

# Future Directions in Canadian Tax Law Scholarship

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## Future Directions in Canadian Tax Law Scholarship

### **Abstract**

Professor Brooks argues that tax law scholarship should be more relevant, problem-oriented, and interdisciplinary. He suggests not only that a commitment to the university enterprise demands such scholarship, but also that its production is essential in ensuring that law students are educated in a milieu that provides them with an intellectual base for life-long critical reflectiveness about legal institutions, the profession, and their own work.

# FUTURE DIRECTIONS IN CANADIAN TAX LAW SCHOLARSHIP

BY N. BROOKS\*

*Professor Brooks argues that tax law scholarship should be more relevant, problem-oriented, and interdisciplinary. He suggests not only that a commitment to the university enterprise demands such scholarship, but also that its production is essential in ensuring that law students are educated in a milieu that provides them with an intellectual base for life-long critical reflectiveness about legal institutions, the profession, and their own work.*

## I. INTRODUCTION

Calls for more theoretical, empirically informed, and relevant legal scholarship have been made for over fifty years. However, only in the last fifteen years or so has a consensus emerged about the importance of such a task.<sup>1</sup> Important strides have been made;<sup>2</sup> however, the process of re-orienting an organization as complex as the legal academe can

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<sup>1</sup> The strength of this consensus in Canada is reflected in the fact that none of the reviewers of *Law and Learning* (1983), although many took issue with other premises and many of the recommendations of the Report, disputed the need for a more scholarly discipline of law. See E. Veitch, "Our Capacity for Legal Research" (1983) 32 U.N.B.L.J. 253; W.D. Moull, "Law and the Social Sciences in Canadian Legal Education: Some Perspectives on the Arthurs Report" (1984) 34 J. Leg. Ed. 515; M. Cohen, Book Review (1983) 61 Can. B. Rev. 702; P. Slayton, Book Review (1984) 33 U. Toronto L.J. 348; D.A. Soberman, Book Review (1984) 9 Queens L.J. 235; Smith, Book Review (1983) 48 Sask. L. Rev. 171; L.E. Trakman, Book Review (1983) 21 Osgoode Hall L.J. 554; T.A. Cromwell, "In the Matter of an Arbitration Between the Union of Doctrinal and Theoretical Scholars and the Consultative Group on Research and Education in Law" (1984) 22 Osgoode Hall L.J. 761. *Law and Learning* is a report prepared for the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law. It recommended a number of wide ranging changes in Canadian legal culture to encourage more fundamental research.

<sup>2</sup> One sign of the increasing depth of legal scholarship is the burgeoning number of specialized, faculty-edited law journals. See, for example, *Law and Society Review*, *The Journal of Legal Studies*, *American Bar Foundation Research Journal*, *Law and Policy Quarterly*, *Journal of Law, Economics and Organization*, and, in Canada, the recently launched *Canadian Journal of Legal Studies*, *Canadian Journal of Women and the Law*, and *Windsor Yearbook of Access to the Law*. In commenting on the tradition of student-edited law journals Paul Samuelson has noted:

The academic mind boggles at the thought of graduate students writing or even soliciting papers for the *Physical Review*, the *Annals of Mathematics*, or *Comptes Rendus*. Even in my comparatively soft subject of economics, not only could graduate students not remotely edit *Econometrica*, they couldn't begin to edit the *American Economic Review*, which is supposed to be the common denominator publication of the official association.

"The Convergence of the Law School and the University" (1975) 44 *American Scholar* 256 at 260.

only take place incrementally. The purpose of this paper is to contribute to that process by suggesting new directions for Canadian tax scholarship. Because the discussion of the need to increase the theoretical content of legal scholarship often takes place at a high level of generality, the nature of the broadened research agenda is not obvious. This paper attempts to anchor the debate in specifics by providing a categorization of the types of research that academic tax lawyers might undertake.

To serve as a baseline, the research and writing about tax law that has been undertaken by Canadian legal scholars<sup>3</sup> will be surveyed. However, since this is not its principal purpose, the paper does not provide a comprehensive survey of such scholarship. Moreover, the relative value of particular texts and articles is not evaluated. References to such works are intended only to give content to the categories of research under which they are discussed.

In suggesting an agenda for future research, the paper raises two general issues that underlie most discussions of the role and scope of contemporary Canadian legal scholarship: the professional responsibility of legal scholars and the problem of defining the boundary between legal and other types of scholarship. These issues have been the subject of lengthy elaboration elsewhere. However, since they pervade discussions of legal scholarship, and since an approach to them underlies the conclusions of this paper, they will be discussed generally, but briefly, in this introduction.

The tension between intellectual creation and professional responsibility is experienced by most legal scholars. On the one hand, as members of a university community, legal scholars have an obligation to pursue the truth and to critically analyse social activity. Although the debate on the uses and misuses of the university is never-ending, any coherent concept of a university imposes this obligation on all members of that community. On the other hand, legal scholars have affiliations beyond the university community; they are in various ways associated with the legal profession. Most obviously, they have a responsibility for educating future members of the profession. This commitment would seem to entail scholarship that is compatible with it. In addition, most legal scholars would concede that legal scholars have a broader responsibility for the on-going functioning of the legal system and accordingly to research that will contribute to its rationalization. Thus, arguably, they cannot commit themselves unconditionally to the university enterprise. The danger posed by this need for divided loyalties was well stated by Thomas

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<sup>3</sup> More accurately, the paper only surveys Canadian legal scholarship written in English. Unfortunately it does not include articles and texts written in French. However, French-Canadian scholars frequently publish in English in this area.

Bergin who argued that “by compelling true academics, or those who have the potential for serious scholarship, to play out a Hessian-trainer role, and by compelling highly skilled Hessian-trainers to make believe they are legal scholars, the disease [intellectual schizophrenia] dilutes both scholarship and Hessian-training to the advantage of neither.”<sup>4</sup>

Although this tension is manifest in many debates in the legal scholarly community,<sup>5</sup> it is primarily felt by legal scholars in deciding whether to engage in research that will impart an understanding of legal rules or lead to a rationalization of the legal system, or to engage in research of a more fundamental kind in which the criteria of success are not professionally defined. Historically, the inevitable tension caused by this conflict of loyalties led some of the most noted philosophers of higher education to suggest that professional education should be carried on at an academy or a research center off the university campus and unconnected with it.<sup>6</sup> However, since the university has become inescapably involved in the complexities of society, and all traditional university disciplines have to some extent felt the need to engage in some form of social service work, professional schools now seem firmly entrenched in the universities.<sup>7</sup>

Those who are critical of the present state of legal scholarship generally concede that legal scholars have a responsibility for the functioning of the existing legal system. They argue, however, that too many institutional and other factors lead legal scholarship in the direction of primarily professional activity and away from scholarship that reflects

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<sup>4</sup> T.F. Bergin, “The Law Teacher: A Man Divided Against Himself” (1968) 54 Va. L. Rev. 637 at 645.

<sup>5</sup> Recently, for example, the tension was central in a well-publicized debate about whether the responsibility of legal scholars to the legal systems implies that they must accept certain basic premises of the existing system. See the exchange of letters occasioned by Dean Paul D. Carrington’s suggestion that certain legal scholars he described as nihilists have “an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy,” “Of Law and the River” (1984) 34 J. Leg. Ed. 222 at 227. See exchange of letters, “‘Of Law and the River’, and of Nihilism and Academic Freedom” (1985) 35 J. Leg. Ed. 1. See also, T. Finman, “Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington’s River” (1985) 35 J. Leg. Ed. 180. At one level Carrington’s concern about the commitment of legal scholars seems to confirm an observation made by Jencks and Riesman in their brilliant essay on the professional schools, “A profession . . . is a subculture that shares certain values and attitudes, that feels itself separate and superior to the laity, and that is prepared to enforce its claims. Professional schooling is crucial to developing these attitudes — perhaps even more crucial than to the mere transmission of knowledge.” C. Jencks & D. Riesman, *The Academic Revolution* (1968) at 251.

<sup>6</sup> See, for example, J.H. Newman, *The Idea of a University* (1959) (originally published 1852) at 10; T. Veblen, *The Higher Learning in America* (1918) at 31, 215; and R.M. Hutchins, *The Higher Learning in America* (1936) at 46. See, more recently, R.P. Wolff, *The Ideal of the University* (1969) ch. 2.

<sup>7</sup> Two authors representative of this instrumental view of the university are C. Kerr, *The Uses of the University* (1963) and D. Bok, *Beyond the Ivory Tower: Social Responsibilities of the Modern University* (1982).

a commitment to the university enterprise.<sup>8</sup> Thus, in recent years, one of the most urgent debates about legal education and scholarship has been about what institutional changes should be made within the university law school to correct this imbalance in legal research and writing.<sup>9</sup>

Assuming that a legal scholar is prepared to undertake fundamental research about law — and all legal scholars would presumably admit that such research should form at least part of the corpus of legal scholarship — a further and related issue involves the relationship of such research to that undertaken by other social scientists. How should the boundaries be defined between the legal scholar's study of the legal system and the work of historians, sociologists, economists, or political scientists writing about law? Can studies about law be restricted in a way that defines the legal scholar's expertise and establishes the legal scholar's role in the intellectual division of labour? In the area of tax law, for example, aside from the conventional study of legal doctrine, what kind of research would be clearly identifiable as the work of a legal scholar? The idea of a discipline embodies a distinctive mode of thinking: it connotes a conceptual apparatus — a theory — that is to be brought to bear on phenomena or problems. When an economist, historian, psychologist, or political scientist writes a piece of scholarship about tax they bring to bear their common intellectual heritages. But what is the distinctive methodology of legal scholars writing about tax law? When they leave pure doctrinal work are they simply borrowing the methodologies of other disciplines? If so, is it any longer legal scholarship? Many legal scholars fear that once they move beyond the methodology involved in reading statutes, comparing cases, and reasoning critically, their discipline has little to contribute that is original, or at

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<sup>8</sup> In addition, many argue that even with respect to their research activities that have resulted from their professional associations, legal scholars have not carefully differentiated between the demands that a functioning legal system imposes on them as opposed to the responsibility it places on other members of the legal profession. More particularly, the professional writing of legal scholars is frequently criticised on the grounds that it is incoherent, neglects underlying principles, fails to exploit data available in other disciplines to support its empirical assertions, and lacks methodological diversity.

<sup>9</sup> One of the most far reaching proposals for change within the university involves separating professional training from the study of the impact of law on society. Joel Handler has recommended that a separate graduate department of law should be established with no responsibility to train lawyers. See J.F. Handler, "The Role of Legal Research and Legal Education in Social Welfare" (1968) 20 *Stan. L. Rev.* 669. Thomas Bergin suggested that there should be a two-track system in the law school: "the LL.B. track (to be followed by those who wish to practice at the Bar) and the Ph.D. track (to be followed by those who wish to become legal academics or legal policy advisors to government or high-echelon private decision makers)." Bergin, *supra*, note 4 at 653. This latter suggestion was taken up and considerably elaborated on in *Law and Learning*, *supra*, note 1. For another recent call for institutional changes within the law school in order to promote legal studies see D.M. Trubek, "A Strategy for Legal Studies: Getting Bok to Work" (1983) 33 *J. Leg. Ed.* 586.

least that it has not provided them with any comparative advantage over other kinds of scholars working in the field.

This is not the place for a detailed general discussion of the problems raised by the professional responsibilities of legal scholars or the precise role of legal scholars in the university community. As mentioned above, however, these issues pervade most discussions of legal scholarship, including discussions about new directions for legal scholarship. Thus, one purpose of this paper is to provide a vantage point from which to make a few general observations about them.

## II. DOCTRINAL SCHOLARSHIP

Doctrinal scholarship commonly refers to the exposition of common and statutory law. The expository tradition distinguishes legal from other forms of scholarship; legal scholars are experts at explicating the meaning of rules and applying them to countless different sets of facts and circumstances. They are experts at mapping doctrine.

The explication of doctrine can entail the application of relatively accessible legal rules to obvious situations, or the application of a matrix of rules in which there are gaps or ambiguities to novel situations. Although the two kinds of doctrinal writing shade into one another, it is useful to divide such writing into work that is largely descriptive and work that is largely interpretive. Since legal treatises fall somewhere between these two kinds of writing, they are discussed separately in the following review of doctrinal tax scholarship.

### A. *Descriptive Writing*

Most tax articles in Canadian academic legal journals treat the law as a knowable body of rules and simply describe it.<sup>10</sup> No serious effort

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<sup>10</sup> See, for example, D. Beaubier, "A Review of the Taxation of Co-operatives in Canada" (1962) 27 Sask. B. Rev. 51; P. Beckman, "Associated Corporations and Canadian Taxation" (1965) 2 U.B.C.L. Rev. 233; D. Ish, "Some Aspects of the Taxation of Canadian Co-operatives" (1975) 21 McGill L.J. 42; F.D. Jones, "Benefits Under the Income Tax Act" (1968) 6 Alta. L. Rev. 157; F.D. Jones, "Distribution of Corporate Surpluses Under the New Income Tax Act" (1972) 18 McGill L.J. 483; F.E. LaBrie, "Fraudulent Tax Transactions" (1964) 3 W. Ont. L. Rev. 48; B. Murray, "The 1977 Amendments to the Corporate Distribution Rules" (1978) 16 Osgoode Hall L.J. 155; A.R.A. Scace & D.S. Ewen, "Canadian Taxation of Foreign Affiliates" (1972) 10 Osgoode Hall L.J. 325; H.T. Shroeder, "Net Worth Assessment" (1969) 8 W. Ont. L. Rev. 59; H.T. Strosberg, "Registered Retirement Savings Plans, Employee's Profit Sharing Plans, Deferred Profit Sharing Plans: Their Scope and Relationship to the Income Tax Act" (1969) 7 Osgoode Hall L.J. 271; E.B. Switzer, "Canadian Taxation of Foreign Affiliate Distributions" (1978) 16 Osgoode Hall L.J. 81; M.L. Weissman, "Company Taxation in Australia" (1960) 13 U. Toronto L.J. 190. These are a sample of about one-third of the articles in Canadian university law journals that describe aspects of tax law. Not all were written by legal academics. However, legal academics have contributed about an equal amount of descriptive writing to various publications of the Canadian Tax Foundation that were intended to inform practitioners of 'the law'.

is made to analyse, synthesize, or evaluate the rules, or to identify and resolve ambiguities or gaps in them. Indeed, in the tax law area much of this kind of legal writing is not much more than a straightforward paraphrasing of the relevant sections of the *Income Tax Act*. Although some of these articles reveal the relationship between complex sections, apply the law to situations that would not be apparent to a casual reader, and are extremely well written and even imaginative in the way that the descriptions are developed, surely no one would refer to them as scholarly. In fact, as expository writing, many of them are no better than the average manual on how to operate a power tool. And in the tax area, tax accountants often do as competent a job as tax lawyers and academics in writing such material. Even scholarship in its widest sense — a commitment to truth — must stop short of embracing the truthful description of the operation of a relatively straightforward activity. This is not to belittle the value of these articles to practicing lawyers or the hard work and skill involved in producing them; however, neither the functions of the university nor the legal scholar's obligation to the profession would appear to dictate this kind of work.<sup>11</sup>

## B. *Treatises*

Legal textbooks are perhaps the most important form of doctrinal writing. A number of criteria — other than the standard criteria of accuracy, brevity, and clarity — are commonly used in evaluating traditional legal textbooks: First, good legal treatises synthesize and systematize the law. When this is done well it involves a large element of creativity in conceptualizing the relationship between various aspects of the law and in discerning and articulating the underlying similarities and contrasts among apparently diverse lines of doctrine. Second, good treatises reflect a clear understanding of the principles underlying the law. The law is discussed as a purposive activity. Third, they explain

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<sup>11</sup> The same might be said for articles on tax planning, of which the university law journals contain a surprising number. Not all of the following sample of articles were written by academics, but again an equal number of articles have been written by legal academics in publications of the Canadian Tax Foundation. See J. Berstein, "Marriage — A Tax Shelter" (1975) 21 McGill L.J. 631; J.N. Bowley, "Winding Up the Family: Some Tax Implications" (1980) 12 Ottawa L. Rev. 678; J.C. Crawford, "Alternative Methods of Industry Financing Founded on Recent Income Tax Innovations" (1978) 16 Alta. L. Rev. 250; F. Jones, "Estate Planning Under the New Legislation" (1973) 11 Alta. L. Rev. 28; D.P. Jones, "Tax Implications of Marriage Breakdown" (1982) 20 Alta. L. Rev. 564; V. Krishna, "Tax Consequences of Compensation Policies" (1975) 13 Alta. L. Rev. 111; V. Krishna, "Tax Planning for Dispositions of Depreciable Property at Death" (1977) 15 Alta. L. Rev. 313; K.E. Johnson, "Estate Planning for Farmers" (1981) 46 Sask. L. Rev. 123; E. Kroft, "The 'Going Private' Transaction — Some Income Tax and Corporate Aspects of a Public Company Becoming Private" (1980) 12 Ottawa L. Rev. 49; J.D. Murphy, "The Estate Planning Implications of Marital Disruption" (1975) 13 Osgoode Hall L.J. 407.



the basic problems that the law has to deal with and how the present law attempts to solve these problems. Fourth, often the law is placed, at least superficially, in its historical, social, and economic context.

Canadian legal scholars generally have not been great treatise writers. In tax law, however, there have been some superb treatises and if tax law were not so transitory they would undoubtedly be more widely recognized.

Although not written by academics, the first few treatises on tax law are worth mentioning since they set a standard against which to compare the treatises written by academics. The first treatise on Canadian tax law, *Dominion Income Tax Law*, was published in 1921, four years after the passing the *Income War Tax Act*.<sup>12</sup> The authors, Charles Percy Plaxton and Frederick Percy Varcoe, both worked for the Department of Justice at the time and undoubtedly assisted in the drafting of the *Act*. The text was well organized and clearly written, and the authors made good use of leading English and some leading U.S. cases in suggesting meanings for the words in the new Canadian statute. However, there is no original synthesis or conceptualization of the law, there is almost no discussion of the policy of, or explanation for, particular provisions, and the antecedents of the provisions are not discussed. This is particularly frustrating since obviously these authors understood the purpose of the rules, the reasons why the legislation dealt with some problem areas and not others, and the reasons for in some cases adopting U.S. rules but in other cases borrowing from the English or the existing provincial income tax statutes. A second edition of the treatise was published in 1929. Interestingly, the one section of the treatise that dealt rather perceptively with more general issues, a section on the history and nature of income taxation (and in which the authors acknowledged that the Canadian *Act* was patterned largely on the law of the United States) was deleted from the second edition.<sup>13</sup>

In the late 1930s and early 1940s, as tax rates increased and business became more preoccupied with tax, several of the leading tax practitioners of the day published digests and textbooks, and publishing companies

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<sup>12</sup> C.P. Plaxton & F.P. Varcoe, *A Treatise on the Dominion Income Tax Law* (1921).

<sup>13</sup> A brother of one of the co-authors of this first treatise published a treatise in 1939, H.A.W. Plaxton, *The Law Relating to Income Tax of the Dominion of Canada* (1939). Although it was published as a separate textbook, it was in many respects similar to the former treatise and in places incorporated passages from it. A second edition of this treatise was published in 1947. The debt to the authors of the *Dominion Income Tax Law* was not acknowledged until the second edition.

began publishing loose-leaf tax services.<sup>14</sup> Indicative of the positive strain of all of this writing, a tax service was published in 1954 that discussed alphabetically all the terms used in the *Act*.<sup>15</sup> It started with an article on "Abolition of Office" and concluded with an article on "Year." Apparently, under this system the practitioner first read the relevant section of the *Act* and then the articles on the words used in the section.

Eugene LaBrie was the first full-time Canadian academic to write a treatise on tax law. In the late 1940s he completed a doctoral dissertation on tax at the University of Toronto and accepted a teaching position there. His writing dominated Canadian tax scholarship during the 1950s and early 1960s.<sup>16</sup> In 1948, in collaboration with J.R. Westlake, he published a monograph comparing the law governing the deductibility of expenses with the accepted principles of accountancy and commercial practice.<sup>17</sup> Basically, he sought to show that judicial principles of deductibility had departed from business principles in the preceding twenty or thirty years but had once again moved closer to them. The book was reviewed by Bora Laskin, then a professor at Osgoode Hall Law School, who noted that "the authors do not examine or state the business principles save in the context of judicial exposition of the English and Canadian income-tax statutes. Their book is accordingly in the tradition of analytical jurisprudence."<sup>18</sup> But he went on to comment approvingly of this type of scholarship,

the book . . . is important in marking the beginning of critical legal analysis of the various problems in Canadian income-tax law. The importance of this branch of law makes it entirely appropriate that legal literature on it should not be confined (as in Canada, by and large, it has been) to merely generalized treatment in textbooks or to digest summary.<sup>19</sup>

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<sup>14</sup> The two leading tax services were started at this time: in 1939, C.C.H. Canadian Limited began publishing its loose-leaf service, *Canadian Tax Service*, edited by J.R. Tolmie; in 1942 Richard De Boo began publishing its service, *Dominion of Canada Tax Service*, edited by H.H. Stikeman. In 1937 Molyneux L. Gordon, a well known tax practitioner, began publishing a digest of income tax judgments from courts in the British Commonwealth, *A Digest of Income Taxes of the British Commonwealth of Nations and Principal Subdivisions Thereof*. The volumes contained summaries of the judgments, brief quotations, and comments by the editor. R.I. Frears published an annotated code, *Frears Annotated Income War Tax* (1947), and A.W. Gilmour first published his annual *Income Tax Handbook* (1945). H.H. Stikeman and M.L. Gordon also gave a series of lectures for the Law Society of Upper Canada that provided in effect a textbook treatment of the law, Law Society of Upper Canada, *Special Lectures on Taxation* (1944).

<sup>15</sup> C.H. Morawetz & L.F. Heyding, *Burroughs' Income Tax Service (Canada)* (1954).

<sup>16</sup> Indeed, the only other full-time law teachers who wrote in the area of tax law during the 1950s were John Willis and Dean Curtis.

<sup>17</sup> F.E. LaBrie & J.R. Westlake, *Deductions Under the Income Tax Act: A Return to Business Principles* (1948).

<sup>18</sup> B. Laskin, Book Review (1949) 8 U. Toronto L.J. 185.

<sup>19</sup> *Ibid.* at 186.

In 1952, LaBrie published his doctrinal dissertation, which he had completed in 1949, *The Meaning of Income in the Law of Income Tax*. The English and Canadian case law on the meaning of income for tax purposes was thoroughly analysed. In the preface the author noted that the work was intended to be a purely legal treatise and therefore a discussion in his thesis that compared the concept of income for tax purposes with the concept as used in economics and accountancy was omitted. However, even in his thesis this discussion was brief and superficial.

Three years later, in 1955, LaBrie published an outstanding text on Canadian tax law, *Introduction to Income Tax Law: Canada*. He described it as an introductory text for students.<sup>20</sup> It is exhaustive in coverage: each section begins with a statement of the basic problem in the area; the short summaries of the leading cases often contain critical comments; relevant economic principles are occasionally referred to; many sections conclude with a number of questions that raise the central tax policy issues in the area; and, the influence of the accounting concept of income on the tax concept is thoroughly discussed. In addition, parts of the book, for example the discussion of the concept of realization, reveal a familiarity with the U.S. jurisprudence and academic commentary. John Willis reviewed the book favourably: "This is the kind of book on the kind of topic that more university law teachers in England and Canada should write — a book on a statutory subject which no practitioner has the time, patience, application, knowledge, or understanding to write but no practitioner can do without."<sup>21</sup>

Another important treatise published during the 1950s was written by John G. McDonald, *Canadian Income Tax: A Treatise on the Income Tax Law of Canada*. Macdonald was a practitioner and part-time lecturer at Osgoode Hall Law School. Although his book was in fact a treatise, it was published in loose-leaf form. It was clearly written and exhaustively researched. He conceptualized the subject differently than did the drafters

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<sup>20</sup> F.E. LaBrie, *Introduction to Income Tax Law: Canada* (1955) at 1.

<sup>21</sup> J. Willis, Book Review (1955) 11 U. Toronto L.J. 172 at 173. The book was revised and published in 1965 under a different title, *The Principles of Canadian Income Taxation*, reflecting its increased length and substantial revisions. In the preface the author states that he deliberately sought to make some contribution toward emancipation of the Canadian law of income tax from the bonds of conceptualism that I consider to have hitherto interfered with its wholesome development. . . . This volume is simply aimed at promoting perspective and at encouraging a broad range of inquiry as a background for making decisions in the field of taxation.

Like its predecessor it contains perceptive editorial comments, often in the form of rhetorical questions, a discussion of the legislative histories of some sections, and occasionally a discussion of underlying principles and tax policies. For some reason the references that were contained at the end of each section in the introductory book were not contained in this book. This is a great pity since they were a good bibliographical source of the best writing in Canadian tax law.

of the *Act* or most other Canadian commentators. In addition, the text is replete with critical comments on the development of the jurisprudence.<sup>22</sup>

In my view, no Canadian tax text has exceeded these two in clearness of exposition, learning, appreciation of basic principles, and critical comment. However, both were very much in the formalist tradition and similar in style to the two leading English treatises on tax law.<sup>23</sup> Although the influence of American commentary was apparent in both books, neither fully exploited the rich American literature. For example, by the 1950s Randolph Paul,<sup>24</sup> Louis Eisenstein,<sup>25</sup> Stanley Surrey,<sup>26</sup> and Roswell Magill<sup>27</sup> had become leading U.S. tax commentators and all were heavily influenced by the legal realists. By the late 1940s, there were also two excellent American economic treatises on practical tax policy issues. One was by Henry Simons,<sup>28</sup> the other by William Vickey.<sup>29</sup> The insights of these authors were not reflected in the Canadian treatises. In fact, neither Canadian treatise reflected the rich periodical literature that was developing in the United States on the concept of a comprehensive tax

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<sup>22</sup> After McDonald's death the treatise was edited by a number of practitioners and eventually took the form of a current tax service.

<sup>23</sup> See E.M. Konstam, *The Law of Income Tax: A Treatise Designed for the Use of the Taxpayer and His Advisors*, 12th ed. (1952) and J.P. Hannan & A. Farnsworth, *The Principles of Income Taxation: Deduced from the Cases* (1952). Konstam was published in seventeen editions and then used as the basis for the leading present day English treatise, G.S.A. Wheatcroft, *The Law of Income Tax, Surtax and Profits Tax*, 4th ed. (1982).

<sup>24</sup> Randolph Paul was a leading U.S. tax practitioner, civil servant, and prolific writer. He was a close friend of Jerome Frank and an unreformed legal realist. To give a flavour of his writing, in an essay on tax avoidance he stressed that tax avoidance was an emotional subject and that courts disguised their biases by the use of sententious maxims and the employment of rationalization. He warned the unwary lawyer "to discount everything he reads" in an opinion. "It may be," he wrote, "emotional claptrap, a sermon on the duty to pay taxes, a particular case, or verbal agility rationalizing subconscious predilections. He must watch for inarticulate law. If he reads with trust, he is as lost as a babe in the woods." "Restatement of the Law of Tax Avoidance" in R.E. Paul, *Studies in Federal Taxation* (1937) 9 at 99.

<sup>25</sup> Louis Eisenstein was also a tax practitioner, civil servant, and prolific author. His writing culminated in his brilliant nihilistic analysis, *The Ideologies of Taxation* (1961). His realist premise is reflected in the following quote from a vicious review of a U.S. Treatise. Eisenstein stated,

Our tax law is largely contained in loose words and phrases that are uttered by the courts from one case to another. A discussion which fails to come to grips with these verbalisms says very little, though it may sound quite learned. The job of scholarly experts is to exercise their critical faculties, not to emulate the courts.

L. Eisenstein, Book Review (1964) 20 Tax L. Rev. 215 at 222.

<sup>26</sup> See, in particular, S.S. Surrey, "Assignment of Income and Related Devices: Choice of Taxable Person" (1933) 33 Colum. L. Rev. 791; "Federal Taxation of the Family — The Revenue Act of 1948" (1948) 61 Harv. L. Rev. 1097; and a series of articles, which he jointly authored on the work of the American Law Institute Tax Project, for example, "A Technical Division of the Federal Income Tax Treatment of Corporate Distributions to Shareholders" (1952) 52 Colum. L. Rev. 1.

<sup>27</sup> See R.F. Magill, *Taxable Income* (1945).

<sup>28</sup> H.C. Simons, *Personal Income Taxation* (1938).

<sup>29</sup> W. Vickey, *Agenda for Progressive Taxation* (1947).

base,<sup>30</sup> which was relied upon so heavily by the Royal Commission on Taxation, 1967.

Since the *Tax Reform Act of 1972*, Canadian legal academics have written two general tax treatises,<sup>31</sup> a number of specialized monographs,<sup>32</sup> a collection of essays on tax law,<sup>33</sup> and three tax law casebooks,<sup>34</sup> and one has jointly edited a multi-volume treatise on tax law.<sup>35</sup> Although some of these texts are impressive, they are all written basically in the formalist tradition. They are confined almost exclusively to primary sources of law; a high premium is placed on the logical consistency of doctrine; traditional legal concepts are used to organize the material; and, most significantly, they all appear to assume that deduction from formal rules can severely limit a judge's range of outcomes in a case. But, in addition to being premised on an incoherent theory of judicial decision making even as purely descriptive work, most of these texts fail in another important respect. To most students and practicing lawyers, or anyone else who wishes to be informed about the application of the tax law, the law must appear as an overwhelming, incomprehensible maze of statutory sections devoid of rational policy and lacking underlying concepts. Yet, with a couple of noteworthy exceptions, these texts generally do not systematically explain the purpose of the rules; explicate the pervasive structural principles which underlie the tax system such as the concepts of realization, cost recovery, or attribution; explore the choices that the tax system had in each problem area or discuss how other jurisdictions have dealt with similar problems; speculate on the allocation and distributive effects of the rules; review the origin and evolution of provisions; explain the significance of background information and data, when it is provided; or attempt to seriously reconceptualize confusing areas of tax law. Finally, most do not appear to be based on a coherent

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<sup>30</sup> See, for example, House Comm. on Ways and Means, 86th Cong., 1st Sess., *Tax Revision Compendium: Compendium of Papers on Broadening the Tax Base* (1959).

<sup>31</sup> E.C. Harris, *Canadian Income Taxation*, 4th ed. (1986); V. Krishna, *The Fundamentals of Canadian Income Tax* (1985).

<sup>32</sup> See B.J. Arnold & D.K. McNair, *Income Taxation of Partnerships and Their Partners* (1981); D.K. McNair, *Taxation of Farmers and Fishermen* (1980); D.K. McNair, *The Meaning of Cost in Canadian Income Tax* (1982); B.J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983); V. Krishna, *The Taxation of Capital Gains* (1983); K.A. Lahey, *Corporate Taxation* (1984).

<sup>33</sup> B.G. Hansen, V. Krishna & J.A. Rendall, *Canadian Taxation* (1981). Most of these 'essays' were in fact written like chapters in a textbook.

<sup>34</sup> J.G. McDonald, *Cases and Materials on Income Tax*, 2d ed. (1961); W. Grover & F. Iacobucci, eds., *Materials on Canadian Income Tax*, 6th ed. (1985); M.C. Cullity & C. Brown, *Taxation and Estate Planning* (1984).

<sup>35</sup> D.A. Ward & B.J. Arnold, *Ward's Tax Law and Planning* (Looseleaf).

theory of income tax law, either normative or descriptive. Indeed, these texts, although they are generally much better at what they do, do not differ significantly in style or methodology from texts written by practicing lawyers or accountants.

Even the casebooks do not reflect the university enterprise. A casebook should be devoted to probing fundamental unsettled policy questions of general importance. However, instead of serving as an aid to studying and understanding the *Act* and its underlying problems, the published casebooks simply provide an overview of the present law. For example, notes following the cases are frequently used to report subsequent developments or to see if the student has learned the "rule" in the principal case and can apply it to a new factual setting. They seldom attempt to challenge the student to examine basic assumptions or inarticulate values, or to ask what having a "rule" might mean. They also adopt throughout the ideology of legal positivism or, in places, the legal process tradition. None contains, or at least integrates in a meaningful way, non-traditional legal material, or reflects the author's links with other disciplines or other intellectual environments.

I do not mean to underestimate or belittle the work, skill, and learning that went into preparing these texts. Aside from their adequacy as legal treatises, however, they raise two questions in the context of setting an agenda for legal scholarship: First, is treatise-writing scholarship? Second, even if it qualifies as scholarship, how much effort should legal scholars be expending on this type of work?

With respect to the first question, I do not doubt that within any pluralistic conception of legal scholarship there is room for expository writing. To qualify as scholarship, however, a treatise, at the very least, should be based on an articulate theory about the objectives of the legal rules described, it should explore basic principles, and it should provide some context for the legal rules. In short, it must be a work that advances understanding instead of simply reciting information, even though it reveals a comprehension of, and an ability to apply, that information. Understanding is a process of rendering the unfamiliar familiar: of removing it from the domain of things felt to be foreign to the domain of things felt to be humanly useful and nonthreatening. Understanding results from the identification of unifying themes, the revelation of how choices are made, and the reduction of analysis to matters and processes that are already familiar. It requires analysis, synthesis, and evaluation. Thus even legal scholars who conceive their primary task as exposition have to be contextualists and reductionists. They cannot renege on their responsibility to theorize and articulate underlying assumptions with the excuse that they are writing expository material only.

Even if a treatise advances understanding, in assessing its scholarly significance, one is still left with a disquieting feeling by a remark by the economist Paul Samuelson — even though it has a pompous ring to it. In speaking to a group of legal scholars he noted: “A Williston or Corbin or Prosser or Wigmore achieves fame for codifying a branch of the subject and for writing a successful textbook. When I became a successful textbook writer, I had to live down that fact by producing more and better scientific research.”<sup>36</sup>

The second question posed above — how much of the research agenda should be dominated by treatise writing — is addressed generally below.

### C. *Interpretive*

Textbooks, because they must be succinct, comprehensive, and systematic, obviously must also be superficial and dogmatic. Even a multi-volume treatise cannot deal in any detail with difficult interpretive issues. But doctrinal writing also includes writing that self-consciously and definitively focuses on the difficult interpretive questions of law.

About one-half of the articles written by Canadian tax scholars are descriptive, as described above. With editing they could form chapters in treatises. The other half (with a few exceptions, noted below) deal with interpretive issues.<sup>37</sup> These articles also vary greatly in quality. Some are perceptive and the courts would do well to consider them. Generally, however, the great failing of this type of tax law scholarship in Canada is that it continues to take formalism seriously: it assumes that the legal reasons given by judges determine the outcome of cases, and that legal

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<sup>36</sup> P.A. Samuelson, “The Convergence of the Law School and the University” (1975) 44 *The American Scholar* 256 at 259-60.

<sup>37</sup> See, for example, B. Arnold, “Conversions of Property to and from Inventory: Tax Consequences” (1976) 24 *Can. Tax J.* 231; L.V. Balogh, “Annual Survey of Canadian Law — Taxation” (1979) 11 *Ottawa L. Rev.* 176; J.W. Durnford, “The Corporate Veil in Tax Law” (1979) 27 *Can. Tax J.* 282; B.J. Hansen, “The Definition of ‘Transfer’ in Sections 74 and 75 — Judicial Nonsense” (1976) 24 *Can. Tax J.* 612; J.W. Durnford, “Goodwill in the Law of Income Tax” (1981) 29 *Can. Tax J.* 759; J.W. Durnford, “Benefits and Advantages Conferred on Shareholders” (1984) 32 *Can. Tax J.* 445; V. Krishna, “Characterization of Wrongful Dismissal Awards for Income Tax” (1977) 23 *McGill L.J.* 43; V. Krishna, “Public Policy Limitations on the Deductibility of Fines and Penalties: Judicial Inertia” (1978) 16 *Osgoode Hall L.J.* 19; F.E. LaBrie, “Canadian Courts, Accountant Witnesses, and the Theory of True Income” (1958) 12 *U. Toronto L.J.* 227; K.A. Lahey, “‘Active Business’ As a Technique of Source Discrimination in the Formulation of Corporate Tax Policy” (1978) 16 *Osgoode Hall L.J.* 35; K.A. Lahey, “Minimum Royalties Under Section 12(1)(g) of the Income Tax Act” (1978) 24 *McGill L.J.* 654; A.F. Sheppard, “The Tax Element in Compensation since *The Queen v. Jennings and Cronsberry*” (1971) 19 *Can. Tax J.* 448; D.J. Sherbaniuk, “Receipt and the Time of Recognition of Income: A Historical Conspectus of the Income Tax Laws of the United Kingdom, the United States and Canada” (1963) 15 *U. Toronto L.J.* 62; J. Willis, “Recent Trends in Canadian Income Tax Law” (1951) 9 *U. Toronto L.J.* 42.

decision making is neutral and largely autonomous. Thus these articles normally take the form of identifying conventions of legal interpretation or dictionary meanings that judges have overlooked, identifying ambiguities in the holdings of cases, reconciling cases, rationally extending holdings to similar fact circumstances, and showing inconsistencies in doctrine. In writing these articles, tax scholars occasionally go outside legal conventions (at least they have done so more often than judges) in order to explicitly consider administrative practicality, the effect of a decision on business planning, and tax avoidance possibilities left open by a decision, but they never go far, and they never use such findings to systematically question the methodology of the courts.

The persistence of interpretive writing premised on formalistic theories of statutory interpretation is a mystery. The legal realists demolished formal logic and plain meaning in legal interpretation over fifty years ago. In response to the realists' charge that legal decisions are often arbitrary and partisan, and in an effort to redeem the ideal of the rule of the law, the "reasoned elaborators" of the 1950s and 1960s attempted to construct a theory of legal interpretation based on shared community purposes deduced from the relevant legislative enactment. It is now widely recognized, however, that in many respects reasoned elaboration was simply a reincarnation of formalist decision making, and that any theory of interpretation must account for the important part played by personal, political, and therefore subjective values in decision making.

This is not the place to develop a theory of interpretation in legal reasoning (and in any event I doubt if I could). However, without tracing the following points through to their philosophical assumptions, a comprehensive theory of interpretation would allow judges to postulate a range of plausible, alternative policy options for each interpretive issue; consider the consequences of each in terms of its effect on the allocation of resources, the fairness of the distribution of the tax burden, and administrative practicality; and choose the option that in the light of its consequences appears most consistent with the purpose of the legislation. In effect, the theory would allow judges to formulate what they consider the best rule to cover the case, given the broad purposes of the legislation. The theory would allow judges to assign a purpose to the legislation based upon such matters as the ordinary usage of the words in the statute, the general objectives of the statute, the context in which the provision was passed, the relationship of the provision to other provisions in the statute, and the reasonableness of the result. Judges would also be allowed to consider such matters as the potential for interaction between the court and Parliament on the issue (for example,



in resolving doubts the judge should be able to consider which of the affected parties have better access to the legislative process and thus the potential to have the court's decision reconsidered by Parliament), and the practice of Revenue Canada (for example, where the Department has adopted a practice in relation to the matter, the court should be able to consider the comparative institutional competence of itself and the Department in deciding what weight to place on this practice). Obviously, the theory could make no pretense at value neutrality but instead would require that value choices be expressly and coherently stated.

This brief review of the development of a theory of interpretation leads me to two points. First, and parenthetically, in spite of the voluminous literature, none of the issues in the jurisprudential debates about interpretation have been incorporated into the analysis of tax matters. Indeed, not only have methodological concerns been abstracted from most doctrinal writing, but even concepts that greatly clarify the issues in statutory interpretation, such as those developed by Reed Dickerson,<sup>38</sup> have generally not been used by tax commentators in writing on doctrinal issues. Second, and more importantly, only by postulating a theory of interpretation can the debate on whether doctrinal writing is scholarship be joined.

It is fashionable among some legal scholars to demean the contribution of doctrinal analysis and question whether it is scholarship at all: How does it differ from what judges and even brief-writers do? To avoid question-begging, whether it is scholarship can be reduced to a question of whether it is sensible to have researchers in the university writing such material.

If the formalist theory of judicial decision making were sound, there would be little justification for reserving a place in the university enterprise for legal scholars. No one today is fooled by Langdell's claim that law so conceived is an inductive science and therefore a legitimate part of university learning. More seriously, by pretending to show coherence or political impartiality where there is none, the theory serves to legitimize the power of the bench. Indeed, often the only point of writing in this tradition seems to be to see whether the author can rationalize a political compromise with more imagination than the judges themselves.

Properly conceived, however, judicial decision making, including that involving problems of statutory construction, is simply a form of public policy making. It is necessarily more constrained than public policy making in the legislative process since judges need only develop and

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<sup>38</sup> R. Dickerson, *The Interpretation and Application of Statutes* (1975).

apply a policy that will resolve the dispute between the parties before the court, and in resolving problems of statutory interpretation judges must develop policies that are consistent with the relevant legislative scheme. Furthermore, in formulating policies judges must take account of the well-known institutional limitations on judicial policy making. However, within these constraints doctrinal analysis is often as conceptually sophisticated and creative as what passes for non-traditional legal scholarship, and often involves interdisciplinary work of the most demanding kind.

In doing doctrinal research legal scholars are ostensibly engaged in the same intellectual exercise as brief-writers and judges. The same might be said, however, in comparing the work of academics in most other social sciences when doing research with policy implications, with the work of civil servants and others directly involved in the public policy-making process. The importance of doing doctrinal work in the universities is that in the legal domain legal scholars are the crucial actors in ensuring that the analytical tools developed, and the information about reality gathered, by other social scientists are used to clarify and inform the policy issues considered by courts. They must act as mediators between the university and the legal system to ensure that legal ordering is premised on social realities.

It has been suggested that legal decision making, and therefore doctrinal work, only deals with decisions of marginal impact; furthermore, that doctrinal work is largely a waste of time and energy since judges are motivated in reaching their decisions by a hidden agenda and therefore even a well-reasoned and documented scholarly article is unlikely to influence their decision making. However, in the tax area significant policy-making decisions have been delegated to the courts and there is ample evidence that the courts have been influenced by academic writing.

Although legal scholars discharge one of their most important responsibilities to the legal system and the evolutionary development of the law by critiquing legal decision making, it is also an important part of their obligation to the university enterprise. In assessing the judiciary's role in serving public needs and in influencing the public's perception of that role, legal scholars are undoubtedly the most influential intellectual elite in the country. Therefore, it is their responsibility to challenge judges to make their value judgments explicit, unmask hidden assumptions, and examine consequences. It is all the more crucial, therefore, that legal scholars do not act as apologists for judges by legitimizing an incoherent theory of the role of legal decision making, or by providing judges with more tools with which to obscure their values and assumptions.

### III. TAX POLICY

Both lawyers and economists write about issues of tax policy; therefore, it is a useful area within which to compare their contributions and examine the boundaries between the two disciplines. Since Canadian legal scholars have done very little writing on tax policy, I will largely refer to the work of U.S. legal scholars in making this comparison and in suggesting future areas of study for Canadian scholars.

In discussing tax policy, technical policy analysis and tax expenditure analysis must be distinguished. This distinction turns on the concept of tax expenditures, which was developed in the 1960s by the late Stanley Surrey, an American legal scholar, while he was the Assistant Secretary for Tax Policy in the U.S. Treasury Department.<sup>39</sup> It has been hailed as "the major innovation in tax and public finance during the last twenty or thirty years."<sup>40</sup> The essential insight embodied in the concept is that the *Income Tax Act* (or any tax act for that matter) contains, analytically, two kinds of provisions: technical tax provisions, which are structural provisions essential to implement the tax, and tax expenditures, which are not essential features of the normal tax system but are functionally equivalent to government spending programmes. Technical tax provisions must be analysed using tax criteria; tax expenditures must be analysed using budgetary criteria.

#### A. *Technical Tax Policy Analysis*

Every tax system has certain design features: a base that the tax is imposed on, units that are subject to the tax, a period of time over which each unit's base is calculated, rates that are applied to the base, and a procedure for imposing and collecting the tax. Technical tax policy analysis involves defining these structural elements of the normative or benchmark tax system.

The traditional article on technical tax policy begins by assuming or deriving the criteria to be used in analysing tax provisions. Since these criteria are derived from the fundamental precepts of a liberal, free market economy normally there is little disagreement about them.<sup>41</sup> They are commonly encapsulized within the concepts of equity, economic neutrality, and simplicity. A brief review of each will serve to highlight

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<sup>39</sup> For a description of the development of the concept see S.S. Surrey, *Pathways to Tax Reform* (1973).

<sup>40</sup> E. Kierans, "The Tax Reform Process: Problems of Tax Reform" (Winter 1979) 1 *Can. Tax.* 22.

<sup>41</sup> Compare J. Pechman, *Federal Tax Policy*, 4th ed. (1983) (an economist) with J.T. Sneed, "The Criteria of Federal Income Tax Policy" (1965) 17 *Stan. L. Rev.* 567 (a lawyer).

the respective contributions of lawyers and economists to their development.

### 1. Equity

Most commentators agree that a correct normative definition of income should ensure that similarly situated people are treated equally. Debate over this concept centres around what criteria should be used in measuring equality in this context, and how it should be applied to various transactions. Economists obviously addressed these normative issues long before legal scholars.<sup>42</sup> The central issue in public finance has always been the development of a theory to explain the level and pattern of goods and services to be provided by government. But if the government were to provide goods, goods in the private sector had to be foregone. Thus, it was natural for economists to search for a justification for determining whose satisfactions for private goods were to be reduced so that the satisfactions for public wants could be met. Notions of ability to pay based upon theories of equality of sacrifice and benefit theories dominated the voluminous economic literature on this subject until well into the 1900s. In 1938, Henry Simons, a professor of economics at the University of Chicago, published a short book, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy*. He began his book by briefly and ruthlessly dismissing utilitarian and other theories that suggested taxes should be related to “ability to pay” on the grounds that these theories required inter-personal comparisons of utility and assumed that money could be translated into units of satisfaction or well-being. Instead of relying upon utilitarian theories, he argued that market power should be used as the basic standard for defining personal income. He thus formulated what is now known as the Haig-Simons or accretion definition of personal income: “the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the balance of the store of property rights between the beginning and end of the period in question.”<sup>43</sup>

Since the publication of Simons’ book, discussions of practical income tax reform and policy invariably begin with the Haig-Simons definition of income. The debate then centres around such issues as whether government transfer payments, personal damages, scholarships, gifts, and

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<sup>42</sup> For a history of modern theories of taxation beginning in the late 1700s see H. Groves, *Tax Philosophers* (1974). Tax law did not become a subject of university law school study until after the passage and growth of the income tax in the U.S. and Canada, namely in the 1930s and 1940s.

<sup>43</sup> H.C. Simons, *Personal Income Taxation* (1938) at 50.

imputed income from consumer durables should be included in income under the definition; whether personal expenditures such as medical expenses, charitable donations, casualty losses, child care expenses, and dependant's allowances should be deductible in arriving at income; whether the Haig-Simons concept of income requires the individual or the family as the basic taxpaying unit; whether corporations should be separate taxpaying units; and whether income should be computed over one year or some longer period of time. Most of these discussions are normative and conceptual; an attempt is made to give sufficient content to the Haig-Simons definition of income so that conclusions about the design features of a tax system can be deduced. In debates of this kind — over the application of the income concept to practical tax policy issues — the writings of lawyers and economists are virtually indistinguishable.<sup>44</sup>

In recent years, the broad consensus among lawyers and economists concerning the value of the Haig-Simons concept of income as an ideal for tax reform has begun to break down. Although perhaps more scepticism has been expressed by economists than by lawyers, scholars from both disciplines have participated in the assault on the concept.<sup>45</sup> One of the earliest and most devastating attacks was made by Boris Bittker, a legal scholar, who argued that the Haig-Simons concept of income did not provide a normative basis for taxation, and to the extent that it did, it could not be operationalized. Therefore, the taxability of particular transactions had to be determined by an ad hoc weighing of all the relevant factors. The issues raised by Bittker were taken up by both legal scholars and economists.<sup>46</sup>

Applied price theory suggests that the notion of equity underlying the Haig-Simons formula is vulnerable on another ground when used

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<sup>44</sup> For examples of conceptually sophisticated articles by legal scholars on the application of the Haig-Simons concept of income see W.D. Andrews, "Personal Deductions in an Ideal Income Tax" (1972) 86 Harv. L. Rev. 309 (medical expense deduction and charitable contribution deduction are justifiable under Haig-Simons ideal); M.G. Kelman, "Personal Deductions Revisited: Why They Fit Poorly in an 'Ideal' Income Tax and Why They Fit Worse in a Far From Ideal World" (1979) 31 Stan. L. Rev. 831 (taking the opposite position); M.J. McIntyre & O. Oldman, "Taxation of the Family in a Comprehensive and Simplified Income Tax" (1977) 90 Harv. L. Rev. 1573 (Haig-Simons dictates family unit taxation); Schmalbeck, "Income Averaging after Twenty Years: A Failed Experiment in Horizontal Equity" [1984] Duke L.J. 509 (if income is measured in terms of utility of sacrifice, the one year accounting period for determining income is less arbitrary than commonly thought); M.J. McIntyre, "An Inquiry Into the Special Status of Interest Payments" [1981] Duke L.J. 765; D.A. Kahn, "Accelerated Depreciation — Tax Expenditure or Proper Allowances for Measuring Net Income?" (1979) 78 Mich. L. Rev. 1; and W.J. Blum, "Accelerated Depreciation: A Proper Allowance for Measuring Net Income?!!" (1980) 78 Mich. L. Rev. 1172.

<sup>45</sup> For an excellent review of the various challenges to the Haig-Simons concept, and a defence, see J.G. Head, "The Comprehensive Tax Base Revisited" (1982) 40 Finanzarchiv 193.

<sup>46</sup> See B.I. Bittker *et al.*, *A Comprehensive Income Tax Base? A Debate* (1968).

to advocate tax reform: the concept does not take account of tax incidence and shifting. When the income from an asset is given favorable tax treatment, the price of the asset can be expected to increase. Thus the tax savings will be competed away by being capitalized in the price of the asset. This would suggest that once the economy has adjusted to deviations from the Haig-Simons definition income inequities are created only when subsequent tax changes are made. Again, this aspect of tax equity has been noted by both legal scholars and economists.<sup>47</sup>

Another economic concept that both legal scholars and economists have recognized as having important implications for at least partial tax reform based on the Haig-Simons concept of income is the economic theory of the second best. As applied to income tax, the second-best paradox would suggest that if some departures from the "best" tax system (one based on Haig-Simons) are necessary for administrative or other reasons, the next-best system may not be the one whose individual features most closely resemble the features of the best system.<sup>48</sup>

Two further aspects of the Haig-Simons concept have been challenged by economists, but have not yet been addressed by legal scholars. First, growing out of concerns raised in the public choice literature, economists have argued that the concept is deficient since it does not rest upon an explicit theory of political rule making, and in particular it assumes that the tax system can be designed independent of concerns about the optimal supply of public goods.<sup>49</sup> Second, economists have challenged the theoretical basis of the equity claim underlying the concept.<sup>50</sup>

It is difficult to generalize from this brief review about the respective roles of lawyers and economists in developing and applying concepts of tax equity. However, the similarities of most of the work of American legal and economic scholars in this area is notable. In recent years, though, economists have brought increasingly sophisticated economic theories to bear on the problem. Those legal scholars who have participated in

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<sup>47</sup> See, for example, B.I. Bittker, "Effective Tax Rates: Fact or Fancy?" (1974) 122 U. Pa. L. Rev. 780; B.I. Bittker, "Equity, Efficiency and Income Tax Theory: Do Misallocations Drive Out Inequities" (1979) 16 San Diego L. Rev. 735; M.J. Graetz, "Assessing the Distributional Effects of Income Tax Revision: Some Lessons from Incidence Analysis" (1975) 4 J. Leg. Stud. 351; M. Feldstein, "On the Theory of Tax Reform" (1976) 6 J. Pub. Econ. 77.

<sup>48</sup> See B.I. Bittker, "A Comprehensive Tax Base as a Goal of Income Tax Reform" (1967) 80 Harv. L. Rev. 925 at 984; G. Brennan, "Second Best Aspects of Horizontal Equity Questions" (1972) 27 Pub. Finance 282.

<sup>49</sup> See J.M. Buchanan, "Taxation in Fiscal Exchange" (1976) 6 J. Pub. Econ. 17; G. Brennan & J.M. Buchanan, "Towards a Tax Constitution for Leviathan" (1977) 8 J. Pub. Econ. 255.

<sup>50</sup> See M. Feldstein, "On the Theory of Tax Reform" (1976) 6 J. Pub. Econ. 77; R.A. Musgrave, "ET, OT and SBT" (1976) 6 J. Pub. Econ. 3.

the on-going debate have been able to do so because they have educated themselves in technical economic theory.

## 2. Economic Efficiency

The interest of economists in the economic effects of tax is obvious: taxes effect relative prices; therefore, determining their incidence and resource allocation effects is simply an exercise in applied price theory. Economists have developed theories, based on basic price theory, about the effect of tax laws on labour supply, supply of savings, risk-taking, investment decisions, corporate financial policy, the distribution of income, and so on. Through this research they have also hypothesized about the aggregate effects of taxes on such variables as relative prices, outputs, profits, and industry structure. This kind of theorizing obviously yields empirically falsifiable propositions, and a good portion of the work of economists in tax policy consists of attempting to test theories about the economic effects of taxes. Fairly recently, this analysis has developed from partial-equilibrium frameworks to more sophisticated general-equilibrium models.

Complicated theorizing about, and the empirical testing of, the economic effects of taxation is obviously the work for economists. However, although not undertaking the empirical work themselves (and if they were to do so they would appear to gain little advantage from their legal training), legal scholars have used economic analysis and the empirical findings of economists to clarify tax policy issues and to support empirical assertions. In the United States, a considerable amount of recent legal scholarship frames issues and formulates arguments in economic terms explicitly and makes extensive and sophisticated use of empirical findings reported in the economic literature. By way of example, economic analysis was relied upon extensively in articles by legal scholars on the case for a consumption tax,<sup>51</sup> the problem of formulating transition rules for tax changes,<sup>52</sup> the case for treating financial intermediaries alike for tax purposes,<sup>53</sup> and the case for integrating the corporate and shareholder

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<sup>51</sup> See W.D. Andrews, "A Consumption-Type or Cash Flow Personal Income Tax" (1974) 87 Harv. L. Rev. 1113; M. Kelman, "Time Preference and Tax Equity" (1983) 35 Stan. L. Rev. 649.

<sup>52</sup> See M.J. Graetz, "Legal Transitions: The Case for Retroactivity in Income Tax Revision" (1977) 126 U. Pa. L. Rev. 47.

<sup>53</sup> R.C. Clark, "The Federal Income Taxation of Financial Intermediaries" (1975) 84 Yale L.J. 1603.

tax.<sup>54</sup> As more legal scholars become trained in economics, this work will undoubtedly become increasingly sophisticated.<sup>55</sup>

In addition to using basic economic analysis and relying upon the empirical findings of economists to clarify the consequences of policy choices, legal scholars can play a number of other important roles in this co-operative research programme, such as ensuring that economic findings are not misused;<sup>56</sup> assisting in defining the limitations of what economists claim they know and in identifying policy questions not amenable to meaningful economic analysis;<sup>57</sup> and pointing out real world conditions and institutions that are not adequately accounted for in the simplified models that economists frequently use in studying casual relationships.<sup>58</sup> Lawyers can also ensure that value judgments and dis-

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<sup>54</sup> See A. Warren, "The Relation and Integration of Individual and Corporate Income Taxes" (1981) 94 Harv. L. Rev. 719.

<sup>55</sup> It is interesting to compare, for example, two leading articles on the tax exemption for nonprofit corporations, one written by legally trained scholars, the other by a scholar teaching in a law school but with both formal legal and economic training. B.I. Bittker and G.K. Rahdert, two legally trained scholars, provide a rationale for the exemption of nonprofit corporations from corporate income tax based largely on the basis that such corporations have no "income" as that concept is used in income tax law. "The Exemption of Nonprofit Organizations from Federal Income Taxation" (1976) 85 Yale L.J. 299. Their argument is based largely on analogies and a demonstration of the difficult technical problems that would follow if such entities were taxable. By contrast Hansmann, a legal scholar with both formal legal and economic training, provides an economic efficiency rationale for the exemption. H. Hansmann, "The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation" (1981) 91 Yale L.J. 54. He argues that the exemption is justified on the grounds that there are allocation biases inherent in the nonprofit corporations sector, namely imperfect access to capital, which the exemption roughly offsets. The author provides a detailed narrative description of the economic analysis of his argument and then in an appendix he illustrates and clarifies his argument by what he refers to as a "simple" mathematical model.

For extensive use of economic analysis by another legal scholar see T.C. Heller, "The Importance of Normative Decision-Making: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence — As Illustrated by the Regulation of Vacation Home Development" [1976] Wis. L. Rev. 385 (Heller's main point is to show that while economic analysis does permit a better understanding of conflicting goals, it cannot provide a determinative, value-free answer for policy choices); T.C. Heller, "Is the Charitable Exemption from Property Taxation an Easy Case? General Concerns about Legal Economics and Jurisprudence" in D. Rubinfeld, ed., *Essays on the Law and Economics of Local Governments* (1979) at 183; T.C. Heller, "The Theory of Property Taxation and Land Use Restrictions" [1974] Wis. L. Rev. 751.

<sup>56</sup> See, for example, Bittker's review of the flimsy economic evidence that was being widely used in the late 1960s to argue that the deduction for charitable contributions did not provide an incentive for additional giving. B.I. Bittker, "Charitable Contributions: Tax Deductions or Matching Grants" (1972) 28 Tax L. Rev. 37.

<sup>57</sup> See, for example, W.A. Klein, "The Incidence of the Corporation Income Tax: A Lawyer's View of a Problem in Economics" [1965] Wis. L. Rev. 576.

<sup>58</sup> By way of a simple example, economists frequently construct arguments relating to a consumption tax on the basis of the equivalence of yield exemption to a cash flow income tax. See U.S. Department of the Treasury, *Blueprints for Basic Tax Reform* (1977) 127-28; D.F. Bradford, "The Choice Between Income and Consumption Taxes" (1982) 16 Tax Notes 715 at 718-19. Professor Graetz has shown that a host of implausible assumptions are in fact necessary for the equivalence to hold. See M.J. Graetz, "Expenditure Tax Design" in J.A. Pechman, *What Should Be Taxed: Income or Expenditure?* (1980) 161 at 172-75.



tributional choices are made explicit in tax policy analysis. These matters are often decisive in policy making and yet because they are beyond the competence or pretense of economic theory they are frequently ignored or given little weight by economists. Particularly in recent years, economists have become preoccupied with the efficiency costs of tax.<sup>59</sup> Most efficiency loss is caused because of high taxes on the rich in general and on income from capital in particular. Thus many economists have called for lower marginal tax rates on the rich or for the adoption of a consumption tax. It is imperative that legal scholars ensure that normative and value judgments are not ignored in this debate.<sup>60</sup>

Public finance has undergone an enormous change over the last ten or twenty years. Until the middle 1960s, public finance theory rested upon the fairly straightforward application of price theory; empirical testing was rudimentary. Most analyses of tax proposals used partial-equilibrium analyses. That is to say, in predicting changes in taxpayer behaviour induced by tax system changes only a few relevant effects were considered. Now, however, economists are developing sophisticated simulation models that attempt to incorporate every possible behavioural response to alternative tax rules. Using these complex general-equilibrium economic models, economists have attempted to estimate the ultimate effect of tax law changes on resource allocation and income and wealth redistribution. For example, in 1983 the first study was published that used a general-equilibrium model in estimating the effects of replacing the U.S. income taxes with various consumption tax alternatives.<sup>61</sup> Often the results of these studies are counter-intuitive, or at least would not be obvious from only a partial-equilibrium analyses. This approach is

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<sup>59</sup> See F. St.-Hilaire & J. Whalley, "Recent Studies of Efficiency, and Distributional Impacts of Taxes: Implications for Canada" in W.R. Thirsk & J. Whalley, eds., *Tax Policy Options in the 1980s* (1982) at 23; S.L. Winer, "The Social Cost of Taxation and its Implications for Policy" in A.M. Maslove, ed., *How Ottawa Spends: 1985: Sharing the Pie* (1985) at 162.

<sup>60</sup> Generally, in many areas of tax policy, economists stress economic efficiency considerations while legal scholars have expressed normative concerns. For example, in the debate over the consumption tax the following articles by legal scholars stressed equity concerns: A. Gunn, "The Case for an Income Tax" (1979) 46 U. Chi. L. Rev. 370; A. Warren, "Would a Consumption Tax Be Fairer Than an Income Tax?" (1980) 89 Yale L.J. 1081; and B.K. Dyer, "The Relative Fairness of the Consumption and Accretion Tax Bases" [1978] Utah L. Rev. 457. In the debate over the proper filing unit, compare H.S. Rosen, "Is It Time to Abandon Joint Filing?" (1977) 30 Nat'l Tax J. 423 (an economist) with M.J. McIntyre & O. Oldman, "Taxation of the Family in a Comprehensive and Simplified Income Tax" (1977) 90 Harv. L. Rev. 1573 (legal scholars). Another example involves the child care deduction. Lawyers usually argue about the deductibility of child care expenses largely on conceptual grounds — whether it is a cost of earning income or not. An economist has argued the case on efficiency grounds. See M. Krashinsky, *Day Care and Public Policy in Ontario* (1977).

<sup>61</sup> See D. Fullerton, J.B. Shoven & J. Whalley, "Replacing the U.S. Income Tax with a Progressive Consumption Tax: A Sequenced General Equilibrium Approach" (1983) 20 J. Pub. Econ. 3.

not appropriate for all types of tax policy issues, the technology is in its infancy, and the methodology has been subject to severe criticism. However, tax policy discussions will take on a new direction as these models are further developed. It will become even more necessary that legal scholars become knowledgeable in economic analysis. Otherwise they will be left out of an important aspect of the tax policy debate.

### 3. Simplicity

An important, and in many instances an overriding, consideration in designing a technical tax structure is simplicity. This criterion embraces a long list of specific concerns such as the need for tax rules that impose low administrative and compliance costs, that are understandable and predictable, that are difficult to avoid and evade, and that allocate appropriate decisions to the courts and tax administrators. In applying this criterion to tax policy problems lawyers have, of course, an important role. They are presumably experts in assessing the administrative problems of implementing tax reform, in proposing alternative legislative techniques for dealing with technical tax problems, and, in general, in analysing the range and matrix of rules necessary for social control. Furthermore, since law involves ordering behaviour by verbal formula, tax lawyers should be experts on the pervasive problem of the form that legal pronouncements should take. For example, one of the most recurring issues in tax law is whether legislation should be drafted in clearly defined, highly administrable, particular rules or whether it should be drafted in the form of more general standards. Also, tax lawyers should know when tax legislation can rely upon private law concepts and when it should be drafted directly in terms of economic consequences. These issues can only be analysed by someone who understands such matters as the tax avoidance possibilities that might arise under different proposed rules, the nature of legal concepts, and the institutional limitations on judicial and administrative decision making. However, even here legal scholars undoubtedly have a great deal to learn from other disciplines, such as public administration. Indeed, one of the better texts on the role of administration in the policy process, written by a public administrator, draws heavily on examples in the tax field in demonstrating types of problems that are not amenable to legislative solution.<sup>62</sup>

Technical tax policy analysis involves a careful weighing of equity, efficiency, and simplicity considerations. Generally, American legal

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<sup>62</sup> C.C. Hood, *The Limits of Administration* (1976).

scholars have engaged in such analysis at an extremely sophisticated level, drawing on economics and other disciplines where they were relevant. Although a number of significant studies on tax policy have been published by Canadian tax scholars,<sup>63</sup> this type of writing is not in the mainstream of tax scholarship in the same way that it is in the United States. Furthermore, few of the articles published by Canadian tax scholars reflect the interdisciplinary sophistication that is now commonplace in leading U.S. articles. Clearly, there is a large agenda here for Canadian tax scholars.

### B. *Tax Expenditures*

As even the brief discussion above illustrates, a serious analysis of technical tax provisions necessarily takes legal scholars deep into the disciplines of economics, probably public administration, and perhaps even philosophy. An analysis of tax expenditure provisions takes them even further afield from traditional doctrinal concerns.

Tax expenditure provisions in the *Income Tax Act* have no relation to the normative structure of the tax system; the *Act* would be complete without them. Instead, their purpose is to achieve non-tax, social or economic policy objectives. In most cases they are functionally equivalent to a direct government spending programme. For example, the purpose of the tax credit for research and development (providing, for example, a \$50 tax reduction for every \$100 spend on research and development) is not to increase the equity, efficiency, or simplicity of the tax system, but instead to increase investment in research and development by subsidizing its undertaking. An equivalent subsidy could have been provided through a direct spending programme.

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<sup>63</sup> See in particular, J. Willis, *The Mitigation of the Tax Penalty on Fluctuating or Irregular Incomes* (1951) (this remains one of the most insightful analyses of the problem of averaging); G. Bale, "The Mitigation of the Tax Penalty on Fluctuating Incomes Proposed in the White Paper" (1970) 18 Can. Tax J. 199; G. Bale, "The Tax Reform Bill and the Problem of Income Fluctuation" (1971) 19 Can. Tax J. 487; G. Bale, "The Interest Deduction Dilemma" (1973) 21 Can. Tax J. 317 (a much cited article that was the first to clarify many of the conceptual difficulties with this deduction); G. Bale, "The Interest Deduction to Acquire Shares in Other Corporations: An Unfortunate Corporate Welfare Tax Subsidy" (1981) 3 Can. Tax. 189; K.A. Lahey, "The Taxation of Security Transactions — I: Policy Analysis and Canadian Treatment" (1980) 25 McGill L.J. 478; J. London, "Tax and the Family," background paper prepared for the Law Reform Commission (1975); P.B. Singer, "The Rollover Provisions in Respect of Corporate Reorganizations Provided Under the Income Tax Act: Efficiency and Equity as Policy Considerations" (1983) 31 Can. Tax J. 569; B.J. Arnold, "The Taxation of Controlled Foreign Corporations: A Comparison of Information-Gathering Mechanisms in Canada, France, the United Kingdom, the United States and West Germany" (1983) 31 Can. Tax J. 942; B.J. Arnold, "Partnership and Foreign Affiliate Rules" (1983) 31 Can. Tax J. 353; B.J. Arnold, "An Analysis of the Amendments to the FAPI and Foreign Affiliate Rules" (1983) 31 Can. Tax J. 183. (These three articles by Brian Arnold are part of a major project that he has undertaken on the taxation of foreign affiliates. The study identifies the objectives of taxing the income of controlled foreign corporations, the problems that such a system of tax rules has to deal with, the effectiveness of the Canadian rules, and how other tax systems have dealt with these problems. It will be a major contribution to tax policy analysis in this area.)

Since tax expenditures are not part of the technical tax system, in analysing them tax analysts cannot apply traditional tax criteria — equity, economic efficiency, and simplicity — but instead must apply budgetary criteria, the same criteria that are normally used in analysing spending programmes. The following policy questions, which may be asked about each tax expenditure, indicate the broad range and depth of tax expenditure analysis.

What government objectives are being pursued by use of the tax expenditure? At one level this question can be answered simply in terms of the immediate problem at which the tax expenditure appears to be aimed. For example, the goal of the deduction for tuition fees could be said to be the promotion of higher education. However, analysis of the measure involves moving from this detail to a more conceptual plane. Traditionally, government intervention in the allocation of resources in a market-oriented society is justified by reference to a failure in the market to provide the optimal amount of the good or service in question. Markets are assumed to promote efficiency, but only if, among other things, information is fully shared, transaction costs are insignificant, no participant can influence prices, the actions of the parties to an exchange do not affect the welfare of others, and the commodities involved in the exchange are not public goods (that is, they do not deliver external economies). If these characteristics are not present in a market, government action might be called for. As a guide to government action, this microeconomic model falls short in a number of important respects; however, unless a tax expenditure can be justified solely on distributional grounds, analysis of it must at least begin by determining the underlying market problem that it addresses.

If the need for government intervention is established, and if the objective has a high enough budgetary priority to justify the expenditure of government funds, then a choice of the appropriate form of intervention must be made. Is a tax expenditure an appropriate instrument or should some other government instrument be used? The number of governing instruments is almost infinite; they fall, however, broadly into four categories: (1) instruments that improve the working of the market by removing information and transaction costs; (2) forms of regulation requiring individuals and firms to behave in specified ways under the threat of a sanction; (3) incentives that influence the way that individuals and firms behave; and (4) the direct provision of a particular good or service. When a number of plausible alternative policy instruments have been formulated, the consequences of each alternative course of action must be predicted. Obviously, models or other abstractions from the real world must be used to make informed estimates of these consequences. Finally, the outcome of each alternative must be measured against the criteria normally used in selecting the appropriate governing instrument,

including target efficiency, the opportunity for budgetary control, provision for feed-back and for built-in learning adjustments, take-up ratios, the adequate delivery of benefits, the need for low administrative and compliance costs, and the political viability of the instrument.

The tax expenditure concept reveals, and this was the essential insight of Stanley Surrey and others in the U.S. Treasury who developed the concept during the 1960s, that many if not most of the problems in tax reform — at least most of the major tax reform problems debated over the past three decades — are really spending reform problems.<sup>64</sup> Thus, in evaluating tax reform proposals, if tax scholars continue to stress only the traditional tax criteria of equity, neutrality, and simplicity, while others stress the need for government assistance to accomplish perceived national goals, the contribution of tax scholars will be largely irrelevant. As the questions posed above disclose, however, any serious thinking about tax expenditures involves the legal scholar in the full range of the policy analyst's tasks.

A tax scholar's analysis of tax expenditures might be more modest than the full-scale analysis suggested above. For example, because of their intimate knowledge of the technical imperatives of the tax system, tax scholars might restrict their inquiries to the conceptual problems of identifying tax expenditures, measuring their cost, proposing methods of controlling them, and criticising them in order to make them more equitable, cost-effective, and easy to administer. The danger of this type of partial analysis is, however, that the methodological requirement that tax expenditures be treated as given can surreptitiously become an implicit assumption. That is to say, the analysis will be taken to imply that all is well if the tax expenditure is carefully designed. This is likely to be false in most cases. Almost invariably a non-tax instrument can be designed that is more efficient and equitable than a comparable tax expenditure.

American legal scholars have engaged in a considerable amount of research analysing and developing the tax expenditure concept.<sup>65</sup> In addition, numerous studies analysing specific tax expenditures, using the methodology described above, have been undertaken.<sup>66</sup> Canadian tax law

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<sup>64</sup> S.S. Surrey, *Pathways to Tax Reform* (1973).

<sup>65</sup> Most of the recent literature is referred to in S.S. Surrey & P.R. McDaniel, *Tax Expenditures* (1985).

<sup>66</sup> See, for example, B. Wolfman, "Federal Tax Policy and the Support of Science" (1965) 114 U. Pa. L. Rev. 171; P.R. McDaniel & A.S. Kaplinsky, "The Use of the Federal Income Tax System to Combat Air and Water Pollution: A Case Study in Tax Expenditures" (1971) 12 Bos. C. Indus. & Comm. L. Rev. 351; P.R. McDaniel, "Study of Federal Matching Grants for Charitable Contributions" in *Research Papers Sponsored by the Commission on Private Philanthropy and Public Needs* (1977), vol. 4, 2417; J.K. McNulty, "Tax Policy and Tuition Credit Legislation: Federal Income Tax Allowances for Personal Cost of Higher Education" (1973) 61 Cal. L. Rev. 1.

scholars, on the other hand, have not made any significant contribution to tax expenditure analysis.<sup>67</sup> Clearly if there is to be meaningful tax reform, and more creative solutions to public problems, those who inform the public policy debate, in particular tax scholars, must be prepared and equipped to engage in the full range of analysis suggested by the tax expenditure concept.

#### IV. PRODUCTION OF SCIENTIFIC KNOWLEDGE

Above, it was urged that Canadian tax law scholars should become more involved in writing about policy making aimed at assisting official decision makers in making 'better' decisions. It was also suggested that such policy analysis should ensure that alternatives to the policy decisions that are embedded in the *Income Tax Act* are systematically canvassed and that the costs and benefits of each alternative are comprehensively defined. The audience for such writing is those engaged in public debate, not, in the first instance, the "community of scholars." It is research designed as a guide to social action. An equally important task for legal scholars, indeed a purpose arguably more consistent with the ideals of scholarship, is to engage in research solely for the purpose of obtaining reliable information about human behaviour and the dynamics of social institutions and processes.

Whereas the aim of public policy analysis is to arrive at reasoned statements of commitment about desirable public purposes and the appropriate methods of achieving them, the goal of theory building is to increase understanding of political and social reality. The former is practical and normative, the latter is descriptive or explanatory. While the obligation of legal scholars to the profession dictates the former kind of research, their obligation to the university purpose of producing pure knowledge and basic research dictates the latter.

The number of researchable hypotheses that tax scholars might pursue is limitless, and the real genius of intellectual work involves formulating relevant hypotheses. However, simply by way of example, a number of interesting hypotheses are suggested by the curious fact that in spite of the widespread agreement on the goals of tax reform they are seldom met. Why do tax loopholes and expenditures develop and persist?

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<sup>67</sup> Although the concept has been alluded to in a number of articles, the only article that makes use of it to develop a sustained critique of a tax measure is K.A. Lahey, "The Small Business Credit: A Tax Expenditure Analysis" (Summer 1979) 1 Can. Tax. 29. See also the excellent "tax expenditure" analysis done by two non-tax Canadian legal scholars, S.D. Lyon & M.J. Trebilcock, *Public Strategy and Motion Pictures* (1982). (The main purpose of this study was to explain the particular choice of instruments, which includes a substantial tax expenditure, the government used to develop the Canadian film production industry.) And see more generally, M.J. Trebilcock *et al.*, *The Choice of Governing Instruments* (1981).

Legal scholars have devoted considerable energies attempting to explain the determinants of judicial behaviour and developing theories of the judicial role. Whether legal rules represent the influence of the prevailing scholarly ideas, popular sentiments, the autonomy of the legal system, or the class-bound attitudinal alliances of judges has been the subject of vigorous debate. Legal scholars, however, have contributed very little to assist in developing theories of legislative behaviour. The list of issues to be explored is almost endless: What is the relationship between public preferences and tax policy outcomes? Clearly general ideas and ideological factors provide an important contextual influence by suggesting basic categories of thought in which problems and solutions are perceived, but is their effect more immediate than that? What effect do institutional frameworks — the formal rules of the political system — have on tax policy outcomes? Does the need for some degree of harmonization between the federal government and the provinces that participate in tax-sharing arrangements inhibit tax reform or systematically bias it in some direction? What are the policy consequences of the institutional arrangements in place through which tax reform legislation passes, including the doctrine of budget secrecy, Ministerial responsibility, and the fact that tax bills do not go to standing committees?<sup>68</sup> How is tax reform constrained by environmental factors such as the fact that Canada is a small open economy, is highly dependent on foreign capital and international trade, and shares a common capital market with the United States? More fundamentally, what barriers are imposed on tax policy formulation by the fact that Canada is an industrialized, capitalist economy in which control over most major investment decisions, and therefore the potential for economic growth and full employment, rests in the private sector? Is the tax reform process biased in favour of those who control economic resources, and if so, what are the mechanisms and strategies through which such a bias is promoted? What has been the role of interest group behaviour, including that of the organized Bar or the Canadian Tax Foundation, in the tax reform process?<sup>69</sup>

These kinds of questions are of course addressed by political scientists and economists. Political scientists have developed a number of models to explain policy outcomes in the legislative process; economists have developed a model based largely on the self-interest of the proximate

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<sup>68</sup> Theorizing about this issue would seem particularly pertinent to lawyers since they have participated in numerous working parties to make changes in the process, and yet none seem to be predicated on a clear view of how outcomes would be altered.

<sup>69</sup> It is frequently asserted that not only has the tax bar withheld aid on tax reform matters, but also it has generally conducted itself as an ally of powerful, narrow-based interest groups. Right or wrong, an interesting hypothesis about its behaviour that bears critical study could be formulated.

decision makers. However, unless legal scholars also take part in the task of explaining variations in legislative policy outcomes, they will be excluded from one of the most significant aspects of the subject area they study. Moreover, because of their intimate knowledge of the details of the institutions and the process of reform, and because the precise effects of tax changes are often subtle, tax scholars would seem ideally placed in terms of their knowledge to make an important contribution to the theory of public policy making.

Another obvious area where there is a need for further research is in the application of feminist theory. With a couple of notable exceptions,<sup>70</sup> little attempt has been made to draw upon the recent work of feminist theorists in furthering our understanding of the tax system.

The criteria appropriate in judging scientific or social science knowledge are of course different than those used in judging the premises of policy arguments. This is not the place to review the debate on the appropriate standards to apply to theory building. However, whatever these standards, in Canadian tax law scholarship there is virtually no writing that indicates the author has engaged in the intellectual operations normally associated with scientific inquiry. The need for casual explanation, public testability in hypothesis formation, the operationalization of variables, parsimony in explanation, or other standard elements of at least positivistic social scientific thinking are completely absent from such writing.<sup>71</sup>

## V. ECONOMIC JUSTICE AND THE ROLE OF VALUES IN TAX SCHOLARSHIP

The most striking feature of the Canadian tax system is its discrimination in favour of the rich and owners of property and against everyone else. The overall tax system is viciously regressive: income

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<sup>70</sup> See K.A. Lahey, "The Tax Unit in Income Tax Theory" in E.D. Pask, K.E. Mahoney & C.A. Brown, eds., *Women, The Law and The Economy* (1985) at 273; L. Dulude, "Taxation of the Spouses: A Comparison of Canadian, American, British, French and Swedish Law" (1985) 23 *Osgoode Hall L.J.* 67.

<sup>71</sup> Again, there are a number of articles written by American tax scholars that attempt to engage in theory building. Perhaps the most self-conscious is R.C. Clark, "The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform" (1977) 87 *Yale L.J.* 90. Clark begins his article by posing the question of whether the "rigor traits" of the corporate income tax were "determined by a set of game [a 'few basic decisions'] fixed in its infancy," or whether it grew "in a passive, mechanistic way" with its parts "constantly shaped and re-shaped in response to the shifting pressures of a changing environment?" *Ibid.* at 90. The larger research agenda of which this paper is a part was explained in R.C. Clark, "The Interdisciplinary Study of Legal Evolution" (1981) 90 *Yale L.J.* 1238. The concepts of mechanism and evolutionism are of course commonly used in political inquiry. But, however suggestive these metaphors are, they would appear to be too ambiguous and vague to provide a hypothesis that could be justified or invalidated by experience.



from property bears a much lighter tax burden than income from labour; many high-income taxpayers and multinational corporations pay income tax at extremely low effective rates and in some cases not at all; the government spends billions of dollars in corporate tax expenditures and yet most have been shown to be ineffective and to have an adverse impact on the economy; the income tax subsidizes the lifestyles of the rich; and most personal tax expenditures benefit high-income taxpayers disproportionately more than low-income taxpayers. Yet while this tilt is the most striking feature of the tax system, the most striking feature of Canadian tax scholarship published in university law journals is the absence of any analysis — even mention — of it as class legislation. What role should legal scholars play in the so-called political debate about the class nature of the tax system?

The charge that is frequently made about scholarship that addresses, for instance, the influence of social class, political power, and the distribution of wealth on the law is that it is politicized scholarship. Scholarship, it is said, must be value-free: it should not reflect the political credo of the author. The notion that scholarship can adopt a value-neutral stance is such nonsense that its persistence can only be explained as itself reflecting a political act. Although the arguments are commonplace, at least one bears repeating here.

The most obvious way in which values influence scholarship is simply in what is written about. Values clearly shape the interests of scholars and influence the types of questions they ask. For example, a decision to write about establishing a tax haven for a Canadian multinational as opposed to the case for extending the FAPI rules to foreign sales and service corporations is a choice that is presumably made in part on the basis of the author's view of the needs of our society. A decision to write on a subject that assumes a particular value judgment is a decision not to write on a subject that opposes it. Consequently, to the extent that the assumptions underlying an article have political connotations, which they almost invariably have, writing the article is a substantive political act, no more neutral than the decision to address the assumptions directly. Also, simply writing about 'legal' tax problems is a political act in another way since it allows one to avoid debating the justness of the underlying structure of society. In a 'legal' article the focus is on the technical rules of the existing system. This serves to reinforce the legitimacy of the existing system and to further insulate it from criticism. Almost unconsciously we are lulled into assuming that the basic structure of the system is just. In a subtle way the message is given that there is something inevitable about the present social order. Thus, there is no such thing as 'disinterested' scholarship. The only pertinent

question is of what kinds of interests a scholar will serve. The claim of objectivity is simply an excuse for unaccountability.

Of course there are limits to what can be done. All tax scholars cannot be expected to question the basic ideological or other presuppositions of the tax system, or the meaning of life, every time they put pen to paper. It makes no sense to suppose that a person could simultaneously investigate the truth of a proposition and all the propositions presupposed by it. Yet, it does make sense to require some degree of awareness by all scholars of the ideological assumptions that inform their work if their activity is to be accepted as the pursuit of truth. Then, the level of analysis at which authors enter the debate must be left to depend on the strength of their feeling and good faith. However, the powerful interests at work in the law school that might cause scholarship to be biased in favour of established political power and corporate wealth should cause legal scholars to think hard about who sets their agenda.

Some writing in Canada has attempted to determine whether the tax system reflects the class nature of the Canadian economy. Most is found in *Canadian Taxation*, a journal whose express purpose was to "broaden the participation and views represented in the public discussion of tax policy issues."<sup>72</sup> A sample of the issues dealt with in that Journal will indicate the rich field of research that is largely unexplored by tax scholars (only one of the following articles was written by a tax scholar)<sup>73</sup>: the regressive nature of Ontario's health premium system,<sup>74</sup> the nature and regressivity of the tax on government sponsored lotteries<sup>75</sup> and the ideological purpose served by lotteries in a state of advanced capitalism,<sup>76</sup> the implicit biases of the tax credit for political contributions,<sup>77</sup> the regressivity of the medical expenses deduction,<sup>78</sup> the ineffectiveness of corporate tax expenditures (and the fact that they increase corporate concentration, result in a distribution of income to high-paying jobs and owners of capital, and tend to favour American-owned firms),<sup>79</sup> the

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<sup>72</sup> Editorial, "Broadening Participation in the Tax Reform Debate" (January 1979) 1 Can. Tax. at 2.

<sup>73</sup> G. Bale, *infra*, note 85.

<sup>74</sup> E. Tamagno, "Financing Health Services in Ontario" (January 1979) 1 Can. Tax. 3.

<sup>75</sup> K. McLoughlin, "The Lotteries Tax" (January 1979) 1 Can. Tax. 16.

<sup>76</sup> K. Mellos, "Regressive Tax and Liberal Ideology" (January 1979) 1 Can. Tax. 16.

<sup>77</sup> M. Meakes, "The Tax Credit for Political Contributions: Financing the Government Big Business Deserves" (Summer 1979) 1 Can. Tax. 51.

<sup>78</sup> E. Tamagno, "The Medical Expenses Deduction" (Summer 1979) 1 Can. Tax. 58.

<sup>79</sup> B. Baldwin, "The Case Against the Rapid Write-off of Capital Costs" (Fall 1979) 1 Can. Tax. 9 and K.N. Matziorinis, "The Effectiveness of Tax Incentives for Capital Investment" (1980) 2 Can. Tax. 172.

inadequacies of the refundable child tax credit as a child benefit program,<sup>80</sup> the regressivity of the overall tax system and a critique of normative tax incidence studies,<sup>81</sup> the case for abolishing tax assistance for private pension plans and the hypothesis that such plans benefit employers not employees,<sup>82</sup> the class nature of a tax-based incomes policy,<sup>83</sup> a comparison of social security and tax abuse showing, among other things, that the transfer system that serves the poor is characterized by petty rules, inadequate payments, and the humiliation of clients, and that these indignities are absent in the administration of tax allowances,<sup>84</sup> the effect of the interest deduction on corporate concentration,<sup>85</sup> and the balance of political forces and the outcome of tax reform.<sup>86</sup> This range of subjects illustrates that serious research into the nature of the tax system has hardly begun.

## VI. CONCLUSION

Based loosely on the above review and critique of tax scholarship, it can be asserted that future research in tax law should have the following characteristics. First, the research should reflect serious introspection about what are relevant and interesting questions for tax scholars to be addressing. In a world of scarce time and inadequate resources, and in which there are serious problems begging for social analysis, rare talents should not be squandered on inconsequential studies that simply assist in sustaining and legitimating the unequal distribution of power and wealth in our society. This is not a plea for a narrowly defined 'credo of relevance'. Indeed, in part, it is simply a plea that at least some part of the corpus of academic tax writing should have a point beyond explicating doctrine.<sup>87</sup> Perhaps all legal scholars should have to preface their articles with a short analysis of why they thought the

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<sup>80</sup> B. Kitchen, "The Refundable Child Tax Credit" (Fall 1979) 1 *Can. Tax.* 44.

<sup>81</sup> G.W. Szama, "Is the Tax System the Robin Hood of Our Time?" (1980) 2 *Can. Tax.* 16; M.C. Wolfson, "Tax Incidence in Canada: Robin Hood on Thin Ice" (1980) 2 *Can. Tax.* 123.

<sup>82</sup> H.J. Glasbeek, "A Proposal for a Non-Earnings Related Retirement Income Scheme" (1980) 2 *Can. Tax.* 186.

<sup>83</sup> S. Jelly, "Effect of Wage Controls on Collective Bargaining" (1981) 3 *Can. Tax.* 90; H.J. Glasbeek, "TIP: Another Weapon in the Class War Waged Against Workers" (1981) 3 *Can. Tax.* 94.

<sup>84</sup> R. Hasson, "The Cruel War: Social Security Abuse in Canada" (1981) 3 *Can. Tax.* 114.

<sup>85</sup> G. Bale, "The Interest Deduction to Acquire Shares in other Corporations: An Unfortunate Corporate Welfare Tax Subsidy" (1981) 3 *Can. Tax.* 189.

<sup>86</sup> R. Gardner, "Tax Reform and Class Interests: The Fate of Progressive Reform, 1967-72" (1981) 3 *Can. Tax.* 245.

<sup>87</sup> Indeed there might be a strong case in calling for a moratorium on doctrinal tax writing. The Canadian Tax Foundation produces six volumes a year of articles on tax law and planning. Compare that to the number of articles written in a year on social security law in which the interpretive issues are probably as great and the number of people affected by problems addressed by these interpretive issues probably much greater.

issues addressed by them were theoretically interesting or would transform knowledge into ways of meeting human needs.

Second, the research should be problem oriented. This means that most issues that arise in tax law should not be treated as dealing with 'tax law' problems but instead with underlying social and economic problems. The often self-imposed requirement that tax lawyers stick to tax law ensures that most problems cannot be followed from start to finish. It almost necessarily results in a truncated and conservative body of scholarship. In some sense it ensures the functioning in the academy of the dictum — divide and rule. To work on any serious problem requires one to follow the problem across subject areas. Legal scholars often lament the artificialities of the categories of law, but in legal writing there often seems to be a hidden compulsion to respect them.

Third, tax law scholarship must become increasingly interdisciplinary. Virtually none of the interesting or important problems in tax law can be resolved using only the concepts and techniques developed by jurists. The methodology of legal scholars must be multidisciplinary. In attempting to understand aspects of tax law, legal scholars must be prepared to bring to bear learning from whatever area promises to yield the greatest insights. This means of course that legal scholars will often find themselves dealing with issues in the same way that political scientists, economists or sociologists would. This does not mean that the boundaries between the disciplines are entirely irrelevant. Having scholars from different disciplines deal with similar problems means that different perspectives, habits of thought, and expertise will be brought to bear on the issue. Each will undoubtedly suggest different potential hypotheses, and reveal the significance of different aspects of the problem. However, the segregation of scholarly disciplines means that no one can speak to urgent social issues. As has been observed a number of times, there are no legal, economic, sociological, or political problems, just problems. In research the only permissible demarcation is between relevant and irrelevant conditions. Furthermore, when issues are narrowly defined the division of labour among the disciplines might be obvious. As the problem broadens, however, the less obvious it becomes that one discipline has any special competence over another.

Alfred Whitehead claimed that the justification for the university is to preserve the connection between knowledge and the zest for life.<sup>88</sup> Thus, fourthly, good scholarship should reflect the joy of exploring new ideas. Some articles in tax law are exhilarating, one puts them down with a dismaying sense of not having understood the subject until that moment. Some authors seem to have the knack of seeing things in an entirely different way, as though they were able to get a look at the subject from a perspective denied the rest

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<sup>88</sup> A.N. Whitehead, *The Aims of Education* (1929) at 93.

of us. The great bulk of tax law writing is, however, simply a burden on the memory. It is unimaginative, does not reflect an intellectual vision of the world, nor does it evoke wisdom and beauty. The danger of not indulging in the joy of taking ideas seriously is that not only does such a failure threaten an important part of the university enterprise, but also, at the end of the day, perhaps the joy of taking ideas seriously is the only enduring value of good scholarship.<sup>89</sup>

A final observation to tie together the two themes with which I began. I have no doubt that, if the horizons of Canadian tax law scholarship are to be enlarged, the abilities of legal scholars and their institutional environment will have to be changed along the lines suggested in *Law and Learning*.<sup>90</sup> I am not sure, however, that the gulf between the professional responsibilities of legal scholars, including their teaching responsibilities and their commitment to the university enterprise, is as wide as implied in that Report. As our notion of the role of legal reasoning has changed, it has become increasingly clear that a comprehension of social scientific knowledge is required to deal with many of the problems facing practicing lawyers and judges. Indeed, legal reasoning may be one of the most complex and subtle forms of public policy analysis, and, with allowance for the institutional constraints imposed by the judicial process, the full range of policy skills needs to be brought to bear on judicial decision making. Furthermore, only by involving law students in research that is relevant, problem-oriented, interdisciplinary, and joyous will they be provided with an intellectual base for life-long critical reflectiveness about legal institutions, the profession, and their own work.<sup>91</sup>

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<sup>89</sup> See A.A. Jeff, "Law and" (1978) 87 Yale L.J. 989 at 1011.

<sup>90</sup> *Supra*, note 1.

<sup>91</sup> See D.C. Bok, "A Flawed System of Law Practice and Training" (1983) 33 J. Leg. Ed. 570.

