *Id.* at 202.

[272] *Id.*

[273] 8 OTTAWA L. REV. 549 (1976).

[274] R. SAMEK, THE LEGAL POINT OF VIEW (1974).

[275] Samek, *supra* note 273, at 558. In hindsight, hints of this are probably contained in his critical analysis of HART, *supra* note 10. *See* Samek, *supra* note 274, at 247-56.

[276] Samek, *supra* note 273, at 553.

[277] *Id.* at 557.

[278] *Id.* at 551.

[279] Samek disagrees with J. Ellul's contention that our civilization is one in which the means, not the ends, really matter. *Id.* at 552.

[280] *Id.* at 550.

[281] *Id.* at 552.

[282] *Id.* at 554.

The law, writes Samek, is couched within this "ideological cocoon",[283] and what is needed today is a legal revolution, one that forces a rethinking of the basic values of the social system itself. Professor Samek is not optimistic that the members of the profession will lead or even participate in that effort.[284]

Something of this adverse criticism of the typical lawyer's unwillingness to heed Samek's call for social reform is reflected in a quote from Thurman Arnold's *The Symbols of Government*: "[Law] permits us to look at the drab cruelties of business practices through rose-colored spectacles."[285] S. Verdun-Jones quotes this when he argues that Arnold's "psychological realism" can be useful today in debunking the central assumption of traditional jurisprudence that men live in a world governed by reason.[286] For, like Samek, Verdun-Jones is convinced that, looked at "from within, law is the center of an independent universe with economics the center of a coordinate universe";[287] and like Arbour[288] (who is impressed by Maurice Hauriou's insight that a choice often has to be made in modern western society between justice and social order), he claims to see a "conflict between ideals and practical needs" within society.[289] Verdun-Jones interprets Arnold to say that the root cause of these realities, namely, of the domination of law by business concerns and the necessity of choosing between needs and ideals, is the fact that, although "man is basically an irrational beast, whose strong subconscious impulses effectively preclude him from exercising a free and deliberate choice between good and evil",[290] he nevertheless wants to live in a universe that is perfectly rational. Law in this scheme is depicted as part of man's "folklore".

As Verdun-Jones continues his exegesis of Arnold, he exclaims that the latter's view of authority, namely, that it is "institutional decision-making . . . legitimated in terms of the prevailing myths and folklore of the day",[291] is "among the most revealing in . . . modern Jurispru-

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[283] *Id.* at 557.

[284] *Id.* at 559.

[285] T. ARNOLD, THE SYMBOLS OF GOVERNMENT 34 (1962).

[286] Verdun-Jones, *Jurisprudence Washed with Cynical Acid. Thurman Arnold and the Psychological Bases of Scientific Jurisprudence*, 3 DALHOUSIE L.J. 470, at 470-71, 484 (1976-77). A central issue with which this article deals is whether Arnold's work constitutes a "genuinely comprehensive scientific approach to law" or whether it is simply a "literary device" of some sort. *Id.* at 474.

[287] *Id.* at 471.

[288] *See* p. 761 *supra*.

[289] Verdun-Jones, *supra* note 286, at 472, quoting Arnold, *The Jurisprudence of Edward S. Robinson*, 46 YALE L.J. 1282, at 1286 (1937).

[290] Verdun-Jones, *supra* note 286, at 484.

[291] *Id.* at 487. At this point Arnold states: "[w]ords and ceremonies are our only methods of communication . . . . 'In the beginning was the Word' is an idea which has been repeated over and over . . . . In this way of thinking we are as primitive as the people of the Old Testament." T. ARNOLD, THE FOLKLORE OF CAPITALISM 26 (1937)

dence''.[292] On this point Verdun-Jones makes reference to the American realists[293] but not, oddly enough, to the definitive work on psychologizing the concept of ''law'' which has been done by the Scandinavians.[294] Then, too, given that Verdun-Jones is not simply reporting on Arnold to his readers, but is commending him as well,[295] one is surprised to find no discussion of the merits, or lack thereof, of philosophical and psychological determinism. Finally, Verdun-Jones' reference to Arnold's thesis that man *wants* to live in a ''perfectly rational and moral universe'' cries out to be analyzed and debated against the background of Sartre's classic line that ''Hell is other people''.[296]

Nevertheless, Verdun-Jones' research into Arnold's work is helpful at a time when, as Professor Arbour put it, one of the great problems of contemporary law is its fragility.[297] For Arnold's ''overriding concern was with the psychological function performed by the legal system and the tenor of his thesis [was] that the courts perform a predominantly ceremonial function in the course of which conflicting ideas are reconciled by the invocation of 'higher' principles and the general population is 'comforted' by the fond illusion that abstract principles of law — and not mere men — govern society''.[298] This idea meshes well, of course, with Conklin's notion that the acceptance of ''respect for human dignity'' as a principle for considering human rights is admittedly arbitrary.[299] Either of these assumptions, if true, would undermine Professor Samek's call for the revolutionizing of western legal systems and other social institutions from the ''outside'', rather than from within the framework of the ''prevailing ideology''.[300] For, if accepted, these assumptions would effectively reduce all political and legal values to ideology — in the pejorative sense of that term. Adherents to the various forms of natural law theory refuse to grant this reduction and strive rationally to defend their refusal. Most of the literature surveyed in this section illustrates how formidable is that task.

An attempt made seventy years ago to provide a theoretical justification for the objectivity of law has been brought to light by R. A. Macdonald in a critical review of Karl Renner's *The Institutions of Private Law and Their Social Functions*.[301] Professor Macdonald quickly establishes the relevance of Renner's work to the current ''interest in a functional approach to the [Canadian] legal process''[302] by linking it to the

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[292] Verdun-Jones, *supra* note 286, at 487.

[293] *Id.* at 498 n. 61.

[294] *See* especially, K. OLIVECRONA, LAW AS FACT (2d ed. 1971).

[295] *E.g.*, he writes that Arnold's ''approach to the study of perspectives greatly enriched modern Jurisprudence''. Verdun-Jones, *supra* note 286, at 485.

[296] J.-P. SARTRE, HUIS CLOS (1947).

[297] Arbour, *supra* note 27, at 563.

[298] Verdun-Jones, *supra* note 286, at 506.

[299] Conklin, *supra* note 30, at 507.

[300] Samek, *supra* note 273, at 558.

[301] Macdonald, *supra* note 13.

[302] *Id.* at 7.

work of Paul Weiler.[303] Restricting himself to the "question of the extent to which laws contribute to the existence of an ordered society" and the "problem of elucidating the nature and scope of the social functions of law" as treated by Renner,[304] Macdonald explains that before Lon Fuller, Renner alone "attempted to account for the mutual interdependence of [law (the ideological super-structure) and custom (the economic substratum)] in the articulation of a general philosophy of law.[305]

Renner's central insight, Macdonald says, is that "despite the important influence of economic factors on the law, there always remains an element of the arbitrary which cannot be expressed in terms of social determinism; for Renner this influence consisted of the inertia and structural stability of legal institutions".[306] Because he understands Renner this way, Macdonald is able to argue that Renner's work is neither purely Marxist[307] nor (and here he locks horns with Professor Kahn-Freund) completely positivistic.[308] On both counts Macdonald is, I think, convincing, especially so with regard to Renner's alleged positivism. Starting from the plausible assumption that legal positivism is fundamentally "the view that a legal order is essentially a closed logical system",[309] he shows that, although for Renner "the social effect of a norm transcends its legal structure",[310] thus making possible the Austinian separation between fact and value, nevertheless Renner does not refer to the transcendent aspect of law for that reason. He does it rather because he wants to show that "the forces which he believes really regulate human interaction may be found in social practices and economic conditions; *i.e.*, that legal norms merely confirm a pre-existing social order".[311] Renner's "seemingly positivist position is adopted primarily because of the fact that [given the limits of] conventional legal theory this model alone allowed for the separation of the structure of a legal system from social factors".[312] That separation in turn enabled Renner to go beyond today's "analytical

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[303] Macdonald cites to: Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. B. REV. 406 (1968); Weiler, *Legal Values and Judicial Decision-Making*, 48 CAN. B. REV. 1 (1970); Weiler, *Of Judges and Scholars: Reflections in a Centennial Year*, 53 CAN. B. REV. 563 (1975); WEILER, IN THE LAST RESORT, *supra* note 5.

[304] Macdonald, *supra* note 13, at 7.

[305] *Id.* at 17 n. 12. *See also id.* at 9.

[306] *Id.* at 13.

[307] Macdonald says that Renner is "nominally a Marxist". *Id.* at 8.

[308] *Id.* at 10. Instead, Macdonald explains that a "modified imperative theory of legal norms seems fundamental to Renner's thesis". *Id.* at 11. Renner does so, however, not to develop a command theory of law, but in order to show that legal norms are expressed as relations of state-will to the "will of the subject". *Id. See further id.* at 9: "For Renner, law can never be anything but an imperative addressed by one individual to another, an act of will determined by social factors which lie outside the law."

[309] *Id.* at 10. Macdonald also states, equally plausibly, that the positivist's basic assumption is that order takes primacy over justice. *Id.* at 17 n. 3. One assumes Macdonald means substantive justice.

[310] *Id.* at 10.

[311] *Id.*

[312] *Id.* at 10-11.

positivists who content themselves with discussing . . . the nature . . . of law[313] [and] the historical jurists" who focus on the development of law.[314]

There is, however, a problem that Professor Macdonald sees with the social analysis side of Renner's legal theory. It is that Renner seems to vacillate between the positivistic affinity for the primacy of order over substantive justice as the ultimate aim of legal systems and the idealist's assertion that law can and ought to be an indispensible means for "producing a better human society".[315] On the one hand, Renner stated, as H. L. A. Hart would do almost sixty years later, that the aim or purpose of society and its legal institutions is survival of the human species;[316] yet, on the other hand, he also felt, as we saw asserted above by both Audet[317] and Côté,[318] that public law ought to and probably would displace the private law institutions of capitalism in order to better serve the needs of the new, more communally oriented society of man.[319] It is Macdonald's judgment that Renner's emphasis on the former notion, namely, that "the aim of social organization is simply the preservation of the species",[320] is, philosophically at least, the one worthier of analysis. For its acceptance means that

> all those issues which have troubled philosophers . . . and which are normally identified and grouped by the phrase, nature of man, become irrelevant to the content or application of law. Questions whether man is good or sinful, or whether life is poor, brutish and short, or moral, purposeful and beautiful, are held to be neither the province nor concern of the law.[321]

Renner has, then, thrown down the gauntlet. He has helped clarify that one's understanding of human nature (or of the question whether there be such) is essential to the development of one's concept of the meaning and purpose of law. "To this degree", Macdonald writes, "the practice of law is a theology and not a technology. . .".[322] His work on Renner shows

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[313] The phrase "The analytical question, what is the nature of the law?" is repeated: *id.* at 12. Given that no subject has been more widely debated than the metaphysical, logical and epistemological status of "natures", and, given also that analysts such as Bentham and Hart have prided themselves in asserting that questions concerning their status necessarily lead to dead ends in *legal* philosophy, a more accurate phrasing of the question is: What would count as an adequate description of "law" (as with Hart) or of a "legal system" (as with Raz). This is but a minor criticism of Professor Macdonald's point that Renner leads his readers beyond the analytical moment to insights about law as a social institution.

[314] *Id.* at 11.

[315] *Id.* at 13.

[316] *Id.* at 8. For a devastating criticism of Hart's notion that survival is the overriding aim of personal and social life, *see* Noonan, Book Review, 7 NAT. L. FORUM 169, at 175-77 (1962).

[317] Audet, *supra* note 123.

[318] Côté, *supra* note 125.

[319] Macdonald, *supra* note 13, at 13.

[320] *Id.* at 14.

[321] *Id.*

[322] *Id.* at 15.

how academic research may be of value although it neither leads to insights into the ways in which legal systems function nor gives suggestions for reform.[323] It is more than sufficient that he has acquainted the legal community with Renner's work, which he "ranks on the same plane as the works of Bracton, Blackstone and Dicey".[324] While that is a bold claim, Macdonald has made a *prima facie* case for it.

III. Conclusion

Two things, above all, characterize the bulk of the literature referred to in this survey. In the first place, it manifests a strong interest on the part of many academic and practising lawyers, as well as jurists, in substantive and normative issues arising from the fact that law is a social institution. Secondly, an equal number of writers are becoming increasingly interested in the philosophical ramifications of those issues.

It is fortunate that both developments have occurred nearly simultaneously, for discussions of normative and substantive matters depend, in some ways even more than those of purely analytical issues, upon relatively sophisticated philosophical methodology for their resolution.[325]

Finally, it should be noted that the greater part of mature Canadian philosophizing on the various aspects of law continues to be analytic rather than systematic or "dogmatic" in the Continental sense of the word. This has been so at least since the inception of this Review's annual survey of jurisprudential literature. Nor is that surprising, given the fact that most non-case law jurisprudence has been done in Canada, in common law jurisdictions, by lawyers educated in the doctrines of Bentham, Austin and Hart.

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[323] *But see, e.g., id.*

[324] *Id.* at 16.

[325] For a frustrating example, from a philosophical point of view, of what can happen when a philosophical methodology, especially its analytical moment, is not taken seriously, *see* Leff, *Law and Technology: On Shoring up a Void*, 8 Ottawa L Rev 536 (1976). This article formed part of a symposium dealing with the book, L Tribe, Channeling Technology Through Law (1973), held at the University of Ottawa in 1975.

Leff's aim was "to describe the poverty, even unto total bankruptcy, of present-day ethical theory, its failure to generate any justification for the freely used terms 'good' and 'bad', 'right' and 'wrong'. . . .". *Id.* at 539. His entire attempt was undermined, however, by his failure to define the concepts of "values" and "ideals", so that his categorical claim that there is an unbridgeable gulf between existence (reality) and value was unintelligible.

> *Why* is it that the survival of the race is good? Because we are the race whose survival is in question? Are we in some kind of longevity contest with, say, dinosaurs, which it is our *ethical* duty to win? . . . What if we get wiped out, or indeed the whole world does?

Id. at 544. Clearly, if these are serious questions for Leff, he must have something in hand that has enabled him to strip human existence of value. Others, like Sartre, have done the same, although Leff, unlike Sartre, never indicates to us what that something is

This survey shows, however, that academic common lawyers are awakening to the philosophical theories underpinning the civil law, a development which puts Canadian scholars a step ahead of their English and Continental colleagues.[326] Continental writers are for the most part unfamiliar with the rudiments of Austin and Hart, and have no acquaintance whatsoever with Coke and Blackstone,[327] whereas the English have never read Hegel and think of Kelsen as a neo-Kantian mystic.[328] Given this situation, and the promising record of their literature, Canadian lawyers and legal philosophers have a clear chance to make international contributions to jurisprudence.

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[326] I say "English" rather than "British" because jurisprudence in Scotland has traditionally shown the influence of both common and civil law thinking. Restricting myself to the literature of this survey, I cite such Scottish writers as MacCormick, *supra* note 213, and Stein & Shand, *supra* note 34, as examples.

[327] In my own experience, at least, they want to understand those works, and not only for pedantic reasons. While lecturing at the University of Tilburg (The Netherlands) on the philosophers of the common law tradition, I found that there was a great and genuine interest in their doctrines. Conversely, at that time, the importance of Hegel to legal philosophy was made clear to me.

[328] At least one writer claims, however, that Kelsen is an intellectual descendant of Hume. *See* LLOYD OF HAMPSTEAD, INTRODUCTION TO JURISPRUDENCE 281 (4th ed. 1979): "[I]n reality Kelsen is a positivist of positivists, whose real spiritual father is Hume. . .".