JURISPRUDENCE

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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. Jurisprudence can properly encompass both and reflect this change of focus. This move has a number of interesting features and consequences. As with any change there is some doubt about the extent of its adoption and there are useful comparisons to be made between areas where the change has been accepted and areas where it has not. Recent jurisprudential statements in Canada have reflected to some extent the older focus, but to a much larger extent such statements are now concerned with problems of the legal process. Reflected also, inevitably, is the change in the attention being paid to European and British developments and the attention being paid to American examples. The current constitutional debate has forced many legal scholars in Canada to consider the implications for the legal process of a fundamental change in our constitutional model. Such a change may, for example, force a reconsideration of the role of the Supreme Court of Canada, the method of selection of judges and the relationship between all the various parts of our legal system. The current re-assessment has extended from the Supreme Court to the Family Court and to such specialized areas as labour arbitration.

One area of current interest where models of the legal process have to be articulated is in the area of human rights and civil liberties. These are both areas where many of the proposals put forward for reform [1] have been usually regarded as "good things," and rather indiscriminately eulogized by the mass media. Such eulogizing does little to encourage serious debate and it seems that much work has to be done to assess the impact of these proposals on the legal process. (The apparent conceptual basis of the McRuer Report [2] points up the great need for such an assessment). The first sixty-five pages of the report deal with "Basic Concepts and Constitutional Principles." The model of a legal system adopted by the commission is of considerable jurisprudential significance, for it cannot often be the case that the conceptual framework seen for the operation of a common law legal system is based largely on the work of someone who is as committed to abstract legal theory as Hans Kelsen. The commission's report states:

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[1] A CANADIAN CHARTER OF HUMAN RIGHTS (1968). White paper published by the Minister of Justice. ONTARIO ROYAL COMM'N INQUIRY INTO CIVIL RIGHTS: Report No. 1 (1968) [hereinafter cited as the McRUER REPORT].

[2] 1 McRUER REPORT.

"A rule of law may be defined, although not exhaustively, as a statement made in advance with constitutional authority that when certain hypothetical facts occur and an individual conducts himself in a certain way, the community forces shall take certain prescribed action." [3] This is remarkably similar to the notion of law put forward by Kelsen. [4] The reason why the commission sought to define law in this way is never satisfactorily explained, and such a statement unqualified by a fairly elaborate analysis to show the general applicability of such a model appears to obscure much more than it clarifies. Many theoretical objections can be taken towards the statement in the context of the more traditional jurisprudence, [5] but such a statement cannot, without considerable imagination, advance one's understanding of the legal process, for it bears no relation to the normal way in which people look at law, particularly those legal rules which confer a power on an individual to alter his relations with other people. The statement "expresses a broad truth" [6] only in so far as it appears inevitable that in every legal system occasionally someone has to "put the screws" to someone else in order to get things done. There is certainly no harm (and especially so in a report on civil rights) in focusing on the points where the screws are applied, but to define all law in such terms is only confusing, and adds nothing to the justification for that particular focus.

The commission goes on to talk of "Theoretical Legislative Judicial and Executive Powers in a Hypothetical Legal System." The hypothetical nature of such a system appears from the following assumptions on which it is based:

> (1) All rules of law are stated as general rules and are exhaustive. By exhaustive we mean that at any one time all occasions for action by the organized community forces and the nature of their action are stated.
> (2) All rules of law are stated only by a legislature.
> (3) All rules of law are stated with such clarity of language that no difficulty arises in their application to particular states of fact. [7]

Once again the reason for postulating such a hypothetical system is never made clear. The commission is under no delusions as to the accuracy of the hypothetical model, but if it is only a hypothetical model its utility has to be justified. I have some doubts whether the model of legislative, judicial and executive functions is really a necessary consequence of any legal system operating through rules of law. [8] I feel that the fact that we do see such a division of powers as natural tells us far more about ourselves and the preconceptions we have about the legal process than the model itself does. The scope of any enquiry into such a preconception indicates

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[3] *Id.* at 18.

[4] H. Kelsen, *General Theory of Law and State, in* TWENTIETH CENTURY LEGAL PHILOSOPHY SERIES *esp.* at 50-62 (1961).

[5] H. HART, THE CONCEPT OF LAW *passim* (1961).

[6] 1 McRUER REPORT 18.

[7] *Id.* at 18.

[8] As seems to be assumed, *id.* at 18.

the number of models of the legal process that can be considered.[9] It is the failure of most commentators to be aware of all the available models that appears likely to cause the most difficulty in regard to the current constitutional debate.[10]

These preliminary assumptions are not the only ones that the McRuer Report deals with. The report, in discussing the actual model of the legal system states: "The primary principle of interpretation under our legal system is therefore the 'literal' interpretation of the language of statutes."[11] Once again this seems to be no more than an assumption. Such an approach to statutory interpretation is no more inevitable than the conclusion that the proper way to decide cases is to flip a coin. The statement about the proper way to interpret a statute tells us far more about the approach of the commission to the "business of judging" than it does about judging, for the whole drift of legal analysis is to put the judge's role in a more realistic position and to give him a more fruitful task; one where he can now work in an effective partnership with the legislature and any other institutions of the legal system. The entire approach of the commission to the role of judges is based on the traditional English view that judges have no hand in policies (except to a minute extent),[12] that they are the bastions of individual liberty and that they alone are the ones who can do justice.[13] These are jurisprudential assumptions that are open to discussion and it is the task of legal scholars to articulate the basis and justification for any model we may adopt. Judges *can* fulfil policy centered roles.[14] Individual liberty may be best protected by a competent, honest administration operating under well-designed rules and not necessarily subject to judicial review. It is only by the wildest flights of fancy that we can imagine all, or possibly, even many of the procedural rules which the courts are bound by as the necessary concomitants of a just decision.[15]

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[9] The force of such inquiries as the H. HART & A. SACKS MATERIALS, L. Fuller's *Forms and Limits of Adjudication*, and the current controversy in the United States concerning the acceptable power to review to be exercised by the United States Supreme Court all focus on the way in which the respective institutions of the legal system must operate. The extent to which Canadian courts (and the McRuer Comm'n) appear to be unaware of or unaffected by the co-operative nature of the "enterprise of subjecting human conduct to the governance of rules" (L. FULLER, THE MORALITY OF LAW 122-33 (1964)) has the effect of making them blind to the lack of inevitability in their models. It may also affect some of the current problems in the relationship of the courts to the administrative process and such "quasi-judicial" areas as labour arbitration.

[10] *Infra* at p. 596.

[11] 1 MCRUER REPORT 25.

[12] *Id.* at 22-23.

[13] *Id.* at 46-51. The historical development of the position of judges vis-à-vis the other branches of government is outlined for England in B. ABEL-SMITH & R. STEVENS, LAWYERS AND THE COURTS (1967). The notions found in McRuer seem to be largely nineteenth century ideas and seem to be little influenced by newer views.

[14] See Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. B. REV. 406 (1968).

[15] The rules of evidence are examples of rules that might be hard to justify. These have to be reassessed in constitutional cases in any event (See B. STRAYER, JUDICIAL REVIEW OF LEGISLATION IN CANADA 163-181 (1968)). The comparison with

I do not deny that courts have some characteristics which undoubtedly are the hallmarks of a just decision, but these can be analyzed and transported into other areas where the undesirable aspects of judicial decisions are not present. I agree with one commentator on the report that the legalistic and idealistic aspects of the report are its weakest parts. [16] But for my purposes here, in examining the underlying jurisprudential assumptions, I think that it is extremely unfortunate that the commission did not either ignore the basic concepts or treat them as the assumptions and preconceptions they are, or, and this would probably have gone far beyond the scope of the terms of reference and the time and resources available to the commission, treat these basic matters at the sophisticated level of inquiry that is necessary. Enough jurisprudential ink has been used recently to expose the inadequacies of these assumptions, and no useful purpose is served by bringing them forward again as if they were still of unquestioned applicability.

One of the persuasive and really fundamental problems facing "the enterprise of subjecting human conduct to the governance of rules," [17] and hence the legal process, is the problem of arranging human affairs not only so that the available resources are fairly divided, but so that the sum total available resources are continually being increased. Perhaps the gravamen of the criticisms that may be brought against the McRuer Report is that it fails to consider how its reconciliation of "lawyers' values and civil servants' values" [18] can help the whole legal process to increase the size of the social "pie." [19]

If we make life too difficult for those who have to do the myriad things that have to be done in our governmental system these days we may so slow down the process of decision making as to appreciably affect for example, the economic development of an area. Similar problems arise in the current controversy surrounding labour arbitration and, of course, there are many examples in the traditional administrative law cases found in the reports.

The traditional common law approach to the interpretation of statutes, by ignoring the collaborative effort that must be made by both courts and legislatures, seems to deny to the law its larger and more fruitful role in society.

American practice in this regard may become more pointed if our constitutional model approaches the American one. See also C. HARVEY, THE ADVOCATE'S DEVIL ch. 5 (1958).

[16] Willis, *The McRuer Report, Lawyers' Values and Civil Servants' Values*, 18 U. OF TORONTO L.J. 351 (1968). I do not want here to comment on the substantive recommendations made by the commission. That can more usefully be done by someone who, like Professor Willis, approaches the problem as an administrative law expert and not purely jurisprudentially. Such comment would take this paper beyond its proper scope.

[17] *Supra* note 9.

[18] *Supra* note 16.

[19] This phrase is borrowed from the H. HART & A. SACKS MATERIALS 111 (Tentative Edition 1958). The force of this idea pervades L. FULLER, THE MORALITY OF LAW (1964).

1968 also saw the publication of another Royal Commission study, the Rand Commission Inquiry into Labour Disputes.[20] The whole focus of this report is that the legal framework within which collective bargaining and the resolution of labour disputes takes place must reflect the great and fundamental social importance of the bargaining process. The resulting structure must be such that the economic resources of the country will not merely be fairly divided but increased, so that there may be more for all.

The characteristics that the bargaining process must have to accomplish this have been recognized for some time; the requirement that the parties bargain in "good faith," and the policy of providing a "cooling off" period before a strike or lockout may take place. The Rand Report is characterized by a very wide concern for the long range harm done by a strike and the attitude of bitterness and frustration that can result. The circumstances that led to the creation of the commission—the strike at Tilco Plastics in Peterborough in 1966—brought forcefully before the commission the dangers inherent in the present law regarding picketing, the injunction and the position of strike-breakers. I cannot say what the likely effects of the recommendations of the report may be—and at the moment there is considerable controversy surrounding them—but the very broad consideration given to policy and what the general purposes of society may require, illustrate the broader view of the law and of its role in society and how the competing values found in any case may be adjusted. Perhaps the Rand Report and the McRuer Report may not be so far apart on specifics but I cannot but feel that the general approaches represent different views of the role of law in society.

One more government paper must be mentioned in this context, for the problems raised by it provide a useful focus for several academic contributions to the body of jurisprudential material produced in Canada on the problems, assumptions and functioning of the legal process. This is the proposal for the entrenchment of a Bill of Rights in any new constitution.[21] Such a proposal is of course generally regarded, as I have said, as a "good thing" and put on a par with motherhood and children as something beyond attack. Fortunately, some academic opinion has appeared that dares to question the desirability of such a development, or, at least, to question the suitability of such a development in the Canadian context.

Canadians have, of course, inherited the British approach to constitutional law—at least so far as judicial review of the content of legislation is concerned. We are exposed, however, to a legal system where the power exercised by the courts over legislatures has been far more extensive. Comparative constitutional lawyers have much to learn from both systems. This is not a paper on constitutional law and any detailed analysis would be improper here. However, from the jurisprudential point of view, several things are interesting. There seems to be two general points made in connection

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[20] ONTARIO ROYAL COMM'N INQUIRY INTO LABOUR DISPUTES (1968). (Rand Report).

[21] A CANADIAN CHARTER OF HUMAN RIGHTS *supra* note 1.

with the argument. The first is that the Canadian courts, who must necessarily bear the responsibility of making any protection of civil (or human) rights work in practice, are criticized for not being aware of the proper role of judges in developing and moulding the law and making judicial decisions a truly creative part of the legal process. It is said for example: "Common law judging in Canada has truly been a wasteland of arid legalism, one that is only beginning to be relieved by a profounder vision of the scope of judicial action. For this reason alone, I am just as dubious about the desirability of judicial review of legislative action as about the present review of administrative action. Perhaps the proposal for a Canadian Bill of Rights should await the advent of judges who are products of a different legal education." [22]

The context of this statement is an article that attempts to set out two possible ways of regarding the judicial function in the legal process. The article is a first class example of the new functional and creative way of looking at the role of judges. It is only after one reads such an article that one realizes the frightening extent of "arid legalism" in Canadian legal philosophy. This is not the place for such a study of judicial creativity and pusillanimity in Canada. However, the restrained criticism from two other recent works documents the position sufficiently. [23] It is worth pointing out that the article by MacGuigan is in the more traditional and limited form of critical analysis. He sees the conflict to be between policy and precedent: "For although the Supreme Court's past devotion was to precedent, its future commitment must surely be to policy." [24] The dichotomy is not particularly useful. Of much more use is an analysis that puts the judge in the position of being able to see the proper scope for his absolutely essential policy applying function. The judge *must* make policy decisions, whether he articulates them or not, [25] but the freedom he has to investigate policy and to choose between two competing rules must be clearly appreciated or he will be ignoring the specific task he has to perform. Professor Weiler clearly points out in the context of the two models he is discussing what the limits might be and how they are determined. [26] What Professor Weiler leaves out in the special

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[22] Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. B. REV. 406, at 471 (1968).

[23] MacGuigan, *Precedent and Policy in the Supreme Court*, 45 CAN. B. REV. 627 (1967); B. STRAYER, JUDICIAL REVIEW OF LEGISLATION IN CANADA ch. 5 & 6 (1968).

[24] MacGuigan, *supra* note 23, at 665. What is, if anything, more frightening, is the almost total failure on the part of members of the House of Commons of Canada to indicate even the faintest understanding of the judicial process during the debate on the act that ultimately abolished appeals to the Privy Council. See, in particular, the motion of Mr. E. D. Fulton (later to become Minister of Justice), seconded by Mr. Donald Fleming, *id.* at 633.

[25] Mr. Justice Holmes (dissenting) clearly saw the inevitability of judge's policy decisions as he stated in Lochner v. N.Y., 198 U.S. 47, at 76 (1904): "General propositions do not decide concrete cases." And Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, at 465-66 (1897). His words seem not to have sunk in after seventy years.

[26] *Supra* note 22.

problems of the interpretation of a constitutional document is picked up by Professor Strayer, though the scope of his inquiry and analysis is narrower than Professor Weiler's.[27] Both these analyses point up the supreme importance of the way disputes come before courts, of the rules of evidence and procedure and of the various methods by which courts can deal with the questions they have to decide.

The argument that underlies the discussion of the Bill of Rights is based on the fact that the job of judging the implications of such a bill is more complex and difficult than most people, especially judges, seem to realize. Until this role is clearly perceived it would be futile to entrust such a job to the vagaries of the judicial process. The same general criticism can be made in connection with the McRuer Report. I have already said that the basic assumptions on which that report is based are jurisprudentially suspect. Giving *any* kind of question to a court is not often going to prove useful, if the way in which the question is answered is not understood by all the participants. Of course, judges have a very valuable role to play in society: the development of the common law defences in the field of criminal law is a testimonial to the judges. But just as the balancing of competing interests in the criminal law is a fine business,[28] so also is the balancing of interests in the area of "administrative law." The way in which we expect our judges to act and the way in which they can act must be considered in deciding whether to let them review administrative determinations. Such studies as Professor Weiler has made are more likely to be useful than the assumptions of the McRuer Report.

The second main criticism made against the adoption of the Bill of Rights is that the kind of question it would give to judges should not be given to them (*i.e.* to the judges as one part of the political process). This criticism can also be made against the McRuer Report, though, having in mind the far longer experience of judges as reviewers of administrative action it may be a more limited criticism there.

The criticism is more limited in this area because of two reasons: firstly, the judges have clearly indicated to the legislature their biases and the legislature knows what must be done to reach an acceptable accommodation; secondly, anything that the legislature wants to change can be done in the usual way in which any change is made in the law—judicial decisions reviewing administrative action are not "entrenched." It is the fact of entrenchment, which is crucial to the proponents of the Bill of Rights, that gives the judges' decisions such immunity from political influence and which, correspondingly, causes the greatest concern to those who see dangers inherent in the proposal. The argument made in this connection is that it is undesirable to give the judges (who after all are not politically responsible) the power to make decisions that should only be made by an institution that responds to political pressures.

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[27] *Supra* note 23, at chs 5 & 6.
[28] *Supra* note 16, at 357-58.

> Canadians cannot escape the very difficult task of deciding such issues as whether Lord's Day Observance Legislation is an unjustifiable infringement of the non-Christian's freedom of religion, or whether curtailing the circulation of foreign periodicals infringes freedom of the press, or whether in assessing property for municipal taxation all the requirements of judicial "due process" should be observed, simply by inscribing a schedule of pat answers to these questions in their constitution. Such a procedure will only remove the resolution of such issues from the political and governmental arenas to the courts. [29]

Good examples of the type of decision-making mentioned above are to be found in the decisions of the United States Supreme Court. Probably, the decisions of that court that have occasioned the greatest controversy have been those dealing with what has been termed "substantive due process." These decisions not only imposed limitations on the way in which any government body should conduct itself before making certain decisions but also seemed to impose limits on the kind of legislation that could be passed. As well as the "due process" decisions under the Fourteenth Amendment, the United States Supreme Court has, of course, run into heavy political weather with regard to its interpretation of the "equal protection" clause, but such a clause does not appear to be a likely candidate for adoption in Canada. However the "due process" clause of the Canadian Bill of Rights is very similar to the American. [30] The White Paper published by the Minister of Justice shows that the government is aware of the dangers inherent in giving to courts any power to develop "substantive due process" rules and suggests ways in which the power might be limited:

> In examining American experience with "due process", it appears that the guarantee as applied to protection of "life" and personal "liberty" has been generally satisfactory, whereas substantive due process as applied to "liberty" of contract and to "property" has created the most controversy. It might therefore be possible to apply the due process guarantee only to "life", personal "liberty" and "security of the person". The specific guarantees of procedural fairness set out elsewhere in the [Canadian Bill of Rights] would continue to apply to any interference with contracts or property. In this fashion the possibility of any substantive "due process" would be avoided. [31]

But even these limitations do not, it seems to me, meet Professor Russell's objections. The volume of discussion generated in legal and police periodicals by such United States Supreme Court decisions dealing with life and individual liberty as *Escobedo v. Illinois* [32] and *Miranda v. Arizona* [33] should make us hesitant about giving to our courts such power. Are courts any more qualified than parliaments to decide how the balance between restraining crime and protecting the individual is to be maintained? Such a de-

[29] Letter from P. Russell to The Globe and Mail (Toronto), Feb. 15, 1968, at 6, col. 1.

[30] Bill of Rights, Can. Stat. 1960 c. 44, § 1(*a*), *cf.* § 1(*b*).

[31] A CANADIAN CHARTER OF HUMAN RIGHTS 20 (1968).

[32] 378 U.S. 478 (1964).

[33] 384 U.S. 436 (1966).

cision is a political one and should be made by those who are responsible to an electorate.

The public outcry raised against Bill 99 [34] is an example of how the public (and, of course, the press) can respond and how the political process functions. It might have been highly undesirable if the legislature, having passed that bill, had been later told by a court that it should not have done so. I am not concerned here with what the answer might be to any of these difficult balancing problems: there is almost certainly no easy answer. It does not make the solution of these problems any easier if we give such decisions to the courts to make. It is interesting to remember that the political fuss stirred up by Bill 99, gave the impetus to set up the McRuer commission. Less political fuss is made of judicial decisions, and the fact that we regard judicial decisions as just, very often seems to prevent any inquiry being made to see how just they are. Governments do respond to judicial ineptitude and do something for the future, [35] but judicial mistakes seldom produce an inquiry as far ranging and as important as the McRuer Report.

Professor Weiler's article also contains some points that can usefully be taken in connection with Professor Russell's ideas. The judicial process as we know it involves usually a two-party fight. Even if there are more parties, the decision in a case very often is made on a point or points decided in an argument that concentrates on only two of the parties before the court. Many decisions that have to be made cannot, however, be put into this structure. Where the problem that has to be solved presents what can be called polycentric issues and the form of decision making is tied to the adversary process, the adjudicative function is going to be very difficult or is going to break down and produce unsatisfactory results. Professor Weiler points out that rule making (by courts or anyone else) is polycentric (but must be done) and, in so far as courts must do this within the structure of the adversary process, they are handling polycentric issues. The courts' hesitation and cautious elaboration of the rules they do make emphasizes the difficulties that they encounter. There is, however, another kind of polycentricity that lies in deciding questions as to how available or expected resources are to be allocated. This can be called an allocative function. Judges have intuitively realized that such a function cannot be appropriately supervised by them and have never sought to control the discretion necessarily exercised in such functions as licensing. [36] It would be a great mistake if any of the proposals that have been made to broaden the tasks of the courts

[34] The bill was introduced on March 19, 1964 and was called "An Act to amend The Police Act." Its history is documented in *A Victory for Vigilence in Canada*, 20 BULL. INT'L COMM'N OF JURISTS 13 (1964). See Willis *supra* note 16.

[35] A good example, out of many, of direct legislative action is the case of Attorney-General for Alberta v. Cook, [1926] A.C. 444 (P.C.) which was subsequently reversed by the Divorce Jurisdiction Act, Can. Stat. 1930 c. 15, *consolidated in*, CAN. REV. STAT. c. 84 (1952). The development of privative clauses may be due to legislative hostility to judicial review.

[36] THE ONTARIO ROYAL COMM'N INQUIRY INTO LABOUR DISPUTES (1968) contains

were to put them in the position of having to make this type of decision.

The kind of decision that can come up as a constitutional[37] or administrative problem can present aspects of polycentricity in an analogous way. For example, when the courts have to grapple with the problems of *locus standi* they are deciding the appropriateness of any prospective plaintiff to appear as an opponent to a particular defendant. The difficulties arise because the problem may be so diverse that the right of any one person to appear may not be an obvious one, or easily maintainable. If problems of *locus standi* should become too common because of the breadth of the social problems before the courts it may indicate that the adversary process is not appropriate. The meaning of this is summed up by Professor Weiler:

> Needless to say, the intricate relationship of polycentricity in social problems, the amenability of situations to rules, and the desirability of utilizing the institution of adjudication form a very complex problem for human and personal judgment. No easy answers can be derived from it about the limitations in the practical world of adjudication, but hopefully the analytical model should greatly clarify the exercise of this judgment.[38]

Polycentricity[39] is not the only kind of problem that may make the adjudicative function difficult. The main criticism that must be met by the proponents of any Statutory Powers Procedures Act or Bill of Rights is that the judicial process is inappropriate because of the way in which the problems that will arise must be solved. Neither the McRuer Report nor the white paper on the Bill of Rights meet this point. Polycentricity is by no means the only problem. Professor Weiler poses two models: the adjudication of disputes model and the judicial-policy-maker model. Any study of the role of judges must decide between these two (assuming no third alternative) and must investigate the consequences of the adoption of either. Only then can the decision as to the appropriateness of the determination to give the problems of civil rights to judges be made. Everything that judges do must be investigated: judges decide concrete disputes, through an adversary process, by reference to accepted standards, with some scope for judicial creativity and with an attempt at a rational decision; judges are not elected but are appointed; they only act on request; they are not normally personally accountable to anyone (except through "impeachment"); judges have limited ways of finding out desirable social policies.[40] This list of things

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some interesting observations on the machinery that can perform an allocative function. The negotiation of wages and the fixing of prices are essentially allocative. How satisfactory any kind of tribunal might be in setting wages and prices is something that must be carefully investigated. The settlement of wages by compulsory arbitration may pose awkward problems, whatever the composition of the industrial tribunal. *Id.* at 119, 121, and compare comments re price fixing by government control at 46.

[37] See STRAYER, *supra* note 23, at 96-129, for an interesting discussion of the problem in the constitutional context.

[38] Weiler *supra* note 22, at 425-26.

[39] The problems of polycentricity are discussed by L. Fuller, The Forms and Limits of Adjudication (unpublished paper).

[40] Weiler *passim*, *supra* note 22, and Fuller *id.*, *passim*.

that must be investigated reveals part of the scope of the new focus in jurisprudence and some of the problems that, as I have said, the politically attractive proposal to enact any kind of general legislation (entrenched or not) regarding civil liberties must consider. What is important is that the accepted model of the legal system that is restated in the McRuer Report be investigated, and that its utility be assessed: its validity can no longer be assumed.

The studies which have so far been commented on are concerned with the way in which the law operates in society. Jurisprudence has, as I have said, a proper concern for this and it may well be the focus which offers jurisprudence its basic justification. The more traditional jurisprudential concern for legal philosophy does, however, still offer insights that broaden an understanding of our own legal system and of how law works. Just as the structure of the legal process which we have adopted in Canada is neither inevitable nor immutable but exists only because we give law a certain job which, within the framework of different institutions, is to be performed, so the way in which we look at legal problems and the way we conceptualize the law must be investigated. Professor J. C. Smith in a recent article [41] has pointed out the way in which the rules of law are conceptualized. The conclusion of his argument may be stated:

> Firstly primitive and archaic law is distorted when interpreted and reported in terms of the technical constructs of modern Western law, and secondly, attempts to clarify the meaning of the legal constructs of modern Western law by reducing them to empirical terms only, will, in turn, distort their nature. [42]

A "legal construct" is the term used to refer to legal concepts such as rights, duties, contracts and trusts which are used as the subjects of sentences in the same way as physical things. [43] I would not wish to take issue with Professor Smith's philosophy, but his conclusion (which is based on a linguistic and philosophical analysis) seems to make sense and to present an analysis that emphasizes the relativism of legal doctrine. The values and concepts which we find natural or even inevitable in law are never necessarily so for all people. Before we can fruitfully extend law to, say, the Eskimos in Canada, we have to be aware of how limited the means of legal communication may be. Professor Smith's paper will not of itself help any one to communicate, but if it makes us aware of the difficulties inherent in communication it will have done a useful job.

Professor Smith treats the problem from the point of view of a comparison of primitive and early Roman law. Perhaps the same kind of analysis could be done in fields closer to home. We apply the Canadian Criminal Code to Indians and Eskimos who may have no proper understanding of the language that we are using towards them. Such an approach to the control

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[41] Smith, *The Unique Nature of the Concepts of Western Law*, 46 CAN. B. REV. 191 (1968).

[42] *Id.* at 222.

[43] *Id.* at 192.

of human conduct by rules would seem to involve some falling short from the criteria that Professor Fuller suggests are necessary (to some degree at least) in making effective law. [44] We may be, in a sense, requiring the impossible or we may be guilty of making laws which are by no means clear to those to whom they are addressed (and a criminal statute is not addressed soley to judges and policemen). We know that there have been problems in the application of the criminal law to Eskimos in Canada [45] and I wonder how much of this may be due to the fact that our legal rules are not necessarily capable of being transported to other cultures as the early missionaries carried the Christian religion—though I suppose that a theologian would argue that religious ideas are no more universally communicable than legal constructs, possibly less so. Some interesting comments have been made on this theme in a recent paper by Professor Lon Fuller. [46] In this paper Fuller explores briefly four areas where law cannot "communicate" with those among whom it has to operate. He considers the application of the rules of "due process" on skid row, and offers the comment from a sociologist who was in turn, telling the story of a police officer called in to settle a row over the ownership of a pair of trousers:

> The patrolman maintained that no one could unravel mysteries of this sort because "these people take things from each other so often that no one could tell what 'belongs' to whom!" In fact, he suggested, the terms owning, stealing and swindling, in their strict sense, do not really belong on skid-row, and all efforts to distribute guilt and innocence according to some rational formula of justice are doomed to failure. [47]

On skid row, plainly, there may be no appreciation of the legal constructs of Western law and any attempt to impose meaningful rules must acknowledge this. It is worth noting here that the kind of relationship between the members of skid row and the police is not one that may readily be supportable under any Bill of Rights. Fuller raises the question that "due process" may have only a limited function to perform on skid row.

The last of the four examples of problems of communication is touched on by Fuller in the concluding section of his article entitled: "Establishing

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[44] L. FULLER, THE MORALITY OF LAW ch. 2 (1964).

[45] Some years ago there was a case involving two Eskimos in the shooting of a female member of their tribe because she was, in their belief, a danger to the group of which they were members. They were later charged with murder, but one was acquitted while the other was convicted of manslaughter. The latter was given a suspended sentence by the late Mr. Justice Sissons. This relates more to the inapplicability of our value system to the Eskimos, and a failure to communicate values is the same kind of failure in the legal system as the failure to communicate concepts or constructs. A graphic account of the trial has been written by Mowat, *The Executioner's*, 79 MACLEAN'S 7 (July 2, 1966). Problems have also arisen in connection with Eskimo and "Canadian" family law, though, in *Re* Noah Estate, 32 D.L.R.2d 185 (N.W.T. 1961) a decision also of Mr. Justice Sissons, there was an emphatic rejection of the "white man's" values. See Comments, *Law and the Eskimos*, 1 MAN. L. SCHOOL J. 91, (1962-65) and *Eskimo Native Marriage*, 2 ALTA. L. REV. 121 (1962-63).

[46] L. Fuller, The Law's Precarious Hold on Life (unpublished).

[47] *Id.* at 3.

the Rule of law among Peoples Who are Not Accustomed to Thinking of Law as Something Made or Enacted." [48] Here Fuller comments, *inter alia,* on the problems of the distinction which generally we can make between property and power; we can legitimately sell the former: it is corruption and a criminal offence to sell the latter. But those who see no such distinction may have trouble seeing the crime involved in selling power and this failure may make any attempt to impose the rule of law impossible. So also the creation of a constitutional form of government in primitive societies may produce surprising results where people are unable to understand the collectivity that now governs them. Fuller concludes by quoting Walter Bagehot:

> The best reason why Monarchy is a strong government is, that it is an intelligible government. The mass of mankind understand it, and they hardly anywhere in the world understand any other . . . . When you put before the mass of mankind the question, "Will you be governed by a king, or will you be governed by a constitution?" The inquiry comes out thus—"Will you be governed in a way you understand or will you be governed in a way you do not understand?" . . . we have whole classes unable to comprehend the idea of a constitution—unable to feel the least attachment to impersonal laws. [49]

This was written about one hundred years ago and I have no idea how applicable it may be to current North American (or Canadian) society. It may have no application whatsoever. Nevertheless, it must be borne in mind that these are the kinds of problems which have to be considered to some extent, though not necessarily at the basic level Bagehot mentions. The problems we face in the area of communication which are pointed by Fuller's discussion are problems related to the expectations that individuals have of the legal process. Are people able to understand why law operates in the way it does? How much of the perennial unpopularity of the legal method (the dislike of lawyers is only part of this) is due to a lack of understanding about law? How satisfactory are our inferior courts in demonstrating to those who are involved with them the role and purposes of law in society? Will the greatest effect of any legal aid scheme be to educate people? What role do we see for our police force, and how will they be able to operate under any Bill of Rights when they have not only to catch criminals but also to represent the "law" to many people? The problem of communication in this sense is very important. [50]

There are therefore two main areas where inquiry into law must be made. The first is in the area of our legal machinery: what do we want to

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[48] *Id.* at 8.

[49] *Id.* at 15.

[50] One of the charges that law must increasingly meet is the charge that it is becoming irrelevant. Such a charge, if true, cuts away the very basis for the existence of law and a legal system. Perhaps the problem of communication has not been properly dealt with by our legal institutions and it might be possible to convince society that law and lawyers are useful and necessary. See B. ABEL-SMITH & R. STEVENS *supra* note 13, at 1-4 and Miller, *Science and Legal Education,* 1 CASE WESTERN RESERVE L. REV. 29 (1967).

achieve and what machinery with what characteristics can best achieve our end. The second is how can we make the methods of the law relevant to those who have to live with them? How can law most effectively communicate with its own society?