JURISPRUDENCE

*John Swan**

The dichotomy between theory and practice that arises in many areas of law now afflicts that area formerly (or generally) thought to be the most theoretical—jurisprudence. There are two largely unconnected strands of current jurisprudential thought that are the concerns of recent Canadian studies. The first is the practical concern of making the law work in society and of reflecting current theories of the role and nature of law and of the conflict between group interests and individual interests. The second is the traditional concern of jurisprudence as legal philosophy: the concern to relate law to the philosophical ideas that are current in society—the ideas that are traditionally used as criteria to test various aspects of law and justice. Some recent articles have drawn on both of these two principal concerns. The difficulty (or even the failure) in reaching a happy co-existence or symbiosis says much about the utility and relevance of both approaches.

The last year has seen the appearance of a relatively large amount of jurisprudential literature in Canada. It is, of course, impossible to define just what is "jurisprudential literature." I have taken as my criteria the test of scope or breadth of applicability. Jurisprudence, of whatever kind, is concerned with drawing out and examining common or fundamental elements in samples of legal phenomena. Thus, philosophic fundamentals are clearly the concern of jurisprudence, but, equally clearly, so are basic problems of the legal process, the value systems of courts, the role of courts and legislatures, the basic problems of law reform, and the rights of the individual. Several of the articles that could be included in this survey also cover other areas of law, particularly constitutional law and administrative law.

The study of the legal process in Canada has only recently begun to reflect both the current political controversies surrounding the proposal to entrench a bill of rights [1] and the general problems of legal institutions and the achievement of social purpose. These two questions are, of course, closely related—or, at least, should be—for the second must inevitably arise if the first is to be fully investigated. The most interesting study done of this interaction is that of Professor Peter Russell.[2] The focus of his enquiry is seen in the following extract:

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*B.Comm., 1962, LL.B., 1963, University of British Columbia; B.C.L., 1965, University of Oxford. Associate Professor of Law, University of Toronto.

[1] See Hon. P. E. Trudeau, *A Canadian Charter Of Human Rights* (White Paper published by the Minister of Justice, 1968).

[2] Russell, *A Democratic Approach to Civil Liberties*, 19 U. TORONTO L.J. 109 (1969).

> In Canada, as in the United States, nearly all of the books and articles formally devoted to discussions of "civil liberties" are written by lawyers, whose data about "civil liberty" are derived almost exclusively from court cases in which judges have been concerned with balancing the claims of the state (national or local) against the claims of private persons. The common thrust of this literature is the advocacy of laws and judicial decisions which treat the latter claims more generously than the former. What we miss in the literature is any real consideration for the quality of public life beyond the fragmentary episodes which turn up in the law reports. What this means in terms of conceptualizing the problem of civil liberty is that no consideration is given to the extent to which the claims of the state represent the interests of the people; no real concern is given to the possibilities which our society permits outside the court room for its members to influence the powers by which they are governed. [3]

Russell then demonstrates that the present concern with civil liberties, typified by the attitude mentioned in the quotation, is the legacy of those nineteenth century philosophers like J. S. Mill who saw the political problem to be one of controlling the tyranny of the majority rather than that of controlling the "tyranny" of the minority through the courts. [4] He argues that we need to return to the fundamental analyses of the political scientist:

> [W]e should return to the original inspiration of democratic philosophy to find effective ways of enlarging the citizen's liberty or preventing its diminition. Such a course means seriously examining the possibility of overcoming or at least reducing the barriers to fulfilling the underlying aspiration of democracy—the ideal of diminishing coercion and expanding freedom by making government responsive to the interests of the governed.
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> [T]his orientation rather than the conventional advocacy of judicial checks on popular power is the correct approach to civil liberty. The fundamental libertarian problem is not too much democracy but too little. . . . [5]

In this analysis it is easy to appreciate the force of the argument as it is developed that the proposal to entrench a Bill of Rights in the Canadian constitution runs counter to the more general thrust of political theory and philosophy. The person who is committed to the view that the majority is entitled to make our fundamental value judgments must be suspicious of this transfer of power to the judges: "The concrete determination of the degree

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[3] *Id.* at 110.

[4] This is, of course, still argued within the old limits. The final resolution of the famous Hart-Devlin controversy comes down to this. Devlin asserts that the majority can tyrannize the minority; Hart that the majority should always be aware of the responsibilities of their power. H. HART, LAW, LIBERTY AND MORALITY 77-79 (1963). Put in such a way the debate has always seemed to me to lack force. I can agree with both sides in theory, but the basic question of practicalities remains. What could a majority do to enforce its morality? What good would it do? What would be the cost of doing it? The current problems of the so-called intersection of law and morals demand an answer on these lines. Some attempt was made to provide it in the REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS (1969). [Hereinafter cited as the OUIMET REPORT].

[5] *Supra* note 2, at 114-15.

to which the state should permit its citizens to enjoy the kinds of rights and freedoms listed in a bill of rights is among the most significant of a community's policy-making tasks. It is far too important an exercise in social ethics to be left to appointed judges in the cloistered sanctuaries of judicial tribunals." [6] Russell goes on to castigate the Supreme Court of Canada for its lack of sensitivity to the wider implications of the issues coming before it and its failure to outline some more direct ways (such as an ombudsman) for achieving some of the values that might be protected by a bill of rights.

The value of this analysis is that it forces the lawyers' traditional thinking about a bill of rights into the political science context, where, of course, it has always belonged. It is no longer possible to argue in traditional terms about the need to control the exercise of arbitrary power. Some of the more general considerations were outlined in the previous survey of jurisprudence, [7] but now Professor Russell has given those vague misgivings a sound basis in political philosophy.

It is, I suppose, common for lawyers, and in particular the legal academic, to applaud measures protecting the individual from the state and to think of such things as judicial independence as "good things." [8] It comes somewhat as a surprise to find it argued that the traditional notion of the independence of the judiciary is "outmoded." [9]

> The constitutional guarantee of judicial independence and the separation of powers it necessarily implies belong to an earlier era of political conflict and an outmoded style of political theory. There may have been a time when the citizen's freedom from arbitrary and capricious government was in serious jeopardy because of governmental coercion of judges, but that time is not now. In recent decades the citizen's well being has been much more seriously threatened by the judiciary's resistance to the novel administrative schemes of the expanding welfare-state. [10]

Once again, Professor Russell's objections are based on the fact that the independence of the judiciary has been used by the judges to maintain their position as the final authoritative interpreters of the law. This has been used by them to support an argument that the *institution* of the judiciary is the only appropriate one to make certain value decisions. This point of view is seen to be an anachronism in that the institutional approach to government is being replaced by a view that each institution may have to perform a variety of functions—including some that have always been regarded as those of the judge.

Professor Russell has attacked in these two studies two articles of faith

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[6] *Id.* at 123.

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

[8] See in this regard, the remarks on the McRuer Report, 4 Royal Commission Report on Civil Rights, No. 2, *in* Willis, Book Review, 20 U. TORONTO L.J. 274 (1970).

[9] Russell, *Constitutional Reform of the Canadian Judiciary*, 7 ALTA. L. REV. 103 (1969).

[10] *Id.* at 109.

that most lawyers and legal academics subscribe to. This has been done by an approach which forces us to reconsider the wider implications of many fundamental tenets of received legal doctrine. This approach points the way for even more illuminating studies of the operation of law in society. Just as legal philosophy has generally been unable to resist the pressures of ideas arising from philosophic ideas developed in other institutions and fields of society, so the rather more pragmatic analyses of the legal process are susceptible to an analysis and criticism from the point of view of modern political science.

It cannot often be the case that a royal commission provides as much exhilarating jurisprudential material as the McRuer Report. [11] The report touches on all the matters that have so far been discussed, and, in addition, attempts to analyse at a very fundamental level the implications of trying to provide guides for human conduct by means of rules of law. The report adopts as its general analytical model the abstract positivist analysis of Hans Kelsen. In this model, law is seen as a series of norms of ever increasing "concretization." From the basic norm and fundamental constitutional principles, through statutes worded in more or less general terms, the legal norm proceeds to the judge whose job it is to apply the norm in the concrete fact situation that he finds before him. [12] This analysis is justified in a series of chapters which begin with an analysis of the constitutional ideas of Austin, Dicey and Olivecrona. The conclusion is reached that the basic idea is that sovereignty lies in the "ideas of the people:"

> It is certain organizing ideas for the relevant society and not certain official persons that are supreme or sovereign. The primary organizational ideas of a modern state are its fundamental constitutional laws. It is those primary doctrines, principles and procedures that are the focus of obedience; they are supreme, not particular persons in office at particular times. It is fundamental to "The Rule of Law" that in the end such ordinary ideas are supreme and, therefore, it follows that all officeholders are under the law, none are above it. [13]

After this explanation of the "Rule of Law" the report goes on to outline the legal nature of powers, rights and freedoms and then to discuss the content of declarations concerning basic rights and freedoms. The question the commission felt that it had to answer was put in the following way: "[W]hat is the best constitutional blending of parliamentary supremacy and judicial supremacy in defining the issues in determining the means by which human rights and freedoms are to be protected?" [14]

In answering this question, the commission develops an interesting analysis of the use and interrelation of general and particular propositions.

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[11] ROYAL COMM'N INQUIRY INTO CIVIL RIGHTS: Report No. 1 (1968), vols. 1-4, Report No. 2 (1970) (Ontario) [Hereinafter cited as the McRUER REPORT].

[12] 4 McRUER REPORT, No. 2 1531-33.

[13] *Id.* at 1486-87.

[14] *Id.* at 1497.

This analysis takes as examples the common-law process as illustrated by *Donoghue v. Stevenson*[15] and the broad statement of principle found in the Universal Declaration of Human Rights, and attempts to show how a solution to the basic question cannot be found without falling back on Kelsen's idea of the ultimate "concretization" process of the judicial function. Both general propositions, such as are found in the Universal Declaration of Human Rights, and detailed rules are necessary; the problem is always to understand the appropriateness of each. This analysis is made particularly interesting by the use of examples drawn from the constitutions of Nigeria and India. In the Indian situation the political consequences of, for example, provisions designed to protect the right to compensation in cases of expropriation made it impossible, because India could not afford it, to give them the force that might otherwise appear desirable. The purpose of this analysis and, particularly, the use of comparative material is to demonstrate the need for a rigorous study in order to achieve the most appropriate protection of the individual's basic rights: "Everyone is in favour of the best that can be done to secure basic human rights and freedoms, but the public interest requires hard-headed, rigorous investigation and analysis of just what is the best method. Mistakes as to method will cause good intentions to miscarry . . . . Over simplification is easy and dangerous." [16]

The report next examines some specific forms for establishing human rights and freedoms and alternative methods of achieving compliance.

Finally, the report examines the problems of a Bill of Rights and concludes that entrenchment in any form is not desirable:

> We think it would be unwise for the Province of Ontario to compromise those areas of legislative jurisdiction that it now enjoys by agreeing to the constitutional entrenchment of a national Bill of Rights. If there is to be a readjustment with respect to the subjects over which the Federal Government and the Provincial Governments should have legislative jurisdiction, it should be through agreement between the Provinces and the national Government with regard to subject matters and not through the entrenchment of a Bill of Rights in the constitution, which would indirectly affect the legislative powers of the Provinces and which, by judicial interpretation, could effectively alter those powers. [17]

The analysis that has been considered is designed to show how a Bill of Rights fits into the existing techniques of the legal process as seen by the commission. The analysis is, in general, useful and illuminating, but the more theoretical arguments may cause some difficulty. The basis for much of the argument is the abstract theory of Kelsen and the commission's views on the "Rule of Law." I do not think that the commission made too much of these but the highly metaphysical views of Kelsen, by concentrating on the "final concretization of the norm," tend to distort the way in which the

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[15] [1932] A.C. 562.
[16] 4 McRuer Report, No. 2 1529.
[17] *Id.* at 1597-98.

norm is created and developed. The process is not one of logical deductions from pre-existing concepts but one of constant interaction between the received values that the judge faces and his own striving to achieve some social purpose. In the same way, the notion of the "Rule of Law" is not something that has a fixed content or even an easily perceivable one; instead, it is a set of often vague criteria that are generally accepted as standards to judge official action but which can change over time. There is a tension in the report between the rigorous study that the report so obviously undertakes and the intrusions of theory which sometimes deflect one into metaphysical detours.

The commission considers that the freedoms and individual rights that are to be protected by any kind of Bill of Rights, even an unentrenched one, are the traditional libertarian ones of freedom of religion, expression, association, movement, freedom to vote, and freedom of access to courts staffed by an independent judiciary. The commission was required by its terms of reference to examine essentially *legal* problems;[18] the problem that remains is whether the essentially nineteenth century libertarian values are still the ones we should be seeking to protect. The problem has moved, at least according to Professor Russell,[19] from one where the courts have a fundamental role to one where the answer must be found by means of schemes developed by the political scientists. The report is well aware of the dangers of "over-judicialization" at this level (*i.e.*, in the area of macro-administration—whatever may the views of some as to its performance in regard to micro-administration)[20] and is conscious of the need to maintain parliamentary supremacy. But while it may be clear that, under a constitution establishing a federal system with a division of powers, no legislative body can pull itself up by its own boot-straps, and that there must be some kind of final authoritative body to interpret the constitution, it does not follow that the same kind of body is appropriate to balance the competing claims of individual and state no matter what the source of the criteria for such a decision might be. The commission is, I think, heir to outmoded thinking in much the same way as the Donoughmore Committee of 1932[21] which "started life with the dead hand of Dicey lying, frozen on its neck."[22] The traditional scope of the "Rule of Law" may have to be radically reassessed, and the rigorous analysis of the McRuer Report will have to be redirected if the argu-

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[18] The terms of reference of the commission were to "examine, study and inquire into the laws of Ontario including the statutes and regulations passed thereunder affecting the personal freedoms, rights and liberties of Canadian citizens and others resident in Ontario for the purpose of determining how far there may be unjustified encroachment on those freedoms. . . ." 4 McRUER REPORT, No. 2 viii.

[19] See Russell, *A Democratic Approach to Civil Liberties*, 19 U. TORONTO L.J. 109 (1969) and Russell, *Constitutional Reform of the Canadian Judiciary*, 7 ALTA. L. REV. 103 (1969).

[20] *See, e.g.*, Willis, Book Review, 20 U. TORONTO L.J. 274 (1970).

[21] COMMITTEE ON MINISTERS' POWERS, FIRST REPORT, CMD. No. 4060 (1932).

[22] W. ROBSON, JUSTICE AND ADMINISTRATIVE LAW 318 (2d ed. 1947).

ments made by political scientists like Professor Russell are valid.[23]

The proliferation of bodies specifically charged with law reform around the world has led to considerable comment in legal periodicals on law reform in a jurisprudential context. Inevitably problems of law reform raise problems of the choice of method. Three articles in Canadian journals spend some time on this topic.[24] One[25] discusses the essentially administrative and political problems of getting the commission set up so that something is likely to get done. The others, while spending some time on this aspect of the problem, go on to talk generally about the choice of method from the point of view of the appropriate way to get any legal change made. The whole area of law reform by permanent law reform commissions raises the very difficult problem of deciding what method can best be employed. Should the problem be left to the judges so that the common law can "work itself pure?"[26] Or should the commission attempt to draft remedial legislation? How political an issue may "lawyers' tinkering" be? How much of the substantive law may be changed by changes in "lawyers' law?" Some of these problems are raised by W. F. Bowker in discussing the machinery of law reform in Alberta.[27] He discusses the problem of statutory change in the law of torts, for example, where the judges have usually managed to make changes as required,[28] and the arguments made in favour of and against codification (even in the more limited common law sense). These are the real problems where law reform commissions are employed as a technique for achieving change in the law. The political problems discussed by Professor Deech have to be met after the legal ones have been solved.

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[23] The previous survey article commented on the curious analysis of governmental functions made in 1 McRUER REPORT. See Swan, *Annual Survey of Canadian Law: Jurisprudence*, 3 OTTAWA L. REV. 591, at 592-93 (1969). The consequence of such an analysis now seems plain. The analysis is based on a number of assumptions which we are now questioning. I do not know what form we would find suitable to balance our competing values if we were to adopt a radically different model of the functions of government. It would not be, at least in its initial stages, so much a *legal* problem as a political one. *See* Russell, *Constitutional Reform of the Canadian Judiciary*, 7 ALTA. L. REV. 103, at 109-10 (1969).

[24] Deech, *Law Reform: The Choice of Method*, 47 CAN. B. REV. 395 (1969); Bowker, *Organized Law Reform in Alberta*, 19 U. TORONTO L.J. 376 (1969); Sawer, *Legal Theory of Law Reform*, 20 U. TORONTO L.J. 183 (1970).

[25] Deech, *Law Reform: The Choice of Method*, 47 CAN. B. REV. 395 (1969).

[26] The advent of the new English Law Commission has apparently led to a curious abdication of the law-making functions of the judges—at least as their spokesmen have indicated. Both Lord Devlin and Lord Denning have appeared content to let Parliament amend the law from now on. Such statements may indicate no more than the usual tendency of English judges to be unaware of their truly creative powers, but they could lead to the far more dangerous situation where the judge fails to see that in almost every case that comes before him—certainly any case with a good arguable point of law—he must act creatively. He cannot apply the law: he must make it. The famous practice statement of the House of Lords in 1966 ([1966] 3 All E.R. 77) cannot now be meaningless. *See also* Deech, *supra* note 24, at 399-400; *Suisse Atlantique*, [1966] 2 All E.R. 61, at 76 (H.L.) (Lord Reid) and Beswick v. Beswick, [1967] 2 All E.R. 1197, at 1201 (H.L.) (Lord Reid).

[27] Bowker, *Organized Law Reform in Alberta*, 19 U. TORONTO L.J. 376 (1969).

[28] *Id.* at 386.

Professor Sawer discusses the "Legal Theory of Law Reform." [29] He adopts a rather cynical view of the interaction of legal philosophy and law reform: "One might expect that Law Reform in general would provide merely a special field for the application of the great systems of legal theory. Actually it is surprising how little help the jurisprudence which we habitually teach in law courses gives the handling of law reform problems, except at the most general level of thought." [30] He goes on to observe that the analytical schools of Austin and Kelsen "clear the decks" of the confusing ideologies of natural law. It is not, it seems to me, surprising that the "great systems of legal theory" are of so little help: what is, however, surprising, is that anyone should have thought that they would be. The traditional positivistic analytical jurisprudence of the English legal philosophers and Kelsen may, in spite of Austin's view to the contrary, have gone so far along the road of divorcing legal norms from social and moral values that the great need for law to be conscious of its value content may be forgotten. There are two aspects of this. Law has a value content as a means of achieving certain social ends. This may be termed its substantive value content. The law of torts, for example, reflects the judgment of society that, in certain cases, it is better for the plaintiff's loss to be shifted to the defendant. This aspect of the law's values may properly be regarded as beyond the scope of any purely legal study: lawyers have in general no particular competence in these kinds of areas. There is, however, a danger in this view when it is carried too far. Law, as Fuller, [31] for example, argues, carries its own internal values with it. This aspect of the law is rather summarily dismissed by Professor Sawer. [32] The large problem of law reform, it seems to me, is that the constraints put upon the method of achieving reform by the need to respect the law's internal morality, may considerably influence the success of any attempt to make a particular change. Sir Owen Dixon is quoted as saying that "law reforms always produce a different result from that which their promoters expected." [33] The achievement of compliance with Fuller's eight points [34] may involve the balancing of very fine distinctions and considerable sophistication in the choice of method. We come back at this point to the factors raised by Mr. Bowker. Some of these points are raised by Professor Sawer [35]—the problem of reconciling clarity and certainty, for example. "Lawyers' law" also presents some interesting problems in this area. A proposal may be characterized as one involving merely "lawyers' law" but may nevertheless involve either, as Professor Sawer points out, [36] some points of policy or some important problems of the coincidence of what

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[29] Sawer, *Legal Theory of Law Reform*, 20 U. TORONTO L.J. 183 (1970).
[30] *Id.* at 186.
[31] L. FULLER, THE MORALITY OF LAW (1964).
[32] Sawer, *Legal Theory of Law Reform*, 20 U. TORONTO L.J. 183, at 187 (1970).
[33] *Id.* at 187.
[34] See L. FULLER, THE MORALITY OF LAW 33.
[35] *Supra* note 31, at 188-95.
[36] *Id.*

one can call "natural relations" and "legal relations." For example, time-purchase schemes, should, if the law is to be intelligible and as unlikely as possible to confuse, reflect the expectations of the average purchaser, not the theoretical approach of the reforming lawyer.

An important problem of law reform is just touched on here, but it seems to be well worth investigating much further. The best efforts at simplification of the law may be frustrated by a failure of the law to reflect people's expectations of it. This works two ways, not only in the way that has been mentioned, but also in the common belief that law reform is a simple task and law can do many things that people think it should, regardless of the wisdom of any attempt to do anything. This belief may be given concrete reinforcement in the present efforts to control consumer sales.

The great systems of legal theory can have almost nothing to say on these problems, because they have been developed with such a high degree of abstraction that they bear no relation to the ideas of the common man. This would seem to be most particularly true of Kelsen. The rather more mundane concerns of law reform must reflect the basic demand for fairness and equality that are at the heart of the law's efficient and effective operation in society. The claims made by the law's internal morality set up the general limits within which reform must take place and some of the criteria by which it can be tested.

Many of the points discussed so far in this survey article are dealt with in an excellent study of legal values by Professor Weiler.[37] This article is a comprehensive analysis of the values applied by courts and the values of having courts perform the job they do. It includes a short analysis of the relation of courts and legislatures in the context of the traditional division of governmental functions in the area of law reform. The general argument is that it is neither possible to regard the courts as having a function of merely applying rules of law developed by a legislature[38] nor valid to think that every actor in the legal system must act to advance certain substantive social goals —the fallacy of "institutional fungibility." The analysis that follows depends on two assumptions:

> [F]irst, judges and legislators (as well as administrative officials, and so on) should act as partners in a collaborative effort to enhance the quality of our legal order; second, their joint efforts should proceed on the basis of a rational division of labour, each concentrating on the job he is best capable of performing. What is best for each is determined by an intelligent evaluation of differing, relevant, institutional characteristics.[39]

The development of the argument set out above in the light of these two assumptions leads to the conclusion that:

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[37] Weiler, *Legal Values and Judicial Decision-Making*, 48 CAN. B. REV. 1 (1970)

[38] *See, e.g.*, the extraordinary view of the separation of powers contained in the opening statements of 1 MCRUER REPORT [commented on in the previous jurisprudence survey, 3 OTTAWA L. REV. 591 (1969)].

[39] Weiler, *Legal Values and Judicial Decision-Making*, 48 CAN. B. REV. 1, at 6 (1970).

> [F]irst, judges may legitimately perform a creative role in developing and changing the law, a role which reflects the peculiar advantages and insights open to their institutional position; second, the courts' concern for the substantive policy of the rules they accept must be limited by attention to, and respect for certain legal values which limit the pursuit of utilitarian ends; third, not only are these legal values often unaffected by judicial activism, but they often can only be implemented if the law is changed to bring it into line with prevailing community standards of reasonableness. The conclusion we arrive at is that courts must play a *limited*, but *creative*, role in improving the quality of our law. The decision as to when a particular innovation may be legitimate cannot be controlled by any form of general, objective standard; instead, each instance must be analysed in terms of a calculus of substantive policy gains and institutional losses. [40]

The analysis in this article is so penetrating and illuminating that many of the problems of the co-existence of courts and legislatures become much clearer and easier to solve. The limited but creative role of the judge qualifies him to perform only a subsidiary role in the handling of fundamental rights. But the method of judicial decision-making may mean that the judge may be a peculiarly appropriate agent to achieve certain kinds of law reform. There is, for example, very often a greater chance of satisfactory law reform by means of intermittent, interstitial, post facto legislation by judges than by broadly drafted codes designed to offer guides for future conduct. The value of such an analysis from the jurisprudential point of view is that it demonstrates the importance of two possibly related facts. The first is the requirement that the judge enter into collaboration with the other branches of government to share in the articulation and, particularly, the application of shared purposes. The second is that the whole institutional framework of the law, both legislation and adjudication, imposes certain restraints on the role that each body must play. This is the consequence of the conclusion that the judge plays a "limited but creative" role. This conclusion, if it be right, as I think it is, offers a basis for the analysis of the legal system and particularly the process of adjudication that has nothing to do with the great systems of legal theory but which is, nevertheless, sufficiently fundamental to be of universal application and securely grounded in the recognition of the need to satisfy the basic moral demands of human existence. At this level the theories of the positivists and the natural lawyers only distort and confuse: they add nothing. This is why, I think, that we should not be surprised at the fact that the great systems of legal theory offer no help in problems of law reform: they are, quite simply, completely irrelevant.

Much of what Professor Weiler says in this article is an extension of what he said in an earlier paper. [41] The lesson that could be drawn from that paper, *i.e.*, that our traditional models of the operation of the judging function distort our view of it and frustrate attempts to use it in achieving certain social goals, applies to this paper as well. Both papers demonstrate

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[40] *Id.* at 17, 18.

[41] Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. B. REV. 406 (1968). This article was extensively commented on in the previous survey, *supra* note 37.

the complexity of our legal process—a complexity, for example, quite hidden in the analyses of Austin, H. L. A. Hart and Kelsen—and the need to understand this complexity before we can be sure that our courts are doing what they should be doing. Professor Weiler discusses some examples of both "good" and "bad" judging in his paper and shows, for example, the problems that must be faced before we change, say, the rule regarding union liability for secondary picketing.[42] There is, I think, a great need for this kind of discussion in Canada for we are at the same time asking too little of our judges—we only seldom explore their role in law reform—and at the same time expecting too much of them. We think that they should be the guardians of the individual's rights. Both Professor Russell[43] and Professor Weiler demonstrate that in order to solve or attempt to solve our political and legal problems, we need to explore thoroughly both our political approaches and the complexities of the judicial function.

The other side of the present schizophrenic Canadian jurisprudence is the analysis of legal theory and language. An article by Kaufman and Hassemer[44] discusses, from a historical point of view, the development in German jurispudence of various ideas of the relation of enacted law to the judicial function. The article is very concise and condensed, but manages to discuss most of those writers whose views on law have become known to lawyers outside Germany. For most Canadians the views of Hans Kelsen and Gustav Radbruch are of the greatest interest and these are discussed in as much length as the article allows. The Pure Theory of Law is criticized for being an approach that exposes certain presuppositions to any legal theory but does not *describe* positive law. Such a description must take account of the factors that Kelsen seeks to eliminate from his theory. Radbruch's theory is said to reach what is regarded as the most fruitful way to look at the problem, that is, that the relationship between enacted law and the judicial decision performs a complementary function. German legal theorists are said to have accepted,

> [T]hat enacted law is not anything completed. . . . [T]his incompleteness is unavoidable and has provided a reason therefore: the import of the changing reality on the legal order. This import is not treated today, as it was in the free-law school, as a programmatic presupposition of legal theory; it has

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[42] The case discussed in Hersees of Woodstock Ltd. v. Goldstein, [1963] 2 Ont. 81. In this case the court ignored the fact that there was "no consensus within the relevant community concerning the appropriate standards from which a court might reason with relative objectivity and assurance to the appropriate rule for the specific type-situation." Weiler, *supra* note 36, at 44. The seriousness of the charge is clear: "[The rule in the case] is imposed on the other side with the force of law without the latter having any real consultation or participation in the course of its creation and imposed by an unrepresentative body which feels no obligation to be responsive to an important segment of the society." Weiler, *supra* note 37, at 44-45.

[43] See Russell, *A Democratic Approach to Civil Liberties*, 19 U. TORONTO L.J. 109 (1969) and Russell, *Constitutional Reform of the Canadian Judiciary*, 7 ALTA. L. REV. 103 (1969).

[44] Kaufman & Hassemer, *Enacted Law and Judicial Decision in German Jurisprudential Thought*, 19 U. TORONTO L.J. 461 (1969).

> rather proved to be a matter beyond dispute as a result of a reflection on the univocality of enacted law, on the possibilities of the constitution of the actual states of affairs, and on the preconditions of legal interpretation.[45]

Thus, the answers of theorists like Kelsen can never do more than to clear the decks for the studies that must now take place. The quotation just given from Kaufman and Hassemer may seem trite and obvious from the point of view of the common lawyer. The bothersome thing from the philosophical point of view is that this conclusion of the authors (one gathers that it is not completely accepted in Germany) [46] is based on the theories of Radbruch. Radbruch is said to have achieved in some way a synthesis of the "ought" and the "is," *i.e.*, value and reality, and this, for a common lawyer is a very difficult philosophical idea to digest. The translation into German [47] is so literal and difficult to master that very little can be made of this analysis and much has to be taken on faith. This is not satisfactory because a weak theoretical foundation for so unexceptional a statement as has been quoted seems to make the gulf separating Anglo-American jurisprudence from that of the European continent wider than ever. The kind of "received knowledge" has generally been to the effect that the gulf was narrowing.

The article by Kaufman and Hassemer demonstrates a number of interesting and fundamental differences between the common-law and civil-law theories of law. The position of synthesis between enacted law and judicial decision, *i.e.*, that neither the conceptualists nor the free law school are wholly right, is reached by a process of reasoning wholly at the theoretical level. There is, in the article, no discussion of any case, nor, so far as appears, any comment by any judge speaking of his experience with the problem.[48] The conclusion reached by the Germans would appear self-evident to anyone who had had to consider the process of statutory interpretation or elaboration. The use made of the philosophers in developing theoretical ideas on the relation between judicial decisions and enacted law provides an interesting contrast to Professor Sawer's short statement on the use of the "great system of legal theory."[49] The common-law lawyer's approach, as indicated by Professor Sawer, is to find such help as there may exist elsewhere in order to do what has to be done. The help actually found is of a highly practical nature. The German approach leads one to wonder what help might be sought outside the theoretical limits of jurisprudence and what effect that might have.

A curious attempt to use both the abstract theoretical approach to law and the more pragmatic common-law approach occurred in a series of cases

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[45] *Id.* at 486.

[46] *E.g.*, Ulrich Klug believes a jurisprudence of concepts can provide all the answers; nevertheless, the "Free Law" school may not be quite dead.

[47] By Ilmar Tammelo.

[48] The authors do mention that there are modern studies of case law reasoning but these are not further referred to in the article. *Supra* note 43, at 461.

[49] *Supra* note 45, at 186.

arising out of the Rhodesian Unilateral Declaration of Independence. These are discussed in an article by F. M. Brookfield.[50] After U.D.I. in November 1965, the Rhodesian courts found themselves in the familiar dilemma of those who "are caught between the devil and the deep blue sea." The problem was brought to a head in a series of cases involving the detention of individuals under regulations passed by the Smith regime after U.D.I. and after Smith and his ministers had been dismissed from office by the governor. The leading case was *Madzimbamuto v. Lardner-Burke*[51] and it was followed by a number of other culminating in *R. v. Ndhlovu.*[52] In this case, the Smith regime was finally declared to be lawful. It is not proposed here to analyse either the various judgments in these cases or to discuss the constitutional points raised; instead, the use by the Rhodesian courts of the analysis of Kelsen will be commented on. In both *Madzimbamuto* and *Ndhlovu*, the Rhodesian judges relied on Kelsen's theory of the *Grundnorm* or Basic Norm. Kelsen postulates the basic norm as the foundation of any legal system: it supplies the ultimate source of validity for every norm in the system, but being ultimate, cannot itself derive validity from any other norm, but must be pre-supposed to be valid. Its validity can never be tested, though its efficacy can be. When one basic norm no longer is efficacious, *i.e.*, no longer operates as a source of validity for the system, it must be replaced by another. The use of this argument after U.D.I. in 1965 is obvious. In the final result, *i.e.*, in *Ndhlovu*, the majority of the Rhodesian judges regarded the new regime as efficacious and as therefore supplying a new basic norm and a source of validity to its rules.

The result is a fascinating example of "jurisprudence in action." First, there is something unreal about judges deciding the basis of the regime under which they must operate. It is the final vindication of the need for there to be some body in every society which must make the ultimate authoritative determination of the law—even though in this case this has elements of "boot-strap" authority. Second, the use by the courts of the concept of the basic norm presents with startling clarity the separation of law and morals in positivistic theory. It is, no doubt, hard for those faced with a choice to put the alternatives of fidelity to an old regime and the practical necessity of compliance (or bona fide fidelity) to a new regime in a cold, logical perspective. But perhaps we should expect this of our judges.[53] The analysis of "efficacy," *i.e.*, which regime was the more efficacious—the U.K. or the Smith Government demonstrates the amorality of the positivistic

[50] Brookfield, *The Courts, Kelsen, and the Rhodesian Revolution*, 19 U. TORONTO L.J. 326 (1969).

[51] [1968] 3 All E.R. 561 (P.C.). Citations for judgments in Rhodesian courts are found *id.* at 326. The background to U.D.I. and this case is admirably set out by Eekelaar, *Splitting The Grundnorm*, 30 MODERN L. REV. 156 (1967).

[52] 4 S. Afr. L.R. 515 (Rhodesia, App. Div. 1968).

[53] Chief Justice Beadle in *Ndhlovu* does say that the acceptance of the new regime is a matter of personal choice even though there may be a legal determination of the loss of efficacy of the old Grundnorm. Brookfield, *The Courts, Kelsen, and the Rhodesian Revolution*, 19 U. TORONTO L.J. 326, at 341-42 (1969).

theory. The judges may have sincerely believed that the 1965 (post U.D.I.) government and constitution was "right." But then they should have said so and based their conclusion on the fact that its rules were legitimate and should be accepted. If they did not think that they could do this, either because of their political views or because of, say, their oath of office, then they should have said so. Sir Thomas More, for example, was faced with the same choice—only for him "efficacy" was not an appropriate test.

Brookfield argues: "[T]he Rhodesian judges could not, as the majority purported to do, determine the success of the revolution as a matter of law, but that they were right (those who attempted the task) to search for a test by which some actions of the regime could be upheld to avoid any vacuum in the day-to-day essential government of the territory." [54] This is, I think, essentially the same point as I have made, except that Brookfield puts his arguments as being based on the law. The argument is that there are two separate decisions to be made, one, whether to join the revolution or not; two, whether the *Grundnorm* has shifted or not. The judge, it is argued, cannot, *as judge*, consider whether a *Grundnorm* has shifted or not—he must accept one. If he chooses to accept the new, revolutionary one, he has, in effect, joined the revolution. I think this analysis is correct, but the problem is more complex. The *Grundnorm* argument appears to indicate that almost any post-revolutionary case can present this dilemma to the judge. This is not so. A legal system can present a continuity in many respects even though political battles are raging. The judge may not have to face the choice of joining the revolution or not for some time. The danger in this may be that the judge, by not facing up to the new regime, may increase its efficacy and lessen the chances of effective opposition. [55] But this is to confuse the judge's role in, say, simple tort and contract cases with his ultimate personal responsibility when he is forced into a political choice. The role of judge is probably never easy, and the dilemma faced by the Rhodesian judges was difficult in the extreme. But the law or legal theory will not offer any easy answer. The doctrine of Kelsen may not offer any easy way out [56] but the reason is not legal: judges, like every one else faced with a revolution, must make a choice that is essentially political, and frequently moral.

Another theme that runs through most discussions of jurisprudence is raised in an article by J. C. Merrills, [57] and commented on in a Report of a Committee of Inquiry. [58] This is the topic of law and morals. The article by

[54] *Id.* at 327.

[55] This was seen to be the case in the constitutional cases, including *Madzimbamuto*, see Dias, quoted in Brookfield, *supra* note 53, at 344. It is not, I think, valid to argue that the old law remained effective because the vast majority of old rules were not changed by the new regime. Rules can be accepted as appropriate criteria to test action without the necessity of going back to any Grundnorm.

[56] 4 S. Afr. L.R. at 544.

[57] Merrills, *Law, Morals, and the Psychological Nexus*, 19 U. TORONTO L.J. 46 (1969).

[58] OUIMET REPORT.

Merrills comments on the analysis of law and morals put forward by Olivecrona. [59] This view is that psychology provides the answer to the question: "To what extent do law and morality actually influence each other?" The analysis of Olivecrona is based on the argument that because law is known to visit sanctions on an offender, then to avoid each individual's facing an intolerable psychological strain, the mind regards the prohibition of law as involving the conscience as well. Olivecrona fortifies this argument by trying to show that since morality in any society may change when law and order have broken down, therefore, law must determine the content of morality and that unless the psychological argument be accepted then there is no rational source for moral standards. Olivecrona further argues that law will only be firmly established in society when it has a strong moral backing. [60]

The criticism of this view made by Merrills is that Olivecrona's view illuminates law by permitting one to regard law as the rules of the game and morality as the spirit of the game but at the same time distorts the view of law by failing to consider the internal aspect of rules. [61] Morality is important in achieving acceptance of the rules of law from an internal point of view. But law and morals, even though there may be a large area of overlap, do not necessarily have the same origin, but represent instead separate attempts by society to control conduct. [62]

The trouble with this analysis and criticism is that the model for law of both Olivecrona and Merrills is too simplistic. Law and morals are, of course, constantly interacting but the relationship between them is not that they are two relatively independent systems of rules but that they are both value systems that to a large extent derive content from each other. This is true not only in such basic areas of intersection as murder and theft but also in many of the more purely legal aspects of the enterprise that is law. For example, the problems of justice, equality and fairness are examples of both legal and moral issues where the legal analysis depends on moral premises and the moral arguments must take note of the characteristics of the legal institutions and rules that the society has established.

The use of the analogy of games to elucidate jurisprudential arguments is, I think, dangerous. There are a number of reasons why the analogy is misleading. First, in a game the purpose behind the rules is fairly clear. The purpose behind rules of law may be far from clear. Second, the institutional framework within which the players and the referee function is very simple and presents none of the complexities arising in an actual, operating legal system. This factor may not appear very important, but it does, I think, illustrate some peculiarly difficult problems of law and morality. These arise where the institutional demands of the legal system and an individual's moral

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[59] K. OLIVECRONA, LAW AS FACT (1939).

[60] *Supra* note 57, at 46-48.

[61] This is the view of law put forward in H. HART, THE CONCEPT OF LAW (1961). The internal view of the rules of law is the acceptance by the individual of the rules as appropriate criteria to test conduct.

[62] *Supra* note 57, at 51-52.

sense come in conflict. The moral position that one should take in face of the well-known maxim, "hard cases make bad law" is by no means clear. Similarly such cases as *Shaw v. Director of Public Prosecutions* [63] raise acute moral problems. In that case the moral sense of society may have been vindicated but at a considerable moral cost—and, in the circumstances, a quite disproportionate cost. Nothing was gained by Shaw's conviction: the case could have been given as notice of the court's intention to convict for the future. The judgment is crudely retrospective. [64]

A somewhat more illuminating study—though by no means the final word—is found in a study of the Canadian correctional process. [65] The Ouimet Report adopts the celebrated views of the English Wolfenden Report [66] in discussing the relation of criminal law to morality. This is the view that there is an area of private morality and immorality "which is, in brief and crude terms, not the law's business." [67] The committee attempts to set out criteria to determine the proper scope of the criminal law:

> 1. No act should be criminally prescribed unless its incidence, actual or potential, is *substantially damaging to society.*
>
> 2. No act should be criminally prohibited where its incidence may be adequately controlled by social forces other than the criminal process. . . .
>
> 3. No law should give rise to social or personal damage greater than that it was designed to prevent. [68]

This view of the proper scope of the criminal law is motivated by the opinion of the committee that: "The deliberate infliction of punishment or any other state interference within human freedom is to be justified only where manifest evil would result from failure to interfere." [69] This is an attitude of restraint that contrasts sharply with the views of Lord Devlin on the theoretical limits of the state's concern as manifested through the criminal law. [70] The committee is concerned with the practical limitations on the power of the criminal law to carry the burden that might be imposed on it if the views of Lord Devlin were accepted. Drunkenness, vagrancy and the sale of contraceptive devices are discussed as examples of conduct that may be only brought within the ambit of criminal law at some cost. The analysis of the committee is not as detailed and as deep as might have been hoped but, nevertheless, the view taken shows how the interaction of law and

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[63] [1962] A.C. 220.

[64] We abhor retroactive statutes but scarcely seem to notice the retroactive nature of judge-made law. In a civil case the answer is by no means clear, but in a criminal case the accused must always go free. To punish an individual in such circumstances seems quite plainly pointless. How could he have refrained from committing the crime unless he knew or could have known that it was criminal? See L. FULLER, THE MORALITY OF LAW 51-62, and the extremely interesting case of Regina v. Howson, [1966] 2 Can. Crim. Cas. Ann. (n.s.) 348 (Ont.) (Laskin, J.A.).

[65] OUIMET REPORT.

[66] CMND. NO. 247 (1957).

[67] OUIMET REPORT 13.

[68] OUIMET REPORT 12.

[69] *Id.* at 13.

[70] P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).

morality is not explicable in terms of psychology or antiseptic talk of "intersection." The relationship between law and morals and the extent to which each is reflected in the other are governed by the demands of the legal process. The Ouimet Report points out that: "The criminal process, including the correctional process, must be such as to command the respect and support of the public according to prevailing concepts of fairness and justice; the process should also as far as possible, be such as to command the respect of the offender." [71] This is much more tolerant than the view that the application of the criminal law is justified merely because members of society may feel "intolerance, indignation and disgust." [72] It also brings into consideration some of the factors that limit the burden of social control that the criminal law can carry. It is, I think, no longer possible for law and morality to be examined as laboratory specimens, abstracted from the role that each must play in society, which roles are influenced by the characteristic method of operation of each.

A number of further articles have also appeared that touch on a number of other jurisprudential topics. Among the more interesting topics that are normally ignored in jurisprudential studies is the study of the effectiveness of law. One study was commented on in the previous survey article. [73] A recent article touches on the same problem in the context of international law. [74] Dean Macdonald argues that the application of sanctions in international law must be tested for efficacy and consequences in much the same way as one tests the application of sanctions domestically: "Functionally, sanction is a principle of implementation that is limited only by the context in which the principle is sought to be applied." [75] The application of a sanction in any particular context must be justified as being likely to achieve certain purposes: it must be possible to assess how apt the sanction applied will be to ensure that the purposes are met. We are familiar with studies made by criminologists who try to determine how effective imprisonment and fines may be in discouraging anti-social behaviour. It is useful to have these basic approaches applied in what might be termed "international criminology." The author does not attempt to provide any answers to the problem that, say, the application of sanctions against Rhodesia may raise, but he does argue for a new approach. While criminology may provide answers to the question of the effectiveness of the criminal law process, it is clear that neither domestically, nor in international law, have we nearly enough studies of sanctions in general. We need to know far more about the contents of the legal armoury and the kind of ways in which it might be employed.

This kind of approach to legal problems is closer to the approach of scholars like Weiler and Russell, and forms part of the truly significant studies

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[71] OUIMET REPORT 17.

[72] P. DEVLIN, THE ENFORCEMENT OF MORALS 17.

[73] L. Fuller, The Law's Precarious Hold on Life (unpublished) [See Swan, *Annual Survey of Canadian Law: Jurisprudence*, 3 OTTAWA L. REV. 591, at 602 (1969)].

[74] MacDonald, Economic Sanctions in the International System, 7 CAN. Y.B. INT'L L. 61 (1969).

[75] *Id.* at 65.

being made of our knowledge of how our legal system works. This is one side of Canadian jurisprudence that is receiving a deserved and increasing share of academic attention. The other side—the more philosophical and theoretical enquiries—falls into a curious dilemma. On one hand, such studies can only be truly valuable so long as they remain wholly theoretical attempts to understand the philosophical basis for law—and then they are charged with being irrelevant—while, on the other hand, such attempts as are made to show the great legal theories in action seem to fail in the attempt to be either useful or really relevant. The studies of either the legal or political processes seem to have little use for the more theoretical ideas about law, and one is left with Professor Sawer's rather plaintive inquiry about the role of the great systems of legal theory. [76]

[76] Sawer, *Legal Theory of Law Reform*, 20 U. TORONTO L.J. 183 (1970).