ANNUAL SURVEY OF CANADIAN LAW
PART 2
JURISPRUDENCE

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I. INTRODUCTION

In the last *Ottawa Law Review* survey of jurisprudence Professor John Swan observed that a dichotomy between theoretical and practical concerns has emerged in Canadian jurisprudential writings. [1] "There are", he wrote, "two largely unconnected strands" of current Canadian jurisprudence, one aiming to make the law work in society, the other concerned with relating "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". [2] The lack of cross-fertilization that Professor Swan noted between these two strands of thinking led him to characterize Canadian jurisprudence as "schizophrenic", [3] and this in turn forced him to conclude that both sorts of writing, theoretical and practical, lacked "utility and relevance". [4] Only the McRuer Report [5] and the then recent work of Professor Weiler, [6] he suggested, successfully combined utility with theoretical insight. [7]

Since Professor Swan's survey in 1971, however, the situation has changed radically. True, the last four or five years have not spawned much Canadian literature on the relation between law and morality, unlike the years immediately following the Hart-Fuller exchange in 1958 over the

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

[2] *Id.*

[3] *Id.* at 550.

[4] *Id.* at 540. The "role of the great systems of legal theory" is, he thought, especially diminished in this regard: *id.* at 547. See Swan's references to Sawer, *The Legal Theory of Law Reform*, 20 U. TORONTO L.J. 183 (1970), *as cited in* Swan, *supra* note 1, at 547, 557.

[5] ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS, REPORT No. 1 (1968), and REPORT No. 2 (1970) [hereinafter cited as the McRUER REPORT].

[6] Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. B. REV. 406 (1968), and Weiler, *Legal Values and Judicial Decision-Making*, 48 CAN. B. REV. 1 (1970). These articles are reviewed in Swan's survey, *supra* note 1, at 548-50.

[7] Swan describes the McRUER REPORT as providing "exhilarating jurisprudential material": *supra* note 1, at 543, while Weiler's articles show the "complexity of our legal process—a complexity, for example, quite hidden in the analysis of Austin, H. L. A. Hart and Kelsen . . .": *id.* at 550.

question of whether man-made laws are inherently moral phenomena; [8] and even the more recent debate between Hart and Lord Devlin over the matter of enforcing morals by providing them with legal sanctions [9] has been pretty much limited in Canadian circles to a "comment" in the *Canadian Bar Review*. [10] Even that was written by an Englishman.

On the other hand, however, because of the federal government's creation of the Law Reform Commission, the topic of law reform itself has attracted extensive attention by Canadian lawyers, both academic and practising. Not surprisingly, the interest in the subject has had the side-effect of generating a relatively large amount of work in the areas of professional ethics, [11] legal methodology, [12] legal education [13] and the relation between jurisprudence and the social sciences. [14] Finally, Canadian writers have shown a strong desire to philosophize about law in ways that are not always slavishly British or European, as is made clear by Professor Samek's *The Legal Point of View* [15] and some of the work generated by the 1975 international conference on legal philosophy hosted by the University of Western Ontario's law faculty and philosophy department.

Before moving to considerations of the work done in these areas I must of course say something about the aim and scope of this present survey. Previous editors have traditionally done this; rationality demands it, for one could hardly cover the subject-matter of an area without first identifying it. In surveys of jurisprudence this demand is unusually pressing, for there simply is no single conception of the subject that is accepted by everyone interested in it.

In one sense every area of a legal system must be understood to have a jurisprudential foundation. It is true, as Lord Radcliffe wrote in 1960, that if law "is to be anything more than just a technique it . . . [must] be so much more than just itself: a part of history, a part of economics and sociology, a part of ethics and a philosophy of life". [16] This is why, as Sir Victor Windeyer wrote twelve years later in the *Alberta Law Review* (approving Mr. Pleydell's remark in *Guy Mannering*) "a lawyer without history

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[8] Hart, *Positivism and the Separation of Law and Morals*, 74 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). See text at notes 46-57 & 150-54 *infra*.

[9] Devlin, *The Enforcement of Morals*, Maccabean lecture in jurisprudence, 1959, the British Academy, *reprinted with some revisions in* P. DEVLIN, THE ENFORCEMENT OF MORALS 1 (1965), and R. WASSERSTROM, MORALITY AND THE LAW 24 (1971); Hart, *Immorality and Treason*, THE LISTENER, July 30, 1959, at 162-63, *as reprinted in* R. WASSERSTROM, *supra*, at 49.

[10] Finch, *Stare Decisis and Changing Standards in English Law*, 51 CAN. B. REV. 523 (1973).

[11] See text at notes 59-78 *infra*.

[12] See text at notes 216-45 *infra*.

[13] See text at notes 225-45 *infra*.

[14] See text at notes 194-215 *infra*.

[15] R. SAMEK, THE LEGAL POINT OF VIEW (1974). Rather than repeat here my summary and assessment of this important book let me refer the reader to its review: Lewis, Book Review, 7 OTTAWA L. REV. 691 (1975).

[16] LORD RADCLIFFE, THE LAW AND ITS COMPASS 93 (1960).

or literature is a mechanic, a mere working mason . . .".[17] I might add that simply because jurisprudence is walled off from the so-called "black letter" courses and taught as an isolated subject in Canadian law schools (and as an option at that), this does not mean that the materials of those other courses can adequately be understood in abstraction from their jurisprudential considerations. They cannot be.[18] Canadian jurisprudence may be thought of as positivistic, but even if that assessment were correct,[19] all it can legitimately mean, given the accepted meanings of positivism,[20] is that Canadian legal scholars accept the view that theories about the nature of law and its binding force can adequately be developed independently of their own ethical assumptions and value judgments about law—that is, in such a way that the concept of "legal validity" is not dependent upon moral considerations. But it cannot legitimately imply that specific legal phenomena such as those treated in, for example, contracts or criminal or administrative law can adequately be dealt with in terms of exclusively non-jurisprudential

[17] Windeyer, *History in Law and Law in History*, 11 ALTA. L. REV. 123, at 124 (1972).

[18] "Much needs to be done", Oxford's Professor Milner wrote in 1974, "to modify the court-centred emphasis of legal education"; for, he continued, "concentrating on disputes and their settlement is bolting the stable door when the horse has gone. We should be trying to create systems of organization and control which will prevent or reduce the number of disputes arising as well as providing machinery for settling them": Milner, *Settling Disputes: The Changing Face of English Law*, 20 MCGILL L.J. 521 (1974). If, as Swan correctly claimed, *supra* note 1, at 540, jurisprudence is "concerned with drawing out and examining common or fundamental elements in samples of legal phenomena", the statements quoted from Milner clearly imply the need for incorporating jurisprudential considerations into every area of the law, taught as well as practised: *see* text at notes 229-34 *infra*.

[19] I suggest below that it no longer clearly is: *see* text at notes 102-36 & 194-215 *infra*.

[20] H. L. A. Hart is to be thanked for pointing out that "positivism" has meant different things over the years. In his article *Positivism and the Separation of Law and Morals*, *supra* note 8, at 601-02 n.25, he wrote:

> It may help to identify five (there may be more) meanings of 'positivism' bandied about in contemporary jurisprudence:
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> (1) the contention that laws are commands of human beings . . .
> (2) the contention that there is no necessary connection between law and morals or law as it is and ought to be . . .
> (3) the contention that the analysis (or study of the meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, "functions", or otherwise . . .
> (4) the contention that a legal system is a "closed logical system" in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards . . . and
> (5) the contention that moral judgments cannot be established or defended, as statements of facts can, by rational argument, evidence, or proof ("noncognitivism" in ethics) . . . .
>
> Bentham and Austin held the views described in (1), (2), and (3) but not those in (4) and (5). Opinion (4) is often ascribed to analytical jurists . . . but I know of no "analyst" who held this view.

considerations. Positivists, like everyone else, operate either tacitly or explicitly within a jurisprudential framework.

In the light of my foregoing remarks, let me lay down a definition of "jurisprudence" that can serve to mark off the limitations of this present survey. Happily, because this is a survey of Canadian jurisprudence, that definition is one employed by a Canadian professor of law,[21] although originally formulated by a non-Canadian. "Jurisprudence", Dr. Mark MacGuigan wrote, quoting Julius Stone, "is the . . . examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law . . .".[22] To this I would add the statement by Huntington Cairns in his already classic *Legal Philosophy From Plato to Hegel*[23] that the "basic character of [modern] jurisprudence is philosophical . . . . [It] has understanding as its first aim and the reformation of practice as only a secondary hope. Jurisprudence's primary objective . . . is to understand the function of law in human society."[24]

At this point those practising lawyers for whom the "rule of law" means that "time is money" and those academics who pride themselves on being black letter men may be tempted to cast this survey aside. But hopefully not, for there are two profound insights that follow from MacGuigan's and Cairns' conception of the jurisprudential task and they are decisively important to the very life of the law itself.

The first is that in their better moments the men of the law have insisted that legal studies are in a way a type of liberal art[25]—a quest for understanding for its own sake, as opposed to a search for knowledge that is valuable only because of its utility.[26] For after all, in their innermost reality, legal systems are not merely institutionalized ways of insuring that the powerbrokers in the world's various nation-states will be able to continue exercising their influence[27] but are rather one of the formal ways that human beings have devised for expressing their fundamental need to live in community with one another. As a person studies the legal system of his province or nation, therefore, he is in reality and above all learning some-

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[21] Mark MacGuigan, Professor and Dean of Law (as he then was), in M. MacGUIGAN, JURISPRUDENCE: READINGS AND CASES (2d ed. 1966).

[22] *Id.* at 3.

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

[24] *Id.* at ix-xi.

[25] In a review of R. SAMEK, THE LEGAL POINT OF VIEW (1974), Philip Slayton stated: "Jurisprudence is widely and rightfully considered one of the most difficult of the traditional academic legal arts": 21 McGILL L.J. 164 (1975).

[26] See J. PIEPER, LEISURE: THE BASIS OF CULTURE 78-79 (A. Dru transl. 1963) for a readable discussion of the distinction adhered to by the founding universities in mediaeval Europe between the "liberal arts" and the "servile arts"—the latter ordained for the satisfying of human needs through activity. CAIRNS, *supra* note 23, at 160, states: "Cicero thought of jurisprudence as the Roman counterpart to Greek philosophy." *See also* MacGUIGAN, *supra* note 21, at 3.

[27] The Scandinavian Realist, Karl Olivecrona, implies in his jurisprudence, however, that his work is "realistic" precisely because his examination of the actual development of Western legal systems has led him to conclude that is their implied purpose: K. OLIVECRONA, LAW AS FACT (1939).

thing more about himself as a person. [28] This is, again, the characteristic trait of every liberal art.

The second insight that MacGuigan's and Cairns' notions of jurisprudence give rise to is that the reason a person must at some point approach his legal studies philosophically is because only then can he adequately understand that particular branch of the law that he determines to specialize in. "It almost goes without saying", MacGuigan writes, that jurisprudence "must apply the insights and techniques of other disciplines . . . for legal purposes"; [29] for, as Cairns puts it, jurisprudence "seeks to frame a system of general ideas that will account for the events of the legal process". [30] "For the lawyer", he says, "the starting point is the juridical institution, practice or ideal, and the end sought is its establishment on a rational basis." [31]

Now lest the reader think that this smacks of the peculiar "ideology", as Kelsen would call it, [32] of a legal idealism that runs counter to the Austinian tradition of Anglo-Canadian jurisprudence, I would point out that in Austin's view a "well-grounded knowledge of the principles of . . . jurisprudence, can scarcely incapacitate the student for the acquisition of practical knowledge in the chambers of a conveyancer, pleader, or draftsman. Armed with that previous knowledge, he seizes the *rationale* of the practice which he there winesses and partakes in, with comparative ease and rapidity; and his acquisition of practical knowledge . . . is much less irksome than it would be in case it were merely empirical". [33]

Two final points need to be made about the scope of jurisprudence as I have conceived it for purposes of this survey in order to understand my selection of materials for review. First, although I shall consider certain writings from French-Canadian sources, I have not taken the word "jurisprudence" to mean what it typically does to those authors. Thus *Interlex: Revue internationale de droit comparé général et spécial* regularly has a section devoted to "jurisprudence" as do *Revue Juridique Thémis* (published by the Université de Montréal) and *Revue Générale de Droit* (a continuation of *Justinien* published by the Civil Law Section of the University of Ottawa). But the "jurisprudence" sections therein consist exclusively of case and statute analysis, and although I shall examine a bit of case-law, I have not construed my topic that narrowly.

Secondly, I am of course aware that most legal thinking that has oc-

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[28] Traditionally in Western culture the concept of "person" is much more than a psychological one. It refers to a being who is "a whole unto himself, a being that exists for itself and of itself, that wills its own proper perfection": Piper, *Justice, in* THE FOUR CARDINAL VIRTUES 50 (1965).

[29] *Supra* note 21, at 4.

[30] *Supra* note 23, at 5.

[31] *Id.* at 4.

[32] "[A] theory of positive law which mixes the latter with natural law or any other type of justice in order to justify or disqualify the positive law must be rejected as 'ideological' ": H. KELSEN , PURE THEORY OF LAW 106 (1967).

[33] J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 380 (H. L. A. Hart ed. 1954).

curred in the Canadian classroom and on the Canadian bench has been influenced by Austin's thesis that jurisprudence is a self-contained subject, a science "concerned with positive laws . . . as considered without regard to their goodness or badness". [34] I know, too, that Canadian law professors and judges have been influenced by his related idea that if "law" is going to be defined without reference to its ethical content, it will (in Austin's view) have to be thought of as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him" [35] so that, because that "power" consists in the ability "to inflict an evil or pain" in cases of non-compliance, [36] a law which lacks such sanctioning will necessarily be thought of as not binding. [37] As the leads I have taken from MacGuigan and Cairns indicate, however, I am going to ignore these ways of conceiving both jurisprudence and the law, and regard the law instead as a type of purposive activity and jurisprudence as a normative discipline (in, as philosophers usually put it, the strong sense of that phrase) in which questions of legal validity and political and judicial legitimacy are ultimately assessed and criticized by appeals to legal ideals. [38] I shall proceed this way because an adequate understanding and fair appraisal of the literature since 1971 demand it. The writers of Canadian jurisprudence themselves are the ones who, largely because of the impact of the federal Law Reform Commission, have been moving away from Austin. Surveys of jurisprudential material, if accurate, are bound to reflect that.

II. The Literature

There are perhaps two characteristic traits that tie together most of the Canadian jurisprudential literature published since Professor Swan's survey in 1971. One, to which I have just alluded, is that it relates more or less to the problems inherent in federal law reform. Insofar as it does so, it largely overcomes that schizophrenia which Swan detected in much of the pre-1971 literature. [39] The other is that the post-1971 work is to a great extent overtly philosophical.

Because these traits are distinctive of the writings surveyed here, it seems reasonable to divide their consideration into two parts. I shall call the first "The Canadian Legal Order and Social Change"; under it I shall consider the literature dealing with (1) law and morality, (2) professional ethics and (3) law reform. The second I shall entitle "Theoretical Con-

[34] *Id.* at 126.
[35] *Id.* at 10.
[36] *Id.* at 14.
[37] *Id.* at 27.
[38] The "meaning of an ideal", Cairns writes, "is that which, if we were able to attain it would be completely satisfying. It is thus a standard of value against which actual behavior is to be measured": *supra* note 23, at 18.
[39] *Supra* note 1, at 540, 550, 557.

siderations"; under it I shall survey (1) the philosophy of law, (2) jurisprudence and the social sciences and (3) methods in jurisprudence. [40]

A. *The Canadian Legal Order and Social Change*

In a paper read to the John White Society at Osgoode Hall on September 29, 1971, [41] Mr. Justice Emmett Matthew Hall of the Supreme Court of Canada remarked that to "suggest that judges should not consider societal facts ignores the very ends that law seeks to serve in our society. There may have been a time . . . when the function of law was to preserve peace and, later, to keep the status quo . . . ." Now, however, Mr. Justice Hall continued, citing the late Dean Pound of Harvard, "the function of law is [to insure] the maximum satisfaction of human wants". [42]

This sentiment is, I think, typical of those Canadian lawyers who have been moved to address themselves to the question of whether the law in Canada as presently formulated is capable of confronting the difficulties generated by the present economic, political, racial and moral upheavals shaking Canadian public and private life and of providing for their rational solution. The survey of writings in the following three sub-sections is designed to acquaint the reader with the scholarly work done in this connection.

1. *Law and Morality*

Law is the only social institution in a modern, secular nation-state that can conceivably bring its otherwise disparate members into community with one another. This is why, as Mr. Justice Hartt and his Law Reform Commission have warned, when citizens show an indifference to the social value of law, the society itself is in grave danger of disintegration. [43] It is also why there will be some intellectuals who feel driven to discuss the question of whether and in what sense moral values are a fit matter for legislation.

In a *Canadian Bar Journal* article entitled *Le droit à la vie*, [44] Dr. Lise Fortier has tackled the subject within the context of the abortion issue. Her approach to the subject is especially valuable, I think, because she suggests, in effect, that when people are attempting to determine whether a certain moral value ought be enshrined in legislation, they should resolve the matter in terms of assumptions about the function of law rather than through direct appeals to systems of morality. She thus asserts that when in the matter of abortion a society moves through law to protect its members, it does so, "not in virtue of a natural law, but because doing so is a necessary

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[40] The literature on legal education will be surveyed under this last head.

[41] Hall, *Law Reform and the Judiciary's Role*, 10 OSGOODE HALL L.J. 399 (1972).

[42] *Id.* at 405.

[43] Hartt is of course no longer chairman. But see THE LAW REFORM COMMISSION OF CANADA, FIRST RESEARCH PROGRAM 6 (1972), and A TRUE REFLECTION, THIRD ANNUAL REPORT 4 (1973-74).

[44] Fortier, *Le droit à la vie . . . doit être laisse à chacun*, 3:4 CAN. B.J. (N.S.) 23 (1972).

condition of its very existence".[45] Dr. Fortier's claim that we should look to the ends of law (such as social cohesion) rather than "natural law" in determining whether to legislate alleged moral values (such as foetal right to life) is perhaps unfortunate in light of the natural law tradition stretching back to Aquinas in the 13th century. In that tradition the ends of law are, when adequately understood, seen to parallel the demands of men's nature (the human inclination to live in society, for example). But Fortier's instinct here is, I think, sound; she apparently wants to move the question of whether certain moral values are fit subjects for legal concern out of the subjective, "private morality" realm of debate into an arena where the objective, anthropologically and psychologically verified needs of people living in community with one another can be identified and where legislative action can accordingly follow.

Dr. Fortier's article might be read as a model of how the issues involved in relating law to morality can rationally be framed. Those interested in the topic as it relates specifically to abortion should look also at K. W. Cheung's critical summary[46] of the United States Supreme Court's thinking as revealed in *Roe v. Wade*[47] and *Doe v. Bolton.*[48] That court focuses on the gestation period of the foetus and in view of Dr. Fortier's arguments about how to properly assess the morality of abortion, the reader may find the American court's reasoning insufficiently rigorous. In any case, Cheung argues, the Americans will not decisively influence Canadian thought on the matter.[49] For further Canadian work one might read Natalie F. Isaacs' *Abortion and the Just Society,*[50] a consideration of the topic in light of the "Omnibus Bill".[51]

Professors E. A. Fattah and A. Normandeau, both of the Department of Criminology at the University of Montreal, have collaborated on an article in the area of law and morality that is very much worth the while of lawyers who are philosophically inclined. It is at once broader in scope than Fortier's work, because it deals with the issue of legislating morality generally, and yet has a narrower focus, because it is restricted to the way the issue is perceived by the citizens of Quebec. It is entitled *Le droit pénal, la morale et le public québécois*[52] and asks whether the modifications in the criminal law concerning sodomy, gross indecency and lotteries as incorporated in the "Omnibus Bill' square with Quebec public opinion. What gives the work its broad appeal is the way Normandeau and Fattah

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[45] *Id.* at 23 (translation).

[46] Comment, *The Abortion Decision—A Qualified Constitutional Right in the United States: Whither Canada?*, 51 CAN. B. REV. 643 (1973).

[47] 93 S.Ct. 705 (1973).

[48] 93 S.Ct. 739 (1973).

[49] *Supra* note 46, at 654-58.

[50] Isaacs, *Abortion and the Just Society*, 5 THÉMIS 27 (1970).

[51] Bill C-150, 28th Parl., 1st Sess. (1968); sanctioned June 27, 1969, as the Criminal Law Amendment Act, S.C. 1968-69 c.38.

[52] Fattah & Normandeau, *Le droit pénal, la morale, et le public québécois*, 5 THÉMIS 5 (1970).

have penetrated the legal issues to the underlying philosophical ones. Crimes, they write, are "anti-social acts that violate the rights of others".[53] The question then is whether sodomy and the others are crimes. J. S. Mill's classic essay "On Liberty" (1859) is employed by Fattah and Normandeau to argue that in a democratic society the fundamental assumption is that "man is free" unless he harms others.[54] The well-known Hart-Devlin dispute over enforcing morals is mentioned and statistical tables are added at the end of the article showing the percentages of variously-grouped Quebec citizens in favour of legalizing homosexual acts and lotteries.[55]

Finally, an exceedingly perceptive article in the field not only of law and morality but also, as I shall indicate below, legal history, law reform, legal philosophy and methods in jurisprudence appeared in a 1975 issue of the *Dalhousie Law Journal*. Written by W. L. Morison of the University of Sydney and entitled *Frames of Reference for Legal Ideals*,[56] it explains in reference to the conceptual relation between law and morals that prior to World War I the criterion typically used by Englishmen (and, I would add, Canadians) for deciding controversial ethical and legal matters was "practical common sense", because that sense was thought to be "very much embodied in the law itself".[57] So true was this that the concept of "common sense" was not even analyzed philosophically but was itself used as an analytical tool. It needed no clarification but was utilized as a primal concept that could clarify and serve to determine ethically-laden legal issues.[58] For anyone interested in understanding the current theoretical battle between Anglo-Canadian positivists and legal idealists, Morison's article can provide an excellent perspective.

2. *Professional Ethics*

Until recently an accurate, if American, comment on the conventional attitude of the North American legal profession toward legal ethics was summed up in a newspaper cartoon in which a law professor was shown asking his class what a knowledge of the law produced when coupled with a sense of moral concern. Met with silence he exclaimed: "A sense of justice!" The students wanted to know whether that answer would be required on the exam.

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[53] *Id.* at 6 (translation).

[54] *Id.* at 6-7.

[55] *Id.* at 12-16. *See also* Dybikowski, *Law, Liberty, and Obscenity*, 7 U.B.C.L. REV. 33 (1972). Dybikowski's "aim is to attack existing obscenity legislation", which he does by relying on J. S. Mill's concept of individual freedom.

[56] Morison, *Frames of Reference for Legal Ideals*, 2 DALHOUSIE L.J. 3 (1975).

[57] *Id.* at 5.

[58] Morison, *id.* at 6, refers to the Hart-Fuller exchange in Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, at 628 (1958), over whether law is an inherently moral phenomenon and makes use of this notion to provide insights into the historical significance of that debate. Hart argues that Fuller maintains that English positivists are not concerned with the law as it ought to be. In rebuttal, Hart tries to show that they are—precisely by arguing that the law as it is is as it ought to be.

In Canada times have changed. The "purpose and meaning of the law [is] justice", A. H. Wishart, Q.C., wrote in the *Gazette*; lawyers must not "fall into the error of regarding law as an end in itself . . . [for it] is a means to an end and that end is justice". [59]

Two things are significant about Mr. Wishart's appeal here. One is that it has met with no contradiction in Canadian legal literature, at least that I could find, between 1971 and 1975. More significant is the fact that he is not talking about justice in its purely formal sense of "legal justice"—*i.e.*, the notion that justice is whatever technically valid law commands, as Austin held [60]—but about substantive justice: about the requirement that the contents of positive law conform to the demands of human nature. Apart from some "few basic instincts", Wishart writes, "man makes his appearance on earth bereft of any inborn or innate code of conduct. The society into which he is born will have established rules and these he must learn . . . . It has been the role of the legal profession . . . to formulate that code . . . and improve it as the need arises." [61]

Mr. Wishart's claim that lawyers should seek to recapture a vision of the ethical dimension of positive law is reinforced by J.-G. Castel and J. W. Mohr in articles that appeared in the fiftieth anniversary volume of the *Canadian Bar Review*. [62] There the editor himself grapples with the question of how lawyers can "make the law a more effective instrument of peace and human welfare". [63] What makes his writing so timely is his reference to the most important societal fact that present and future Canadian lawyers will have to come to grips with in order to give meaning to their ethical and professional lives: namely the fact that "diversity and lack of consensus are already the characteristics of our society". "How", he asks, "will a society that cannot agree on standards of conduct be governed?" [64] But for the patience and perception of Mr. Justice Hartt and his colleagues on the federal Law Reform Commission, this lack of public consensus might have destroyed their efforts, not to say their sanity. [65] It is helpful to know,

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[59] Wishart, *Law—The Great Profession*, 7 GAZETTE 127, at 129 (1973).

[60] "In case [a] statute were . . . generally pernicious . . . it might be styled irreligious and immoral as well as unconstitutional. But to call it illegal [is] absurd: for if the parliament for the time being be sovereign in the united kingdom, it is the author, directly or circuitously, of all our positive law, and exclusively sets us the measure of legal justice and injustice": J. AUSTIN, *supra* note 33, at 260 (italics omitted). Austin continues in a note referring to Hobbes that "[b]y the epithet *just*, we mean that a given object, to which we apply the epithet, accords with a given law to which we refer it as to a test": *id.* at 262 n.23.

[61] *Supra* note 59, at 128.

[62] Castel, *The Law and the Legal Profession in the Twenty-First Century*, 51 CAN. B. REV. 1 (1973); Mohr, *Law and Society: From Proscription to Discovery*, 51 CAN. B. REV. 7 (1973).

[63] Castel, *supra* note 62.

[64] *Id.* at 4.

[65] *See* text at notes 79-94 *infra*. As a result of his chairing the Commission, Mr. Justice Hartt was described in The Globe and Mail (Toronto), November 16, 1974, at 1, col. 1, as "showing signs of wear and tear—both physically and emotionally".

therefore, that the first two numbers of the fiftieth anniversary volume of the *Canadian Bar Review* are given over to the question of how lawyers can "make the law a more effective instrument of peace and human welfare". [66] One thing is certain, Castel maintains, and that is that lawyers will no longer be able to think "exclusively in terms of the adversary system" [67]—a challenging notion if ever there was one. No lawyer can consider it without bringing into play his ethical assumptions about his professional role in public life.

This difficulty of focusing one's role as legal practitioner is compounded by the fact that, in the words of Dean H. W. Arthurs of Osgoode Hall and Laval's Doyen Pierre Verge, [68] legal services will in the future attract a new type of client, the "clientele of conscience" [69]—people who will seek help from the law in advocating social, cultural and economic revolutions. If this be so, how can lawyers continue to see themselves as servants of *orderly* social change? Will they not have to rethink their ethical responsibilities to their clients in order to fit the "clientele of conscience" into their own personal value-systems? These questions are, of course, rhetorical.

Professors Verge and Arthurs have no doubt raised an explosive issue. The fact that they have to some extent, at least, brought Toronto and Montreal together on that issue, however, provides a hopeful sign that factional and class disputes will be transcended in Canada and that the dilemmas it poses will be recognized for what they are: national problems that the profession as a whole will have to deal with. The first step toward their solution, writes Professor Verge, is the profession's commitment to making a knowledge of the law a part of the average citizen's cultural background, [70] a view seconded, incidentally, by the federal Law Reform Commission. [71] Once this is accomplished it will become possible, as it probably is not now, to employ the law as an instrument of peaceful social change.

And change will necessarily come. For as Calvin A. Becker of the British Columbia Bar has written in *Professional Aristocracies and Social Change*, [72] "[i]t is presumably beyond dispute that contemporary western political and economic structures are characterized by an inequitable distribution of wealth and power"; the only question is "how best to accommodate the professional resources of law" to the need for revolutionizing the monetary and political status quo. [73] Assuming that this is the question,

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[66] *Supra* note 62, at 1.

[67] *Supra* note 62, at 4.

[68] Arthurs & Verge, *The Future of Legal Services, Juridiques de L'Avenir*, 51 CAN. B. REV. 15 (1973).

[69] *Id.* at 20.

[70] *Id.* at 25-27.

[71] *See* text at notes 95-101 *infra.*

[72] Becker, *Professional Aristocracies and Social Change: Some thoughts on the Profession of Law*, 22 CHITTY'S L.J. 261 (1974).

[73] *Id.* at 261.

Jean Beetz's point, made in his Cecil Wright Memorial Lectures, [74] can be seen as more than rhetoric: "Justice consists in giving to everyone his due", he asserted, "and therefore justice and the law must be concerned with old age pensions, unemployment insurance . . . housing . . . the production of consumer goods [and] the depletion of natural resources . . . ." [75] He then adds in a statement as forthright as any I have seen in surveying the Canadian literature on professional ethics, that he "fail[s] to see why the state should not receive . . . recommendations from lawyers on matters of policy . . .". The assumption that "the law and men of law ought not to be professionally concerned with policy, nor policy with the law" is, he strongly implies, no longer valid. [76] This is another way of putting A. H. Wishart's point in *Law—The Great Profession* [77] that throughout the day-to-day practice of law "there runs this golden thread of professional responsibility". [78]

If, then, the Canadian literature over the past three or four years is at all indicative of the larger mind of the profession, the time has clearly come when the subject of legal ethics can no longer reasonably be dismissed as an esoteric, odd concern of a soft-headed few. On the contrary, astonishingly enough a consensus appears to be emerging that the topic should probably be re-introduced in a serious way even into the law school curriculum. The publicly displayed interest on the part of such nationally and internationally respected men of the law as Arthurs, Castel, Verge and Wishart make it clear that the anti-intellectual bias against incorporating a rationally founded course of study of legal ethics into law school and professional "refresher" programs is, although perhaps consistent with the positivistic spirit in the teaching and practice of the fifties and sixties, not well-attuned to present assumptions about the nature of a publicly responsive and responsible practice of law.

3. *Law Reform*

In an article that the *Gazette* thought important enough to reprint from the American magazine *Fortune*, Professor R. H. Bork of the Yale Law School said that "[l]aw has entered upon troubled times". [79] And so it has. Law is, after all, a social institution, and North American societies are in a state of near chaos. Thus the Prime Minister was quoted in Europe as saying, in "all our societies with industrialization and urbanization the laws more and more are not respected", so that it is "important to create a new social contract, a new definition of the values which unite a country". [80]

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[74] Beetz, *Reflections on Continuity and Change in Law Reform*, 22 U. TORONTO L.J. 129 (1972).

[75] *Id.* at 140.

[76] *Id.*

[77] Wishart, *supra* note 59.

[78] *Id.* at 129.

[79] Bork, *We Suddenly Feel That Law is Vulnerable*, 6 GAZETTE 25 (1972).

[80] Windsor Star, Mar. 17, 1975, at 13.

Such is the condition to which reformers of Canadian law must respond and, as Jean Beetz wrote, the law, thus threatened, has "at long last taken corrective measures such as the establishment of law reform commissions". [81]

The establishment of the federal Law Reform Commission, especially, has generated considerable scholarly interest. Before turning to the jurisprudential work that has come from it, however, I should like to refer briefly to the Commission's various *Reports*, for they contain statements that can provide a context for reviewing the literature in the journals.

If Canada were in fact the model society that Lord Devlin (mentioned by the federal Commission in one of its *Reports*) [82] describes in his *Enforcement of Morals*, namely one in which there is a "community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives", [83] the Commission could quite easily carry out its intention "to unearth and to articulate public opinion on the law—discussing with the public the values which they think law should enshrine, the functions it should perform, the aims it should pursue". [84] If the Prime Minister and the Commission's members are correct, however, such consensus is lacking; and the Commission's task is thus twofold: to reform not only Canadian law but the Canadian citizen's understanding of it. [85] For good law, Mr. Justice Hartt wrote in the *Canadian Bar Journal*, "must reflect the collective experience and the values of a society". [86] Yet, he continues, "I do not believe it is possible, or desirable, to *impose* traditional values on the generation that is entering this post-industrial age . . . . We now have the possibly unique opportunity to assist in adapting the social force of the law to the minimum needs of a new society . . . ." [87] To this end the federal Law Reform Commission has produced a series of annual reports, all of which contain proposals not only about specific areas of Canadian law—criminal law and procedure, sentencing, evidence, family law, administrative and commercial law—but also about the role of law itself in society.

These attempts to reform Canadian law by harmonizing it with public values require great delicacy. As G. H. Kendal points out, public opinion is "not a substitute for the evaluation" which leads to the formulating of

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[81] *Supra* note 74, at 138. There was a time, Professor G. Marini of the University of Pisa wrote, when law was conceptually free "from its rigid tie with the state law and state power": Marini, *The Philosophy of Law in Modern Italy*, 22 U. TORONTO L.J. 77, at 85 (1972). Although Marini's discussion of the relation between law and state centres on recent developments in Italian legal philosophy, much of what he says could be helpful to Canadians interested in the topic.

[82] THE LAW REFORM COMMISSION OF CANADA, THE WORST FORM OF TYRANNY, SECOND ANNUAL REPORT 19 (1972-73).

[83] P. DEVLIN, THE ENFORCEMENT OF MORALS 9 (1965).

[84] THE LAW REFORM COMMISSION OF CANADA, A TRUE REFLECTION, THIRD ANNUAL REPORT 4 (1973-74).

[85] *See, e.g.*, THE LAW REFORM COMMISSION OF CANADA, FIRST RESEARCH PROGRAM 6 (1972).

[86] Hartt, *Transitional Man: A Hundred Years and a' That*, 4:1 CAN. B.J. (N.S.) 29, at 30 (1973).

[87] *Id.* at 31-32.

social rules;[88] but at the same time, the public must be listened to. "I am glad", Mr. John Farris said in his Presidential Address to the Canadian Bar, "that our National Law Reform Commission in its review of the Criminal Law does not intend to adopt a purely legalistic approach."[89] There is "justifiable discontent"[90] in the land, he said, that must be harnessed in order to reform the law "in the service of mankind".[91]

Even granting the Prime Minister's premise, shared by Mr. Justice Hartt and his former fellow commissioners, that there is no longer a consensus amongst Canadians about the value of traditional ideals, it remains true that the reform of law cannot rationally be effected until the root cause of citizen discontent, of which the shattering of the public consensus is but a symptom, is known. The nature of that cause is trenchantly summed up by W. L. Morison in his *Frames of Reference for Legal Ideals.*[92]

> One detects in general community thinking at the present time, presenting itself as a demand for progress, an association of "law" with the "establishment" and an appeal to what is demanded by society or humanity in opposition to what are thought to be the demands of the law. In this kind of thinking law seems to be regarded simply as binding precepts, and as constituting therefore chains which require to be broken if the community is to break free of the trammels of the past. The "received ideals" in Pound's . . . meaning . . . and the techniques for their adaption . . . are on the approach [to reform] now under consideration excluded . . . . Nowadays, community thinking tends to adopt society as a frame of reference for formulating ideals *for* law . . . rather than expecting to find ideals *in* law commanding respect. This is a challenge to our fundamental frames of thinking . . . .[93]

What Morison is getting at here, I think, is that Canadians, for instance, see themselves as living in an Age of Progress. They have rejected the past as altogether lacking significance for the present and for the future; they see the "golden age" as lying in the future and "progress" therefore as "newness". Tradition, ritual, the older generation's ways of doing public and private things—all of which were consciously held by the older generation to be ways of transmitting to the newer generation time-tested, and perhaps eternal, values—are now casually dismissed. One result of this, Morison writes in the conclusion to his article, is that current law students react with "scornful laughter" when they read materials wherein some judge or author is shown appealing for support "to the law considered as an object to which veneration, or some lesser degree of respect, is due . . . . If, however, 'society' is appealed to in the same manner . . . [students'] reaction is one of approval".[94]

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[88] Kendal, *Value and the Law*, 2:2 CAN. B.J. (N.S.) 12 (1971).

[89] Farris, *The Value of Discontent*, 3:4 CAN. B.J. (N.S.) 1 (1972).

[90] *Id.* at 2.

[91] *Id.* at 3.

[92] Morison, *supra* note 56. Morison is at the University of Sydney, but his essay is focused on law reform problems common to all industrialized, non-Marxist societies.

[93] *Id.* at 18-19.

[94] *Id.* at 33.

Given this remarkably accurate assessment, as I take it to be, of the Canadian frame of mind, it is simply unrealistic to assume that in response to the question of whether the law should shape society or society the law, one might easily answer that the relationship should be reciprocol. In the minds of too many, even (as Morison points out) in our law schools, the law is simply not thought of as carrying enough weight to uphold its side of the relation. Too much of the Canadian mind, lay and legal, has been too thoroughly conditioned by the Austinian idea that the power of law lies in its coercive force, so that quite naturally the veneration of which Morison writes has been replaced by fear—or indifference.

This is why, I think, it is not sufficient to say, as the Law Reform Commission did in its initial report, that law is "much more than a system of rules and an authoritative structure for regulating society in a formal way", and that it is in addition "a social science [that] must be concerned with the social, psychological, economic, political and cultural forces within which it operates and of which it is itself an integral part". [95] For missing here is an explicit reference to the law's directive character, to the notion that its overriding function in society is the directing of citizens to the "public good". [96] Yet in the history of Western jurisprudence it has been precisely in terms of that good that the reciprocal relation between private rights and public responsibility under law has been thought out and understood. "Legal justice" on the one hand and "distributive justice" on the other, it used to be said in pre-Austinian days, *are* the right reciprocal orderings between individual citizens and the state.

Something of this is referred to in the Commission's later reports. In the third report, for instance, one reads that "before knowing what alterations to make to our law we need to understand . . . not only what the law prescribes but also what its purpose is". [97] In their second report, in connection with the criminal law matter of obscenity, the members of the Commission say that they are prepared to recommend that "subject to overriding considerations of public policy . . . it is the parent's right to decide how to bring up his child"; [98] and they insist that the values they seek to implement "are not simply values of [their] own preference, nor . . . values currently

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[95] THE LAW REFORM COMMISSION OF CANADA, FIRST ANNUAL REPORT 22 (1971-72). A similar way of looking at law in society is found in Baxter, *The Creative Role of Law*, 2 DALHOUSIE L.J. 41 (1975). Baxter does, however, offer some specific suggestions for integrating social values with law.

[96] In traditional jurisprudence the phrase "public good" is an umbrella-term that is meant to cover that whole range of goods or objectives that can be created in a society only when all its members work to bring them about: *e.g.*, public peace; security of persons and property; knowledge (education); health and personal freedom consistent with the well-being of others. *See also* Laskin, *The Function of the Law*, 11 ALTA. L. REV. 118, at 120 (1973): there are "basic values in our society which are essential to orderly and peaceful change and to the very climate of responsiveness of the political authorities that we look to the law to assure".

[97] THE LAW REFORM COMMISSION OF CANADA, *supra* note 84, at 3.

[98] THE LAW REFORM COMMISSION OF CANADA, *supra* note 82, at 12.

held by the majority of Canadians", but the ones that can "best be rationally supported and defended". [99]

It would be unfair to the Commission's members to label the jurisprudential assumptions that appear to be at work in their minds here, but on the basis of these last-quoted statements, their position can hardly be characterized as positivistic in the usually accepted sense of that term. [100] The way the position is characterized, though, is less important than the fact that it is gathering support across Canada from other lawyers, both practising and academic. [101]

B. *Theoretical Considerations*

In addition to the considerable amount of Canadian literature over the last three or four years devoted to relating law to changes generated by shifts in our various social institutions, much work has recently been done in speculating about the theoretical foundations of law. Some of it has been straightforwardly historical and philosophical, some concerned with understanding the possible ways of relating jurisprudence to the social sciences, and some given over to discussing methods in jurisprudence.

1. *The History and Philosophy of Law*

Philosophizing about law and its related concepts has until several years ago been done in Canada within the framework of British analytical philosophy. One thinks of the models provided by H. L. A. Hart's *The Concept of Law* [102] and *Causation in the Law* [103] (in collaboration with Professor Honoré).

There has recently been some writing in Canada, however, of a type that has been called "normative jurisprudence". Calvin A. Becker refers to it in his article entitled *Professional Aristocracies and Social Change* [104] and says that, as distinguished from "morally neutral jurisprudence" (which presumably would partially describe analytical approaches to the subject), normative jurisprudence is "a means of extending the rule of law to all the forums of pressure and legitimation that exist in a democratic society". [105] I have reviewed most of this work in surveying the literature on law reform, [106] but some of it, because of its explicitly philosophical character, is better dealt with here.

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[99] *Id.* at 9.

[100] I am thinking here of the idea that a legal system is a closed, logical one in which legal decisions can be thought to be reached without reference to social aims or moral standards and according to which moral judgments are thought to be non-rational. See note 20 *supra.*

[101] See this survey's sections on, *e.g.*, professional ethics and philosophy of law.

[102] H. L. A. HART, THE CONCEPT OF LAW (1961).

[103] H. L. A. HART & A. M. HONORÉ, CAUSATION IN THE LAW (1959).

[104] Becker, *supra* note 72.

[105] *Id.* at 267 n.15. For this reason Becker prefers to call it a form of "political jurisprudence": *id.*

[106] See text at notes 84-96 *supra.*

A case in point is Morris C. Shumiatcher, Q.C.'s *Welfare Fifty Years Hence* in the fiftieth anniversary volume of the *Canadian Bar Review*.[107] The major controls on public and private behaviour, he writes, "will not be imposed by public laws. They will become the restraints that individuals will exercise over their own desires and appetites, accepting the concept of Ortega y Gasset that: 'Order is not a pressure imposed upon society from without, but an equilibrium which is set up from within'."[108] Whatever Shumiatcher's more extended thinking on the matter might produce, the fact that he understands public order to be a value that can ultimately be secured only by individual persons restraining their "desires and appetites" would seem to place him firmly within the tradition of natural law philosophy; for Ortega y Gasset's conception of "order" is markedly like the definition of "peace" set down in the fifth century A.D. by St. Augustine in his *City of God*. "Peace", Augustine wrote, "is the tranquillity of order",[109] and civil peace is the "well-ordered concord" among the citizens of a community and between them and those in authority.[110] It is brought about when, and only when, the members of the community share common goals and act toward one another with justice. For again, peace is not simply order, which can be brought about whenever those in authority possess sufficient coercive power to ensure it. Peace is rather the tranquillity of order, brought about when people living together willingly harmonize their respective aims. This in turn can be accomplished only by people who, to repeat Shumiatcher's words, exercise restraints "on their own desires and appetites".[111]

The philosophically interesting point here—aside from Shumiatcher's quasi-utopian assumption that men will increasingly be able to achieve peace[112]—is that, should social order come about through men's rationally willing it rather than through their subjection to the threat of coercive

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[107] Shumiatcher, *Welfare Fifty Years Hence*, 51 CAN. B. REV. 40 (1973).

[108] *Id.* at 49 (footnote omitted).

[109] ST. AUGUSTINE, THE CITY OF GOD bk. XIX, ch. 13, at 690 (Dods transl. 1950).

[110] *Id.*

[111] One implication of this proposition is that individualism in global politics (*i.e.*, nationalism) may well be an un-human goal to strive for. See Macdonald, Morris & Johnston, *International Law and Society in the Year 2000*, 51 CAN. B. REV. 316 (1973). The "traditional sovereign state system" will be replaced, they say, "by a global order of parallel, often-competing systems in which a variety of international and transnational actors play their roles" so that some international lawyers "will be questioning the usefulness of maintaining the systemic distinction between 'international law' and 'municipal law' ": *id.* at 330-32. If Shumiatcher is right when he says that men will in the future control themselves by restraining their appetites and desires, then the role of externally imposed sanctions within legal systems will impliedly be diminished. This would in turn mean that arguments against the reality of international law in terms of its sanctionless character (except for war) would miss their mark.

[112] Compare Beetz, *supra* note 74, at 135-36: because of the "religion of change and progress and the myth of science", man "has moved from the myth of Paradise Lost to the myth of the Promised Land in this world". For an excellent elaboration of this topic see the Canadian philosopher, G. GRANT, PHILOSOPHY IN THE MASS AGE chs. 1-4 (1966).

measures, the role of sanctions in law will obviously be diminished. This would mean that definitions of legal systems as "coercive orders" (as in Kelsen) [113] or sanctions (as in Austin) [114] would become inedequate. The concept of "law" would better be understood in terms of its ends—"common goods" or "public welfare". One thinks of the philosophizing already done by the American Lon Fuller, who defines law in terms of purposive activity. [115] As Professor Morison wrote in his *Dalhousie Law Journal* article, [116] Fuller's is a type of "ethical rationalism" in which law is thought of as a "co-operative human enterprise directed at a reasoned harmony of human relations". [117]

Anglo-Canadian legal philosophers have more often than not followed Austin's lead in defining law exclusively in terms of its authorized makers. [118] But when Canadian men of the law such as Chief Justice Laskin, E. F. Ryan (Counsel to the Ontario Law Reform Commission), A. H. Wishart, Q.C., I. F. G. Baxter (of the University of Toronto), the editor of *Chitty's* (presumably the editor-in-chief, Hugh W. Silverman), and Mr. Justice Morrow (of the Territorial Court of the Northwest Territories) begin referring to pre-determined goals, [119] two repercussions are bound to be felt at the philosophical level. One, as I have just suggested, is that the concept of "sanctions" in its relation to the notion of "valid law" will have to be reconsidered. The other is that the concept of "legitimacy" will have to be re-examined in other than purely formal terms. [120] Reference will have to

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[113] H. KELSEN, PURE THEORY OF LAW 33-58 (1967).

[114] See notes 35-37 *supra.*

[115] See L. FULLER, THE MORALITY OF LAW 145-151 (rev. ed. 1969).

[116] Morison, *supra* note 56.

[117] *Id.* at 16,17. Morison here refers to L. FULLER, THE LAW IN QUEST OF ITSELF 2-3 (1940). Morison's critiques of ethical rationalism (*supra* note 56, at 20-24), ethical intuitionism (*id.* at 24-26), ethical utilitarianism (*id.* at 26-27) and evolutionary ethics (*id.* at 27-32) will acquaint his readers with the major thinkers of these schools and provide them with perceptive criticisms. His relating of Bentham to the work of H. L. A. Hart, although brief, is especially well done.

[118] See Ryan, *Acceptable Law in an Age of Dissent*, 5 GAZETTE 73, at 77 (1971): "Since the days of John Austin the law has been, officially at least, socially agnostic."

[119] Laskin, *supra* note 96, at 119: "I share the conviction that . . . important as it is to know what the law is, it is at least equally important to know what the law is for. . . . [I view the law] as purposive . . ."; Ryan, *supra* note 118; at 74: law is "the external manifestation of a collective body of shared values, ideals and expectations"; Wishart, *supra* note 59, at 129: "[Law] is a means to an end, and that end is justice. . . . [T]he purpose and meaning of the law [is] justice . . ."; Baxter, *supra* note 95: "The Common Law and the Civil Law are integral parts of the cultural heritage of the Western world, and . . . creative forces for the future of our societies"; Editorial, *Whither the Supreme Court of Canada*, 21 CHITTY'S L.J. 356 (1973): "Courts are not computers. Facts may not be facts to everybody. There is much judgmental value-assessment in the reasoning. We are not dealing with a scientific process. . . . There is room for deviation from precedent, in light of our existing conditions and environment"; Morrow, *Law in an Age of Protest*, 11 ALTA. L. REV. 383, at 386 (1973): in matters of what is right, the court in the North "has adopted many practices that would be considered unorthodox or aberrations from the norm in the southern communities. For example, some adjustment is made in sentencing and probation . . .".

[120] The clearest case of a purely formal notion of legitimacy is perhaps Kelsen: "The principle that a norm of a legal order is valid until its validity is terminated in

be made, in other words, precisely to those "ends or final causes" for which, Austin acknowledges, "governments *ought* to exist". [121]

One such fresh look at "legitimacy" is provided by Jean Beetz in his *Reflections on Continuity and Change in Law Reform.* [122] It is a "difficult concept" to formulate, he writes, because "whether one wishes to judge the legitimacy of a particular rule or of a system of positive law, or the legitimacy of the ruler, one has implicitly to refer to criteria, values, and principles which, somehow, are above the ruler and above the law and, to some extent, not altogether part of what lawyers usually men when they speak of positive law. These supralegal principles of legitimacy have varied with the times and circumstances." [123]

When legal theorists define the subject "law" in terms of its makers, as Austin did, or regard legal systems simply as internally unified sets of rules or organized norms, as Hart and Kelsen do, their "supralegal principles of legitimacy", as Beetz calls them, will be formal ones, formulae in terms of which a sovereign's legitimacy or the legitimacy of the rules or norms of a system and of the system itself can be ascertained. Such is Kelsen's concept of the "basic norm" [124] or Hart's "rule of recognition" [125] or Austin's "habitual obedience". [126] But when "law" is defined even partly with reference to its ends or goals, purely formal principles of legitimacy will be inadequate. The reason for this, of course, is that if law is conceived as goal-directed (as in Fuller's notion that law is purposive activity) the goals or ends of law will themselves play a role in determining legitimacy, so that the mere

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a way determined by this legal order or replaced by the validity of another norm of this order, is called the principle of legitimacy": H. KELSEN, PURE THEORY OF LAW 209 (1967). This principle "does not apply in a case of a revolution" (*id.*) and "is limited by the principle of effectiveness" (*id.* at 211). Kelsen "legitimacy" is determined by a formula that ignores altogether the law's content. *But see* J. AUSTIN, *supra* note 33, at 192-93: "[I]n order to an explanation [*sic*] of the marks which distinguish positive laws, I shall analyse the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*. With the ends or final causes for which governments *ought* to exist . . . I have no concern."

[121] J. AUSTIN, *supra* note 33, at 192. It is interesting, to say the least, that the acknowledged father of the modern *science* of positive law (assuming one excludes Hobbes on the grounds that he insisted that geometry is "the only science that it hath pleased God hitherto to bestow on mankind": LEVIATHAN, pt. 1, ch. 4, at 21 (M. Oakeshott ed. 1946)) should continue to use the term "final cause" here. It is a familiar mediaeval or "scholastic" term that originates in the classical Greek thought of Plato and Aristotle. It is plausible to assume, then, that in rejecting definitions of law that incorporate references to "final causality", Austin knew precisely what he was doing. It would be interesting to search out the philosophical assumptions that led him to do it.

[122] Beetz, *supra* note 74, at 131-32.

[123] *Id.* at 131.

[124] H. KELSEN, *supra* note 120, at 198-205.

[125] H. L. A. HART, THE CONCEPT OF LAW 89-96, 98-107 (1961).

[126] J. AUSTIN, *supra* note 33, at 194: "If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." (Italics omitted).

fact, for example, that citizens owe "habitual obedience" to the makers of the law will not be enough. [127] What is called for, as Beetz puts it, is a legitimizing principle that embraces the assumption that the rulers and their rules are to be subordinate to the "higher ideal of justice and order". [128] (I might add that perhaps the clearest example of a definition of law construing legitimacy in this way is found in Aquinas' 13th century *Treatise on Law*: [129] "Law is nought else than an ordinance of reason for the common good made by the authority who has care of the community and promulgated." [130] Both the legitimacy of the authority and that of his commands depend upon whether his exercise of power and the resultant "ordinances" are related to the citizens' achieving of their "common goods"—goods that they must work together to bring about and in which distributive justice demands that they all share. [131]

"It is easy", Beetz writes, "to deride this ideal of justice . . . but it would appear difficult to deny a general human craving" for it. [132] Because of this, he argues, any concept of "legitimacy" capable of accounting for the fact that people normally distinguish between the commands of political rulers and those of gangsters, to use Kelsen's example, [133] or between "being obliged" to do something and "having an obligation" to do it, as Hart puts it, [134] must refer in some way to justice regarded as an ethical value. Beetz does this in his "very rough and tentative description of legitimacy as being the coincidence of established law with the aspirations and considered wishes of a free people". [135] This may be "rough and tentative"; but it indicates that new, less purely analytic approaches to Canadian jurisprudential problems are being tried. Given the fact that attempts at law reform and judicial activism [136] will most certainly generate a renewed interest in the philosophical assumptions underlying the role of law in Canadian society, this can only be a good thing.

This is not to say, however, that analytical jurisprudence is not alive

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[127] Kelsen would agree with this but for a different reason. The reason, he writes, why Austin's notion of habitual obedience to authority cannot constitute its legitimacy is that habitual obedience is a fact, whereas legitimacy is a value, and the move from fact to value is logically impossible. See H. KELSEN, *supra* note 120, at 10. Austin is not named by Kelsen, but the reference is clear.

[128] Beetz, *supra* note 74, at 131.

[129] ST. THOMAS AQUINAS, *Treatise on Law*, SUMMA THEOLOGIA I-II, Questions 90-108 (T. Gilby ed. 1966).

[130] *Id.* at Question 90, art. 4.

[131] Such goods, says Aquinas, are peace, security of person and property, and standards of health and education: *id.* at Question 94, art. 2. See editor's note, *Common & Public Good*, 28 *id.* app. 4, at 172.

[132] Beetz, *supra* note 74, at 132.

[133] H. KELSEN, *supra* note 120, at 8. This example from Kelsen and the following one from Hart are at my initiative and are not mentioned by Beetz.

[134] H. L. A. HART, *supra* note 125, at 80-81.

[135] Beetz, *supra* note 74, at 132. (As an aid to Beetz's readers it might be noted that his reference to Aquinas at 133, n. 6, should read "*Summa Theologica* I-II, Question 97, art. 2.")

[136] *See* Swan, *supra* note 1, at 540, 542, 546-51.

and well in Canada; it is.[137] One would be hard-pressed to find better analytical work anywhere than that being done by Professor J. C. Smith of the University of British Columbia. A thoroughly excellent piece is his *Liberties and Choice.*[138] It is not only a top-flight analysis of the concept of "privilege" but is, as analytical jurisprudence often is not, also helpful to those who would seek a rational understanding of the living law. Privilege, after all, is a large and important legal area, covering that field "of human conduct not subject to legal regulation".[139]

The foil against which Professor Smith develops his thinking about the nature of privilege is the Hohfeldian position, further refined by Glanville Williams, that "privilege" is analytically related to "permission" but not to choice.[140] This, says Smith, is wrong.[141] His argument is briefly that amongst the situations where a person is (1) required to do something, (2) permitted not to do it, (3) required not to do it, and (4) permitted to do it,[142] relations (2) and (4) "are not mutually exclusive and the existence of one does not imply the existence of the other. They can . . . but need not, exist concurrently." If they do, the person "will have a choice as to whether or not" he does the act in question, and this will mean in turn that situations (1) and (3) cannot exist.[143]

Smith's point is that situations (2) and (4) "negate the existence of an obligation. The concept of legal privilege or liberty can be either equated with 'permitted' or 'choice'",[144] so that the only way liberty could be equated with "permitted" but not "choice" would be if it were "possible in a legal system without conflicts in obligation, to have both a liberty and a duty with the same content coexisting between the same people at the same time. Both Hohfeld and Williams say that you can."[145]

Smith claims that they are wrong, however, for the reason that it simply does not square with "the common usage of 'privilege' or 'liberty' in legal discourse" to say that "obligation includes liberty in the same way 'required' includes 'permitted', or 'must' includes 'may'".[146] There is a good reason for this, namely that we "do not say that we are free to do, have

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[137] *See* Slayton, *New Approaches to Legal Study*, 1 DALHOUSIE L.J. 163, at 175-81 (1973). In Canadian writings "[e]mphasis has come to be placed on *particular* and *actual* problems . . .": *id.* at 176.

[138] Smith, *Liberties and Choice*, 19 AM. J. JURISPRUDENCE 87 (1974).

[139] *Id.* at 93.

[140] Smith refers to W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1964), and Williams, *The Concept of Legal Liberty*, *in* ESSAYS IN LEGAL PHILOSOPHY 121 (R. Summers ed. 1968).

[141] *Supra* note 138, at 87, 92.

[142] It is assumed that what is or is not to be done is identical in each case and that the person stands in relation to another person who is also the same in each case.

[143] *Supra* note 138, at 88.

[144] *Id.*

[145] *Id.* at 89-90.

[146] *Id.* at 90 (quotation marks added around "required" and "permitted" for consistency and clarity).

a privilege or a liberty to do, that which we are bound to do".[147] Thus, Williams' position that "X is under a duty to pay taxes. At the same time he has a liberty to pay taxes" is, Smith thinks, a strange one, and I think he is right. For he sees, as Williams apparently does not, that saying that someone wants to do something does not mean that he does not have an obligation to do it. He may have such an obligation, and if so, then he simply wants to do what he ought to do. But that does not mean that he has a privilege to do it; he doesn't. A duty and a privilege, Smith therefore correctly says, cannot exist at the some time with respect to the same situation; the "very essence of a liberty or privilege is, in fact, the element of choice".[148]

Readers of this survey will be interested to know of two further works by Professor Smith. Unfortunately, neither was in published form at the time of my writing, but both will be soon. I shall therefore mention them only briefly to avoid misleading survey readers should any final revisions be made. The manuscript drafts I have seen have been available to his students.

One effort is a joint paper Smith has done with Professor Sam Coval of the U.B.C. Philosophy Department and entitled *The Causal Theory of Rules.* It was written for delivery at a two-day lecture series on "Law and Policy" during February, 1975, at Osgoode Hall. Again Professor Smith shows his instinct for applying methods of analytical jurisprudence to central theoretical problems important to the future shaping of Canadian law. He and Sam Coval set out to examine certain problems in legal philosophy that arise whenever the legal goals of "decisiveness, clarity, predictability, consistency, authority, and universalizability" are set up as conflicting with those of "peace, order, dignity, physical and economic well-being, knowledge, respect, love, security, privacy, freedom of action, and certain other agreed interests". Competition arises "between these two sets of goals", Smith and Coval say, "when the conditions which are required for the achievement of the first set produce, as they often can, a result which is at odds with members of the second".

One of the important things about the authors' analysis of this dilemma is simply that they have perceived and articulated it. Too often legal philosophers proceed as if interest in examining one of the sets of values precludes acknowledging the importance of the other set. Philosophers of law concerned with formal analyses of predictability or universalizability, for example, are often quickly categorized as positivists, as if legal positivism and analytical jurisprudence were the same thing; whereas legal philosophers interested in relating law conceptually to, for example, the goals of human

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[147] *Id.* Smith's next sentence is: "By their very nature obligations are burdensome things." I tend to draw back from this because in the case of the person for whom lawabidingness is a virtue (in the Aristotelian sense of a good habit that enables one to do the right thing gladly and well) doing what he ought to do is not burdensome.

[148] *Id.* at 91-92.

freedom and knowledge are dismissed as being unscientific, as if the quest to understand the significance of human laws could be pursued in the same way as the quest to understand the laws of nature. [149]

Secondly, however, in seeing an "intimate" connection between the two sorts of legal goals and by suggesting that the formal ones such as clarity and consistency are "necessary and sufficient conditions" for achieving the more substantive goals such as peace and knowledge, Coval and Smith have made a significant contribution toward moving Canadian jurisprudence on to a more sophisticated level than it would have reached had the positivists and legal idealists been able without fear of contradiction to think of their interests as mutually exclusive. The analytic jurisprudence contained in Smith's and Coval's *Causal Theory of Rules* will in my estimation clear the decks of that assumption; for the "main pursuit" of their paper is to determine what form a law would have to take in order to exhibit a relation between instances of both formal and substantive goals *in such a way that* each sort of instance would be seen to be the condition for the other. [150] If this can be done, they argue, the debate generated by the Hart-Fuller exchange [151] over whether there could be a law that does not have morality as its necessary condition will have been transcended. So also would the "positivist-antipositivist debate [over] whether legal rules can be thought of as a sufficient basis for legal decisions or whether some other anti-positivistic ingredient such as 'principles' or 'policies' is necessary".

I should like finally to alert the readers of this survey to Professor Smith's forthcoming book tentatively entitled *Legal Obligation.* This too has not been available to me in published form, so I hesitate to say much about it. [152] It is written as a piece of analytical jurisprudence and deals with such topics as whether legal judgments are universalizable; the dynamics of legal decision-making [153] (a timely topic, certainly, given the rise of judicial activism in Canada); the structural properties of legal rules and decisions; and the concept of fundamental rights (also a vital matter in Canadian legal and political life). Can the notion of "fundamental rights" be justified, Smith asks, without reference to doctrines of natural law?

Hohfeld's theory of relations was considered not only by Smith in the *American Journal of Jurisprudence* [154] but by Professor Dickey of Western

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[149] On the relation between law and science see the material surveyed under "Jurisprudence and the social sciences" and "Methods in jurisprudence" (text *infra* between notes 194 and 245).

[150] This would not be done, Smith and Coval add, so as to deny that cases of incompatibility could occur.

[151] *Supra* note 8.

[152] One chapter, written with Professor Coval, appeared as Coval & Smith, *Some Structural Properties of Legal Decisions*, 32 CAMB. L.J. 81 (1973).

[153] The purpose of this chapter is to show that the common law process of decision-making, whereby precedent is applied to facts so as to furnish further precedents, reflects "higher-order priority settling and generative rules" the presence of which enables judges to decide hard cases without resort to judicial discretion or some "nebulous set of standards".

[154] *Supra* note 138.

Australia, in an article appearing in the *McGill Law Journal* entitled *A Fresh Approach to the Analysis of Legal Relations.*[155] In his view the correct place to begin analyzing legal relations is with the concept of "duty".[156] This more easily enables the analyst to clarify the nature of "power",[157] according to Dickey. Using examples of duties without correlative rights, he is also able to explain what "having a right" essentially means.[158] Readers will find Dickey's basic disagreements with the Hohfeldian analysis of these concepts[159] and his criticism of H. L. A. Hart's treatment of "right"[160] new and challenging.

A different and more normative line of philosophizing about law in Anglo-North American circles began to emerge with the appearance in 1971 of John Rawls' *A Theory of Justice.*[161] Although Rawls is not a Canadian scholar, and although his book was not put out by a Canadian publisher, I include his work in this survey for two reasons. It is bound to generate a continuing debate in Canadian legal, philosophical and political science circles, and secondly, it has in fact been criticized in one Canadian journal already.[162]

As Victor Gourevitch points out in his critical study of *A Theory of Justice* in *The Review of Metaphysics,*[163] Rawls' book "has been widely acclaimed as the most comprehensive and searching study of justice in a very long time . . . . [I]t sets out a remarkably detailed frame within which to order the many aspects of the problem of justice, and it brings abstruse theoretical inquiries to bear on such pressing practical questions as the equitable distribution of income, the meaning of equal opportunity in education, the bases of political obligation, and the bounds of legitimate civil disobedience."[164] It is, I think, this concern on Rawls' part to develop a normative, as opposed to a purely analytical, jurisprudence that has caused *A Theory of Justice* to receive such wide attention.

Briefly, Rawls had three aims in writing his book: to uncover those principles of justice that undergird the conventionally accepted moral and political values of twentieth-century Anglo-North Americans; to demonstrate that those principles have been rationally arrived at; and to demonstrate that they do in fact make our social and public lives workable. As Norman Daniels puts it in his Introduction to *Reading Rawls: Critical Studies on*

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[155] Dickey, *A Fresh Approach to the Analysis of Legal Relations,* 20 McGILL L.J. 261 (1974).

[156] *Id.* at 262, 280.

[157] *Id.* at 275-77 & n. 49.

[158] *Id.* at 279 & n. 51.

[159] *Id.* at 267 & n. 27, 269 & n. 32.

[160] *Id.* at 272 & n. 41.

[161] J. RAWLS, A THEORY OF JUSTICE (1971).

[162] Craig, *Contra Contract: A Brief against John Rawls' Theory of Justice,* 8 CAN. J. POL. SCI. 63 (1975). Professor Craig is at the University of Alberta.

[163] Gourevitch, *Rawls on Justice,* 28 REV. METAPHYSICS 485 (1975).

[164] *Id.* at 485.

Rawls' A Theory of Justice, [165] Rawls' goal "is to produce a persuasive, coherent framework for [twentieth-century] liberalism". [166]

It is precisely this acceptance and defence of liberalism that Alberta's Leon Craig finds objectionable. His "most profound objection to Rawls' *A Theory of Justice*", he writes, "is that it continues to accept liberal society as the given". Yet that type of society, "despite its material success, is providing an increasingly meaningless, morally tawdry life". [167] Craig's aim, therefore, is to offer a case against Rawls' work, "especially the part that purports to show that guaranteeing an extensive personal liberty is a task of justice". [168] In doing so he does not provide his readers with a "counter-theory", [169] although he does offer enough of a sketch of one [170] to show that Rawls' theory of justice is not neutral, as Rawls alleges it is, in regard to people's differing ideas about what is good for them. There is, Craig asserts, an incompatibility between Rawls' position and the classical (*e.g.*, Platonic) understanding of human nature; for "personal liberty finds no place in the Platonic conception, nor does equality before the law. Justice, for Plato, is not a procedural matter; it is an integral part of goodness." [171]

Craig's close reading of Rawls and his attempt to locate Rawls' thinking within the historical context of political theory make his contribution to the growing list of readings on Rawls an important one, a firmer challenge than most to Rawls' advocates.

In addition to the more straightforwardly philosophical work done in Canada during the last several years, some work has been devoted to the history of law and legal philosophy. I include it within the present subdivision of this survey because, as Sir Victor Windeyer correctly notes in his *History in Law and Law in History*, [172] today's law is "the product of its past" so that its past must be studied if it is to be properly understood. [173] Law reform, certainly, cannot take place without that understanding, [174] but neither can philosophizing about it—unless the philosopher wants to run the great risk of being irrelevant.

An interesting historical case study is a book by D. and L. Gibson entitled *Substantial Justice: Law and Lawyers in Manitoba: 1670 - 1970*, [175]

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[165] READING RAWLS (N. Daniels ed. 1974). This book of readings can serve as an excellent introduction to Rawls, for although its list price is $14.10, it contains reprinted selections from Dworkin, R. M. Hare and H. L. A. Hart (among others) as well as essays by Joel Finberg and Milton Fisk written expressly for the volume.

[166] *Id.* at xiv.

[167] Craig, *supra* note 162, at 81.

[168] *Id.* at 63; *see also* 66.

[169] *Id.* at 75.

[170] *Id.* at 77-80.

[171] *Id.* at 77.

[172] *Supra* note 17.

[173] *Id.* at 131.

[174] The law on many subjects, Sir Victor continues, "cannot be usefully cast into a new mould, reformed, unless the way by which it took its present form be known": *id.* at 137.

[175] D. & L. GIBSON, SUBSTANTIAL JUSTICE (1972).

dealing with the development of legal institutions and the law profession in that province. It is a history of Manitoba law and lawyers from the founding of the Hudson's Bay Company to the present, but it should have a national appeal because it tells the story of the transition from a frontier society to a "settled" one and because Canada is in some important legal ways going through precisely such a revolution today. The specific problems that the law ran into prior to 1970 (the year when, as the Gibsons report, a woman who tried to get into law school was refused admission on the grounds that "person" in the Law Society Act meant "man" [176]) may be different from those it faces today; but the type of problem is the same—the alignment of law to life.

Of similar interest is Mr. J. F. Newman's *Reaction and Change: A Study of the Ontario Bar, 1880 to 1920,* [177] a period portrayed as one in which lawyers were replaced by industrialists as the social leaders of Canada. This article will give the reader a perspective on the status of the law profession in our present society, important at a time when there is a heightened concern in the profession over the question of social responsibilities.

Several articles devoted to the history of legal philosophy have recently appeared in Canadian legal journals but none, apparently, written by Canadian scholars. Philosophers of law in Canada would find them helpful, however, because the subjects they cover are debated in this country. Thus, for example, in their article *Criteria of Justice*, A. Kaufmann and W. Hassemer [178] claim that West German legal philosophers are seeking to rediscover, as some Canadians are, [179] the "criteria of justice" [180] as principles for philosophizing about law, and in doing so are finding a way to distinguish legal philosophy from leal theory.

> For a legal theory, the criteria of rightness are principles of proper interpretation and application of enacted law; for legal philosophy the criteria of rightness are the principles of right law. That enacted law is binding cannot be presupposed by legal philosophy, for this law does not alone judge but can also itself be judged; the criteria of justice are standards not only for the judicial decision but also for enacted law. [181]

This is not, I think, a new idea. Something very much like it can be found in Austin's distinction between jurisprudence regarded as the science of positive law and "[l]egislation—the science of what *ought to be done* toward making good laws, combined with the art of doing it"; [182] but the value

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[176] *Id.* at 215.

[177] Newman, *Reaction and Change: A Study of the Ontario Bar, 1880 to 1920,* 32 U. TORONTO FACULTY L. REV. 51 (1974).

[178] Kaufmann & Hassemer, *Criteria of Justice*, 4 OTTAWA L. REV. 403 (1971). This is a follow-up to Kaufmann & Hassemer, *Enacted Law and Judicial Decision in German Jurisprudential Thought*, 19 U. TORONTO L.J. 461 (1969), referred to by Swan, *supra* note 1, at 550 n. 44.

[179] See text at notes 59, 74, & 107-36 *supra.*

[180] Kaufmann & Hassemer, *Criteria of Justice, supra* note 178.

[181] *Id.* at 404.

[182] J. AUSTIN, *supra* note 33, at 372.

of Kaufmann's and Hassemer's work for current thinking about law is their consideration of the distinction between legal philosophy and legal theory in terms precisely of the twentieth-century debate between "abstract rationalistic natural-law doctrine" and "legal positivism". [183] Furthermore, unlike Austin and his followers, the Germans are attempting to overcome that dualism.

A similar re-examination of basic philosophical attitudes toward the nature and function of law in modern states is taking place in Italy. Thus Professor G. Marini of the University of Pisa, in his *The Philosophy of Law in Modern Italy*, [184] writes of a "new positivism in which the literal, formal subservience to the law so characteristic of the old positivism has been replaced by a more intrinsic consideration of the *meaning* of a norm . . . . This new positivism . . . no longer considers state law as being capable of exhausting the ambit of law." [185] Also recognized are, first, various other "law-making organizations resulting from the grouping of individuals and capable of imposing normative rules"; second, "the importance of judicial interpretation"; and third, the historical development of a nation's law. [186] The reason this last is seen by the "new positivists" as important is that "in a country with codified laws . . . law [is] seen as the incarnation of centuries of wisdom". [187] It may well happen, I think, that if Professor Marini's lead in attempting to re-think the genuine value and legitimate aims of positivism are followed up in Canadian philosophizing about law, the debates between the "old" positivists and legal idealists might, as I have suggested in my remarks about Professor Smith's work, be transcended.

Finally, if Canadian legal philosophers should decide to take the historical development of Canadian law seriously, they will profit from W. L. Morison's excellent, insightful summary of legal historians such as Vinogradoff, Holdsworth and Pollock. [188]

I have said that no work seems to have been done recently by Canadians in the history of law and legal philosophy. An exception, perhaps, is the essay *Human Law and Natural Law in the Novels of Theodore Dreiser*, by Professor C. R. B. Dunlop of the University of Alberta. [189] Dunlop frames his portrait of Dreiser's "preoccupation with, and uncertainty about, human law and natural law" [190] with the assumption that "[t]he history of jurisprudence can without much distortion be described as a study of the doctrine

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[183] *Supra* note 180, at 404-05.

[184] Marini, *The Philosophy of Law in Modern Italy*, 22 U. TORONTO L.J. 77 (1972). *See also* Cotta, *Main Trends of Italian Legal Philosophy*, 8 OTTAWA L. REV. 463 (1975).

[185] Marini, *supra* note 184, at 90.

[186] *Id.*

[187] *Id.* at 83.

[188] Morison, *supra* note 56, at 3-6.

[189] Dunlop, *Human Law and Natural Law in the Novels of Theodore Dreiser*, 19 AMER. J. JURISPRUDENCE 61 (1974).

[190] *Id.* at 61.

of natural law, and of the criticisms levelled against it".[191] This is a thesis advanced before, most notably by Heinrich Rommen,[192] and it gives Professor Dunlop's treatment of Dreiser's view of the role of law in human society the sort of timeless context it needs in order to be appreciated. For in his novels *The Financier* and *The Titan* Dreiser points up the "quality of hypocrisy" that characterizes the institution of law in modern society. Laws, he thought, "purport to be rules to govern the actions of the members of the society [whereas] in reality, the rules often run counter to the real values of the society".[193] Anyone who reads Dunlop's treatment of Dreiser's metaphysical and ethical assumptions about law will be challenged to deny this claim.

2. *Jurisprudence and the Social Sciences*

Some writers in Canadian jurisprudence have shown a concern to determine the theoretical relationship between the development of Canadian law and the study of social science. Not surprisingly, given the interest in federal and provincial law reform, their literature has been shaped by the question of whether the social sciences as presently conceived in North America have anything to offer those trying to relate law to life.

J. W. Mohr grapples with this question in his *Law and Society: From Proscription to Discovery.*[194] He suggests that to the extent that one is interested in understanding how the law functions in a given society "there can be little doubt that the relationship of positive law and positive science is justifiable and important".[195] He adds, however, that such models of legal systems are severely limited, for "[t]hey do not represent the law in action nor the life in the community".[196] They do not, furthermore, because although social scientists can and do report on community values, their required (*i.e.* scientific) "neutrality" forbids them from recommending or otherwise utilizing values in their attempts to understand the role of law in society. So, when the aim is that sort of understanding, it is necessary, writes Mohr, to regard as a "dialectic polarity"[197] the legal system on the one hand and, on the other, the society whose ever-changing values it is designed to promote. That is to say, the two are, by nature, in tension; they stand "over against" each other, and during the next fifty years, Mohr concludes, the profession's central task will be the discovery of new values to be enshrined in law rather than the proscription of old ones.[198] This will not be easy, Mohr writes, because in order for Canadians to set about

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[191] *Id.*

[192] H. ROMMEN, THE NATURAL LAW 267 n. 2 (1947).

[193] Dunlop, *supra* note 189, at 61.

[194] Mohr, *Law and Society: From Proscription to Discovery,* 51 CAN. B. REV. 7 (1973).

[195] *Id.* at 10.

[196] *Id.*

[197] *Id.* at 11.

[198] *Id.* at 14.

searching for values that, when implemented by law, will make it possible for them to shape their lives in personally responsible ways, they will have to "regain the trust that social life . . . best proceeds on its own course rather than a planned and proscribed one . . .".[199]

Much the same thesis is expounded by Jean Beetz. One of our society's conventionally accepted assumptions, he says, is that if men hope to make the same progress in law as they have in science, they must "borrow as much as possible from that methodology".[200] Beetz calls this the "Myth of Science",[201] and the implication that follows from accepting it is that law "is and ought to be the *reflection* of the particular society which has produced it at any given time. The law is and should be the *mirror* of the morals, beliefs, and customs of the time".[202]

Now as I have said before,[203] although the federal Law Reform Commission at times clearly accepts this assumption, it is in fact, according to Beetz, a "denial of the law".[204] He is, I suggest, correct in this, for not only is he right when he says that the data made available to legislators and jurists by the various social sciences are only the law's "raw material", but in addition, as we earlier saw him say,[205] the concept of "legitimacy", to be adequately understood, must necessarily be referred to justice as an ethical value. This is because "[t]he purpose of the law is the regulation of social facts in the light of reason and consideration of justice".[206] On occasions, therefore, it may be unable to mirror current values and must instead "go against fashion and public mood . . . . This role is not compatible with the passive reflexion of society. To deny this role to the law is to deny its normative nature."[207]

A contrary view—or so it seems to me—of the theoretical relation between law and the social sciences is found in Peter Brett's article *The Implications of Science for the Law.*[208] I must confess that I am not altogether sure what Professor Brett's position is on this matter because, although he begins by asserting that the law "has grown out of touch with the scientific outlook that dominates our age, and . . . must change its attitude so as to harmonize with that outlook if it wants to remain a living and respected force in contemporary society",[209] he concludes by insisting that

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[199] *Id.*

[200] Beetz, *supra* note 74, at 137.

[201] *Id.*

[202] *Id.* (emphasis added).

[203] See text at note 95 *supra.*

[204] Beetz, *supra* note 74, at 137.

[205] Text at notes 128 & 135, *supra.*

[206] Beetz, *supra* note 74, at 138.

[207] *Id.*

[208] Brett, *The Implications of Science for the Law*, 18 McGILL L.J. 170 (1972). Brett is Professor of Jurisprudence at the University of Melbourne.

[209] *Id.* at 170. *Cf.* Baxter, *supra* note 95, at 57-59: the traditional definitions of law in terms of "reason" or "popular will" are unscientific. They need replacing, he says, by a quantitative approach—the interacting between law and "organized studies specially designed to examine . . . the interaction-dynamics of food, population,

the law can be so harmonized only when "considerations of ethics and humanity" are brought into play. [210]

These seemingly contradictory statements are perhaps resolved toward the end of his article when Professor Brett widens his concept of "science" (much as the classical Greeks did) to include any knowledge that can be rationally justified in the way appropriate to the subject-matter in question, not restricted to such knowledge as can be attained through "measurement and analysis". [211] This broader conception of science would, certainly, allow Brett to say that it is a mistake to downgrade considerations of "ethics, justice and humanity" simply because they cannot be measured, for they are, after all, "integral and essential" parts of the situations the law deals with, [212] and eschewing them would be un-scientific.

Even here, though, there is something ambiguous in Brett's idea of science. I am not clear whether he means that legal practitioners and academics should "consider" ethics, justice and humanity the way a sociologist, anthropologist, or social psychologist would, namely by reporting their presence in legal systems, or whether they should recommend them to jurists so as to help ensure their presence in the systems. My difficulty in grasping Professor Brett's thesis is compounded by his earlier statement that "an institution or system of social control that disregards or turns its back on the method of science is likely to wither away. For it is the method of science that provides the basis for our trust in its powers . . .". [213] This would seem to rule out the possibility of scientifically recommending ethical values for inclusion in legal systems, but it also conflicts with his statement that science is more than "measurement and analysis".

In spite of these difficulties Professor Brett has written an article well worth the attention of those interested in the relation between law and the social sciences. His examinations of the various theories developed by Freud, Adler and Skinner about human behaviour as they relate to law will be illuminating because he has analyzed them in light of Sir Karl Popper's criterion for determining the scientific status of a theory; [214] and his elaboration of the thesis that there are "four major features of our legal system which can properly be described as fundamentally unscientific in spirit" [215]—namely the adversary system of trial, the basic postulates of the rules of evidence, the portrait of how human beings act that underlies most of our substantive

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industrialization, natural resources, pollution, with an extended time-horizon". Baxter's intent is clear here, but there is perhaps an unfortunate confusion on his part about what the more traditional definitions of law were designed to do in legal theory. It is doubtful that they need to be replaced by his conception of law; they seem rather to function at a different theoretical level.

[210] Brett, *supra* note 208, at 205.

[211] *Id.* at 204.

[212] *Id.* at 204-05.

[213] *Id.* at 172.

[214] *Id.* at 172-75.

[215] *Id.* at 185-204.

rules of law, and the rule of *stare decisis*—will challenge those who think the law is a perfectly rational institution perfectly designed to govern perfectly rational, although sometimes evil, men.

3. *Methods in Jurisprudence*

In 1973 Professor Slayton of McGill wrote that until recently most lawyers, academic and practising, were content to interpret the law according to "well-understood principles" using "time-honored notions such as *stare decisis*".[216] This is no longer so, as the following survey of the recent literature on the methodological aspects of legal study shows.

In two articles[217] that have appeared since this journal's last jurisprudence survey, Professor Slayton has considered the questions of whether jurimetrics—"the use of electronic (computer) retrieval, quantitative methods, and symbolic logic in the study of law"[218]—is a new way of approaching law that differs radically from the more traditional ways and whether it is, as a method, adequate as a replacement for those old ways.

Jurimetrics is indeed a new way of conceiving and dealing with fundamental legal problems. Traditionally, Slayton writes, citing Professor Rupert Cross,[219] the key to juridical reasoning has been said to be "reasoning by analogy"; in employing jurimetrics, however, scholars are required, because of the demand by computers for qualified data, to treat legal concepts and rules as "factual occurrences" that cannot be analogically related. Any system that "imposes this requirement", Slayton concludes, "is doomed to failure".[220] He argued this point fully in his *Quantitative Methods and Supreme Court Cases*,[221] asserting that quantitative research methods such as the employment of scalograms "cannot replace traditional analysis" because even their proponents admit that such work is directed more toward supporting hypotheses in political science, anthropology and sociology than toward understanding the law as such.[222]

The use of quantified data in legal analysis is, of course, of tremendous value to scholars who think it is possible to determine the "meaning" of a judicial decision by analysing "virtually every word uttered by a judge",[223] since it enables them to compare each word with uses of it by the same court retrieved from computer banks. If one is committed to the principle

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[216] Slayton, *supra* note 137.

[217] *Id.*; and Slayton, *Quantitative Methods and Supreme Court Cases*, 10 OSGOODE HALL L.J. 429 (1972).

[218] *Supra* note 137.

[219] *Id.* at 168 n. 17; Slayton cites R. CROSS, PRECEDENT IN ENGLISH LAW ch. VI (1968).

[220] *Supra* note 137, at 168-70. The value of utilizing modern logic in legal analysis is, says Slayton, "as yet uncertain" because so far not much has been done. It appears, however, that the procedure will prove fruitful, he says, in attempts to relieve legal language of its remaining ambiguities (*id.* at 175).

[221] Slayton, *supra* note 217.

[222] *Id.* at 438.

[223] *Id.* at 429.

of *stare decisis*, one will see this as a logical development in legal research, making it possible to determine whether or not the latest decision has departed from precedent. Readers interested in keeping abreast of this new methodological movement as it relates to Canadian law, especially in the area of Supreme Court decisions, would profit from reading Slayton's work. [224] He invariably attempts, successfully I think, to give his readers an over-view of jurimetrics by discussing its progress and significance against the backdrop of clearly drawn sketches of the more traditional theoretical approaches to Canadian law.

Let me turn in a slightly different direction now and review the literature dealing with the subject of legal education, one closely tied of course to the topic of methodology in the study of law. Here two central propositions are finding increasing support. One, advocated by men such as Wishart, [225] is that the study of law ought to be introduced into the Canadian educational system at the primary and secondary levels in hopes of teaching the law and the love of it to the people at large. From the point of view of law reform this is, as I have suggested above, [226] a matter of great urgency. Unlike other more highly codified systems, the Common Law depends entirely for its effectiveness (and therefore for its legitimacy, if theorists as otherwise diverse in outlook as Kelsen [227] and Thomas Aquinas [228] are to be believed) upon its critical acceptance by the people it rules.

The other point increasingly being made about legal education is that its "court-centred emphasis" in law schools needs to be modified. [229] If it is not, Canadian legal education will continue to be designed exclusively for those who intend to practise, with the result that Canadian law will, in Professor I. F. G. Baxter's words, continue to be regarded as "pigeon-holed and apart". [230] I might mention in passing, perhaps, that should Canadian legal education continue to be influenced, as it has been over the past decade, by the American Realist movement's anti-positivistic notions about the adjudicative process, this modification of the court-centred Canadian legal education is bound to occur. To some extent it already has. [231]

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[224] *See also* Shuler, *Realist Needles in a Positivist Haystack: A Study of Attitudes Operative in the Decisions of Supreme Court Justices*, 32 U. TORONTO FACULTY L. REV. 1 (1974). In this study Shuler attempts to connect the policy-making role of the individual justices with their decisions. His attempt is only "partially successful" (*id.* at 29) because the justices often cloak their policy-attitudes in the "Formal Style" (as Llewellyn called it) of decision-writing (*id.* at 3-4)—something that in a democracy is not nice (*id.* at 29).

[225] Wishart, *supra* note 59, at 131-32.

[226] See text at note 85 *supra*.

[227] H. KELSEN, *supra* note 120, at 208-11.

[228] ST. THOMAS AQUINAS, *supra* note 129, Question 95, art. 2; Question 96, arts. 2 & 6.

[229] Milner, *Settling Disputes: The Changing Face of English Law*, 20 McGILL L.J. 521, at 523 (1974).

[230] Baxter, *supra* note 95.

[231] *See, e.g.*, Lederman, *Canadian Legal Education in the Second Half of the Twentieth Century*, 21 U. TORONTO L.J. 141 (1971), and McRae, *The Law School and the University: A Law Course for Undergraduates*, 21 U. TORONTO L.J. 529 (1971).

Full-blown attempts to revolutionize the Canadian teaching of law by repudiating what I shall call "educational positivism" [232] with its myopic focusing upon "what the courts say" and its unwavering allegiance to what S. M. Shuler calls the remorseless imperatives of *stare decisis*" [233] have not, however, been altogether successful. This is because, although many lawyers recognize the need for relating law to life, the rational principles in terms of which that might be accomplished have been wanting. The result has been that Canadian law faculties are, if my limited experience is indicative, more polarized today into "black letter" and "activist" factions than ever before: activists cannot understand why the "black letter" men resist involving the law with life, and the "black letter" men cannot understand why, as they see it, the activists resist teaching the law.

Happily, however, a reasonable prescription for remedying this situation is found in Professor G. Parker's *The Masochism of the Legal Historian.* [234] This is, as one would expect from a former Senior Fellow of the Research School of Social Sciences at the Australian National University, a learned, insightful treatise on the nature and role of legal history, especially as it pertains to legal education. It exhibits a thorough mastery of the literature on the subject and is refreshingly witty.

One suspects, however, that Professor Parker was trying to smile as he wrote, so that he would not cry. For "legal historians seem to be experiencing something of an identity crisis", [235] he writes, not knowing whether they belong in a university's history department or its law faculty. As to the latter possibility, the situation is bleak. [236] Four Canadian law schools have absolutely nothing of legal history in their curriculum, he writes, six make passes at the subject in their "Legal Method", "Introduction to Law" or "Legal Process" courses, and three more do "fairly honest legal history but [apparently with a] strong English bias". [237]

This is tragic, Professor Parker thinks, because the aim of legal education should be to do more than produce mere technicians, [238] and legal history makes for better lawyers. More tragic still, even if one grants that a knowledge of legal history is a requisite for being a truly good lawyer, "first-year students . . . are not ready for a course on the Maitland-Holdsworth-Fifoot-Plucknett pattern. They are ignorant of medieval history and equally ignorant of modern law. They cannot understand one without the other but they cannot be taught both simultaneously." [239]

Thus the fundamental question is: does the study of legal history have

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[232] This does not of course necessarily entail rejecting legal positivism as a set of philosophical assumptions about the nature and purpose of law.

[233] Shuler, *supra* note 224, at 4.

[234] Parker, *The Masochism of the Legal Historian*, 24 U. TORONTO L.J. 279 (1974).

[235] *Id.* at 279.

[236] *Id.* at 280.

[237] *Id.* at 280-81.

[238] Parker indicates that this assumption may be unwarranted: *id.* at 282-83.

[239] *Id.* at 281.

any role to play in the law school curriculum?[240] If one could show that it does, then because the present is to a great extent the culmination of the past, one could introduce students to the law as it is through the study of its historical development, thereby insuring their commitment to the idea that the law is above all a social institution designed, in Canada at least, to further the interests of the people. The law would be learned by the same students who, in learning it, would be grasping its extraordinary power for effecting orderly social change.

Unfortunately, the matter is not this simple. For before a person can urge the inclusion of legal history in the law school curriculum, he has to know what legal history is. Yet this is a matter that puzzles even Professor Parker.[241] The only thing he is absolutely certain about is that legal history cannot be studied by employing legal methodology. "I suppose", he writes in a footnote, "the most deadly sin of the legal 'historian' is to borrow the methods of the judge . . . ."[242]

For Parker the archetypal legal historian was F. W. Maitland, the "only one true legal historian" the Anglo-Canadian academic legal profession has produced.[243] Yet it is from Sir Frederick Pollock that he takes the idea that, in giving instant perspective to the Common Law, demonstrates why legal history must necessarily be included in law school curricula if students are to understand its significance as well as its content:

> [W]herever and so long as the facts cannot be ascertained with any precision, there is no occasion for precise or elaborate rules of law. The law cannot be more finely graduated than the means of ascertaining facts; and the judicial investigation of facts with something approaching completeness and exactness dates only from relatively modern times. Hence the development of law is largely bound up with the development of procedure.[244]

In sum, if the historical development of the law in Canada were taken seriously in the schools, two results would likely follow. Students would be in a better position to understand why the law decides matters as it does, and through that understanding, to work for reform when the decisions seem irrational in the face of current social needs and values. I realize that many students during the sixties and early seventies have denounced the study of history because they have repudiated the past; indeed, they are impatient even with the present and want to get on with shaping the future.

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[240] *Id.* at 283.

[241] See the section of his article entitled "What then is legal history": *id.* at 300-05.

[242] *Id.* at 307 n. 140.

[243] *Id.* at 289. Parker's insights as an historian into Blackstone, *id.* at 292-94, will be especially valuable to those interested in his, and Austin's, jurisprudence. His critical sketches of Holdsworth, *id.* at 294-99 ("his rigid philosophy of law warped his vision"), Fifoot, *id.* at 308, Plucknett, *id.* at 309, Milsom, *id.* at 311, and the American legal historians, *id.* at 312-16, are admirably succinct summaries of their relative significances for the study of law.

[244] *Id.* at 308 n. 146. Parker quotes POLLOCK, FIRST BOOK OF JURISPRUDENCE 45 (6th ed. 1929).

They would be surprised by Professor Parker's assertion that "interest in legal history increases when it becomes obvious that law has not solved social problems. The legal historian wants to find out where things went wrong." [245] A principled revolution in Canadian law would, surely, have to begin with that search.

III. CONCLUSION

The central conclusion, it seems to me, that can be drawn from studying the literature surveyed in this article is that the distinctively Canadian jurisprudence that Dean Martin Friedland hopes to see developed [246] has begun to take shape. Those writers who have applied themselves to current problems in law reform and legal ethics and in the relating of law to public morals have assured their colleagues that our jurisprudence will be "relevant", that it will accomplish the task of fitting Canadian law to the facts of Canadian life. Up to now most of this work, but not all, has quite naturally been done by those who sit on the bench or come daily before it.

On the other hand most of the overtly philosophical work is being done by academic lawyers. And as this survey has tried to make clear, that work is quickly and boldly leading to a theoretical understanding of the nature and purpose of Canadian law liberated from the strictures traditionally imposed upon jurisprudential thought by the pure positions of positivism, idealism and conceptual analysis. It borrows from these, to be sure, especially from American Realism, British analytic method and the perennial tradition of natural law; but it is not enslaved to any of them. Fittingly enough, Canadian jurisprudence is shaping up not as a monolith but as a mosaic.

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[245] Parker, *supra* note 234, at 312 n. 171.

[246] Friedland, *Law for the Layman*, 50:4 CAN. WELFARE 4, at 5 (1974).