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# Law and Learning Revisited: Discourse, Theory and Research

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# Law and Learning Revisited: Discourse, Theory and Research

## **Abstract**

The article first reviews the major lines of discussion following the publication of *Law and Learning*. It then focuses on the position of theory and research in legal education and scholarship and attempts to argue that law proper can neither be derived inductively from empirical positions, nor deductively from universal propositions but is a constituted account, a form of discourse, a pure theory; or in its negative expression a simulacrum dependent on recognition rather than reference. Its autonomy is thus purely formal and cannot be used to distinguish law substantively from other forms of discourse, such as science and politics which indeed give law its content.

# LAW AND LEARNING REVISITED: DISCOURSE, THEORY AND RESEARCH\*

BY JOHANN W. MOHR\*\*

The article first reviews the major lines of discussion following the publication of *Law and Learning*. It then focuses on the position of theory and research in legal education and scholarship and attempts to argue that law proper can neither be derived inductively from empirical positions, nor deductively from universal propositions but is a constituted account, a form of discourse, a pure theory; or in its negative expression a simulacrum dependent on recognition rather than reference. Its autonomy is thus purely formal and cannot be used to distinguish law substantively from other forms of discourse, such as science and politics which indeed give law its content.

## I. THE STRUCTURES OF THE ARGUMENT

The Report to the Social Sciences and Humanities Research Council of Canada (SSHRC) by the Consultative Group on Research and Education in Law was published in the spring of 1983.<sup>1</sup> A great deal of discussion has been generated by the Report; there

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<sup>1</sup> *Law and Learning*. Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Education in Law. (SSHRC, Minister of Supply and Services, Canada, 1983) (Chair, H.W. Arthurs). There have also been a host of background studies including: *Canadian Law Faculties: Sources of Support for Legal Research* (by John S. McKennirey, SSHRC, 1982); *Profile of Published Legal Research* (by Alice Janisch, SSHRC, 1982). Eight volumes of *Documentation* (SSHRC, 1981/82); *Four Reports on Regional Consultations* (Prairies, April 1981); Atlantic Provinces, June 1981; Ontario, November 1981; Quebec, December 1981). Following the Report appeared: *Reviews and Comments on Law and Learning* (SSHRC, July 1984) and *Additional Reviews of Law and Learning* (SSHRC, February 1985).

was a heated open forum at the Law Teachers Meeting of the Learned Societies in Vancouver,<sup>2</sup> and a National Conference on Legal Research and Education in Canada.<sup>3</sup> In July, 1984, the SSHRC published *Reviews and Comments on Law and Learning* and its 121 pages contain by no means all that had been written on the subject.<sup>4</sup> In February, 1985 *Additional Reviews of Law and Learning* appeared,<sup>5</sup> but from then on a search of the literature becomes difficult, since most of the references to the Report are contained in a variety of articles. Other developments could also be associated with the Report, such as the founding of the Canadian Law and Society Association.<sup>6</sup> Thus, there has been much activity during the first three years following the publication of the Report and no assessment at this time can be complete. This review will attempt to trace the major lines of the responses to the Report and develop further two aspects which are essential to legal scholarship and education: theory and research.

Responses vary a great deal in terms of perceptions, attitudes, and moods, and make visible strong contradictions in the assumptions of what the Report says. What *does* the Report say? This, of course, is a naive question. The field of discourse which has emerged could in fact serve as an exemplary case study for the

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<sup>2</sup> June, 1983. The major lines of critique and defense were already clearly visible at this forum. The major objections seemed to base themselves on the complaint that not enough credit had been given to the work done and the major defense was that the purpose of the report was not to celebrate the *status quo*, but to seek a new direction. The feeling that legal scholarship and legal scholars had been slighted comes through in a number of subsequent responses. The papers published in (1985) 23 Osgoode Hall L.J. were not yet available to me in writing this paper. John D. McCamus makes a similar observation and Harry Arthurs gives a further clarification.

<sup>3</sup> December, 1983. Besides a general review of the Report and the Initial Responses there were eight workshops, covering Funding, Research Strategies, Professional and Community Impact, Joint Ventures, Research Instruments, Prognosis, Graduate Studies and Prospects for an Academic Stream. See Proceedings, John McLaren, Univ. of Calgary, 1986.

<sup>4</sup> *Reviews and Comments*, *supra*, note 1.

<sup>5</sup> *Additional Reviews*, *supra*, note 1.

<sup>6</sup> Its first president, John McLaren of Calgary, had also been the organizer of the Forum and the National Conference.

present vogue of deconstruction in literary criticism.<sup>7</sup> It would be appropriate to apply structuralist methods to the analysis of this discourse since the Report itself deals largely with the structuring of legal research and education, focusing on context rather than specific forms of the content of law. The same holds for the four research reports published separately.<sup>8</sup> One could further apply consensus/conflict theories but this would first require determining the ground of consensus and the background of conflict. That the document is perceived to be a political one (small "p") emerges very clearly from a number of responses; from others it can be inferred. The several highly emotive responses cannot just be ascribed to wounded sensibilities or professional pride, although these too are at times obvious.

Generally, the Report expresses the historical and contextual assumptions on which its value judgments are based; on the other hand, responses rarely disclose their basic assumptions. This often leads to apparently contradictory preferential readings. For example, the *Initial Response, on Behalf of the Canadian Association of Law Teachers*,<sup>9</sup> notes that the members "overwhelmingly accept and endorse the principle thrust of the *Law and Learning Report*." It goes on to say:

We take the primary message of the report to be that the pursuit and enhancement of scholarly research in law in Canada deserves renewed attention, greater moral, material and institutional support, and a willingness to think about new administrative structures and other arrangements both within and outside the law faculties.<sup>10</sup>

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<sup>7</sup> Jacques Derrida, its major exponent, has not only strongly influenced literary criticism but also critical scholarship in the humanities and social sciences and recently law (See, for example, A. Hutchinson, "From Cultural Construction to Historical Deconstruction" (1984/85) 94 *Yale L.J.* 209). Deconstruction makes problematic the nature of texts which is not determined by either authorial intention or reader reception but by the disclosure of structures of perceptions and meanings which appear as differences (*différence/différance*).

<sup>8</sup> See *supra*, note 1, background studies.

<sup>9</sup> *Initial Response on Behalf of the Canadian Association of Law Teachers*. Joost Blom (President), University of British Columbia, 1983.

<sup>10</sup> *Ibid.* at 2.

The response then outlines those aspects of the Report on which there is "widespread consensus." A reading of these sections seems to suggest that there is indeed consensus on "greater moral, material and institutional support" for what is already being done and what the Report largely characterizes as "humane professionalism."<sup>11</sup> While the Report recognizes that there is a "formidable agenda of unfinished business," it finds that "there are signs that it is being seriously addressed."<sup>12</sup> However, its main thrust, as Law Teachers legitimately finds, has given rise to the "most widespread comment and criticism."<sup>13</sup> I say "legitimately," because an overview of the written responses and discussions indeed bears out the summary of contentious issues the Law Teachers' response provides.

This particular response, unlike a number of others, is carefully worded; it denotes what often appears as a highly emotive conflict in "Areas of Discussion" and states that "concern has been expressed about two groups of assumptions that the Report *appears* to make."<sup>14</sup> The "two groups" are in fact variations of one theme which re-emerges in the discussion of "two streams in legal education."<sup>15</sup> The theme is the relationship between academic and professional pursuits, and the tension therein. This is seen as the crux of the Report, and thus the focus of its strongest criticism, whether it is in the area of scholarly research versus professional formation, doctrinal or traditional research versus fundamental research, or finally two streams of legal education.

The Law Teachers' response tends to mitigate seemingly sharp if not violent differences. "Some of what these teachers see as highly coloured descriptions in the Report are no doubt due to

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<sup>11</sup> Report, *supra*, note 1 at 47ff.

<sup>12</sup> *Ibid.* at 133.

<sup>13</sup> *Supra*, note 9 at 6.

<sup>14</sup> *Ibid.* at 6 (emphasis added).

<sup>15</sup> *Ibid.* at 9ff.

the Consultative Group's desire to make their points forcefully.<sup>16</sup> They *are* forcefully made, because it is one of the major concerns of the Report that the consensus/collusion between intellectual and professional interests tends to exclude fundamental conflict/critique to the long term detriment of both academic and professional pursuits and especially of society as a whole. The very dialectic and genuine contradictions expressed in the Report must be addressed and one can only agree with the concluding statements of the Law Teachers:

The impetus that the "*Law and Learning*" Report gives to a renewal of research efforts, to experimentation, to rethinking legal education and legal scholarship, will be invaluable to the Canadian legal community. The Consultative Group deserves every praise for their efforts. The reservations, concerns and criticism that we have tried to describe in this – very summary – initial response spring from a concern that the controversial aspects of the Report should be clearly identified and discussed, so that they will not blunt the impact of the very clear call for renewal and for action that is the Report's principal theme.<sup>17</sup>

This particular response has been chosen as a starting point because it represents a consolidation of various appraisals and critiques carried on by the Law Teachers. Before undertaking a more detailed analysis, one further section of the critical part of this response should be considered. It is "experience in other jurisdictions" which was found to be inadequately investigated by the Report. This might be fair criticism (and appears as such in the response) if it did not invoke the spectre of a habitual process in this field: If you want new ideas, go to other jurisdictions. The Report bases itself squarely on what it sees to be the Canadian experience. This is not to say that once the ideas and the recommendations of the Report are in the process of being concretized, one should not look to other jurisdictions for experience with similar developments; it is surely time to extricate ourselves from a deeply ingrained colonial attitude. As it is, the Report is castigated by at least one response for its colonial attitude,

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<sup>16</sup> *Ibid.* at 7.

<sup>17</sup> *Ibid.* at 13.

especially in regard to leading American law schools.<sup>18</sup> The fact is that most of the legal academics in common law faculties have received their graduate education in the U.S. (Masters – 46%; Doctorate – 29%) and England (Masters – 28%; Doctorate – 48%) but few in Canada (21% and 13% respectively).<sup>19</sup> On the other hand, reviews from the U.S. and the U.K. seem to be much more generous in giving the Report indigenous status, expressing the wish that it should be replicated in the other jurisdictions.<sup>20</sup>

## II. FORMS OF INTERPRETATIONS

It may well be, as some responses to the Report seem to imply, that all is for the best in this best of all possible worlds and that we need only more of it; that there really is no conflict between received notions and fundamental enquiry. It may well be that law *is* a form of theology, of metaphysics in which received notions do have fundamental status and that its appropriate method therefore is careful doctrinal analysis. That its reasoning and its teaching is legitimately pre-Baconian, that the only place law can give to the vogue of science, and scholarship derived from it, is in the realm of fact and not of law, properly so-called. If this should be so, the critical and defensive posture of law teachers and law professionals cannot just be seen in terms of power and self-interest but must be accorded its own validity. If the very basis of law is the profession of authoritative pronouncements (giving witness to revelation) then the separation between scholarship and praxis, between academic and professional, is indeed misconceived. The Report does not claim that there is no relationship between the two. It continuously and strenuously insists that there is. However, it has

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<sup>18</sup> W.E. Conklin in *Reviews and Comments*, *supra*, note 1 at 37.

<sup>19</sup> Source: Survey of Canadian Law Professors, *supra*, note 1 at 64 (Q6A):

|        | Total | US | UK | Can | Other |
|--------|-------|----|----|-----|-------|
| L.J.M. | 169   | 78 | 48 | 36  | 7     |
| Doct.  | 31    | 9  | 15 | 4   | 3     |

<sup>20</sup> See, for example, the extensive review by I. Fletcher in (1984) 4 *Leg. Stud.* at 349.

a different conception of scholarship. "Law, in short, is an undisputed social fact, an obvious subject of scholarly inquiry."<sup>21</sup> Thus, it stresses predominantly interdisciplinary and empirical work, downgrading — as many respondents complain — doctrinal research. In "The Development of Legal Scholarship in Canada,"<sup>22</sup> the Report deplores its inability to give a full account of historical and jurisprudential legal scholarship in Canada, due to the paucity of materials. "However, if our impressionistic sketch at least provokes revisionist reviews and challenges, it will have served an important purpose."<sup>23</sup> It certainly received "revisionist reviews and challenges." Whether that served an important purpose remains to be seen.

Some of the responses to the Report, especially in their more vehement forms, are difficult to sustain in a close textual reading. There are repeated references to what may be called "authorial intention".<sup>24</sup> And yet, in a way peculiar to law, the Report, even in the most negative criticism, is treated like an authority although it claims to be exploratory. Its recommendations are halting and less than definitive, anticipating development rather than proposing detailed models for implementation. Rarely, however, is the project carried forward in the responses: rather it is treated like a case which sets dangerous or welcome precedents. And maybe it does. However, as in the interpretation of a case, (which actually means the interpretation of a judgment), the reading of particulars depends on the basic assumptions made about law, and the fundamental conceptions held; not only about law but about theory and practice and the relationship between the two. If law is seen predominantly as legal practice (cases) in need of theories to

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<sup>21</sup> *Supra*, note 1 at 3.

<sup>22</sup> *Ibid.* at 63ff.

<sup>23</sup> *Ibid.* at 63.

<sup>24</sup> It is a common practice to refer to a report by the name of the chairman of the committee or commission. In this particular case it was also perceived that Arthurs was the primary author and some responses guessed what he might have meant beyond what the Report actually said. (See for example, M. Weisberg, "On the Relationship of *Law and Learning* to Law and Learning" (1983/84) 29 McGill L.J. 155). I personally felt that the Report was far too conciliatory but was proven wrong by many of the responses and discussions.

maintain its purposive values of order, certainty, predictability, and finality, then positive doctrinal work will be seen as the hallmark of scholarship. If, on the other hand, law is seen as social practice, determined by and dependent on other social forces, then a critical theory is necessary to explain the very nature of "law" and its effects by questioning its values. Thus, for instance, critical legal scholarship focuses on the indeterminacy and uncertainty of legal outcomes when measured by doctrinal standards which are exposed as a cover for other values embodied in political ideology.

The academic/professional dichotomy is, at least to some extent, a second order problem. Every profession now tends to legitimate itself through its academic and educational underpinnings. There is no access now to the recognized professions except through university studies and one must keep in mind that in Canada, for law, this is a rather recent development. Conversely, most other academic pursuits now try to legitimate themselves by their professionalism: we now have professional philosophers, sociologists, historians — even professional writers. Academic legitimation is full of practical, relevant, and job oriented pursuits taking its orientation from the market, or that which the market is deemed to be or to become. The Report repeatedly stresses unmet needs for law in society and hence law-jobs which are not envisaged by present professional conceptions. Some responses see in the Report not only an anti-professional attitude but also an anti-academic one, especially when academic is understood in a traditional sense, such as doctrinal analysis.

The major controversies seem to arise from what may be characterized as conceptions of law as an open or closed system or in Kuhn's terms, as a struggle of paradigms.<sup>25</sup> The Report declares: "What we wish to stress at the outset is that law is shaped by culture, economics, history and technology and that in turn it helps to shape them."<sup>26</sup> This seems, on the surface, unproblematic and can be interpreted in various ways by various groups. However, the Report sharpens the problem by adding: "Law is thus at once an

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<sup>25</sup> T.S. Kuhn, *The Structure of Scientific Revolutions*, 2d ed. (Chicago: The University of Chicago Press, 1970) especially c. V.

<sup>26</sup> *Supra*, note 1 at 5.

exotic fossil and a commonplace living organism."<sup>27</sup> In other words, the law is both a closed system *and* an open one. The Report is even-handed by using expressions such as "fossil" on the one side and "commonplace" on the other. Its major thrust, however, is clearly towards opening the system:

But what efforts have we made to understand how law is made and administered, its impact on our economy, our political life, our social relationships, or its cultural significance? What attention have we devoted to the education of those who are concerned with law as scholars or public administrators, as journalists or critics?<sup>28</sup>

The issue of academic versus professional is not primarily an issue of allegiance to academic or professional demands. The Consultative Group which issued the Report consisted mainly of legal academics,<sup>29</sup> so did the Advisory Panel,<sup>30</sup> and the list of participants in the Regional Consultation.<sup>31</sup> As well, those submitting briefs<sup>32</sup> show a similar distribution. The terms of reference for the Consultative Group were, after all: "To examine and advise upon legal research and education in Canada." Most of the responses, critical as well as laudatory, come from the same quarters. The Report remarks:

Specifically we received no formal briefs from any professional, governmental or quasi-governmental body, for the most part not even a pro forma acknowledgement of our direct invitation to submit briefs, and a low rate of acceptance – and even

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* at 4.

<sup>29</sup> Of the eight members, five came from law faculties, one from political science, one was a judge and another a member of the federal Department of Justice (both with academic reputations). *Supra*, note 1 at viii.

<sup>30</sup> Of the 23 members of the Advisory Panel, 14 came from law faculties (two non-lawyers), three from other academic departments, two were judges and four practitioners. It was chaired by the then Chief Justice Bora Laskin. *Ibid.* at ix-x.

<sup>31</sup> Participants are listed in the Consultation Reports, *supra*, note 1.

<sup>32</sup> *Supra*, note 1 at 183-86.

a lower rate of attendance – by individuals associated with such bodies who were asked to join our regional consultations on a personal basis.<sup>33</sup>

The background studies, too, were directed to law faculties, legal scholarship and education. It is therefore no wonder (although it seemed to be a surprise for some) that the Report would focus on academic concerns and would try to increase their ambit.

The Report attempts to locate itself historically, an attempt which is curiously missing from many of the critical responses. This is no accident. As Marx once remarked: "Men make their own history, but they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past."<sup>34</sup> On the other hand, historians have often remarked on the tendency of law to present itself as not historical, even where it uses historical sources as authorities.<sup>35</sup> The lack of interest in legal history, especially in Canadian law schools, has been sufficiently lamented.<sup>36</sup> Historians of law are often puzzled by the connections legal historians make establishing continuity by ignoring differences in context and meaning. Many of what are espoused to be age-old and hallowed traditions of the common law turn out to be of rather recent origin, at least as far as their particular understanding is concerned. The question is not whether doctrinal is better or worse than empirical research or even whether it is more important. The question is what is missing and in need of change at a given historical juncture. Even if we grant an intellectual autonomy to law and hence to legal scholarship, education and practice, the need for re-interpretation is clear, although more pressing at some time than another, in some fields

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<sup>33</sup> *Ibid.* at 5-6.

<sup>34</sup> K. Marx, *The Eighteenth Brumaire of Louis Bonaparte*. I, para. 2.

<sup>35</sup> See, for example, D. Hay, "The Criminal Prosecution in England and Its Historians" (1984) 47 *Mod. L. Rev.* 1, esp. at 2.

<sup>36</sup> See, for example, G. Parker, "The Masochism of the Legal Historian" (1974) 24 *U.T.L.J.* at 279.

more so than in others.<sup>37</sup> Kuhn, for instance, distinguishes between "normal science as puzzle-solving," and "crisis and the emergence of scientific theories."<sup>38</sup>

### III. INTEGRITY, AUTONOMY AND BOUNDARIES

The Report has been repeatedly accused of denigrating the academic status, if not stature, of law schools and law teachers. Whether those have or have not adopted the common nomenclature of the university, they have for some time transformed themselves into law faculties and law professors. There is nothing in the Report that one cannot repeatedly hear in faculty offices and common-rooms, hallways, washrooms, and classrooms, by faculty or students. Even some of the most severe critics of the Report have been known to raise similar issues, albeit with somewhat different interpretations. The question is not – as it is often formulated, and in all fairness the Report does at times provoke such formulations – whether law faculties are academically better or worse than other faculties. Arguments can be made both ways, depending on the orientation one adopts. Isolationism and closed system thinking is not peculiar to law faculties. It is pervasive in almost all faculties and departments of the university and furthered by almost all disciplines in order to make claims on professional autonomy and turf. Among the social and behavioural sciences, it can be said that psychologists are no less prone to doctrinal squabbles and oriented more towards their own literature than to human needs; sociologists write and teach more the jargon of sociology than give expressions to social concerns; and economists are more fascinated by economics than the material well-being of all members of a society.

The problem of artificial boundaries, of more and more about less and less, of the reification of theoretical claims, of the generalization of specifics, of seeing the world through one lens

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<sup>37</sup> I have discussed this theme at greater length in "Criminal Law: Is There a Legal or Social Logic Left for Its Renewal?" in P. Fitzgerald, ed., *Crime, Justice and Codification* (Toronto: Carswell, 1986) at 31.

<sup>38</sup> *Supra*, note 25.

only, is part of our heritage of rational-instrumental reasoning. It leads to the production of *idiots savants* or *Fachidioten* for which we do not even have a good English word. It is, however, the *raison d'être* of industrial commodity production, a process for which the academy sees itself more and more in the business of supplying the human widgets? That even industrial production no longer needs them in the quantity supplied is a different point.

This scheme is not part of any special knowledge formation, expression, and transmission; on the contrary, this increasingly partialized knowledge no longer knows what it is a part of and so remains apart, and each part attempts to construct the universe in its own image. Interdisciplinary and cross-disciplinary studies which the Report stresses may make the isolation more obvious. Experience in other disciplines shows that what starts out as an inter- or cross-disciplinary endeavour soon becomes another enclave, indeed another discipline with its own language and mode of reasoning, its own adherents and promoters, or it fails, or both in rapid succession, whether they are specific combinations such as socio-biology or conglomerates such as criminology. Law has tended to keep some distance but is not exempted, as the proliferation of courses entitled "Law and ..." show. The very conjunction "and" indicates that there is a recognition that law meets all kinds of other disciplines and systems on its way. It also indicates, however, that their mutual autonomy is to remain intact. This, of course, is neither theoretically nor practically possible. Subjects such as "Law and Economics" have a definite theoretical impact on legal thinking, if they have any impact at all; and subjects such as "Law and Psychiatry" not only influence their mutual theories, but also practices, and often at the lowest common denominator.

Every philosophy from Plato to Hegel that is worth both its name and its recollection had to work out its own conception of law.<sup>39</sup> Every religion contains it. Science has appropriated the term for its own use. Ideology (this curious modern ball of wax of all three rolled into one) has to deal with it in one way or another, indeed has to adopt one form or another if it is to retain any claim

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<sup>39</sup> H. Cairns, *Legal Philosophy From Plato to Hegel* (Baltimore: John Hopkins Press, 1949).

on *praxis*. Marxism is a case in point; neither state nor law show any signs of withering away. Liberalism has taken the law so much for granted as its highest accomplishment that it takes it to be its base rather than its superstructure, which indeed it now is. This made it possible to dispense with a critical philosophy of law and replace it by a legitimizing legal philosophy; to dispense with a critical history and replace it by a legal history which would show its own continuity with scant reference to context. As the most elaborate systematic expression of a social and political philosophy of liberalism, law could also claim to be its own social and political science. It was well on its way to establish the kind of autonomy which is now so vigorously questioned.<sup>40</sup>

"The ideology of the law was crucial in sustaining the hegemony of the English ruling class."<sup>41</sup> This is an assertion somewhat different from those associated with the "rule of law." Somewhat different, because it does not deny that law has autonomy and that it constitutes a form of power; but only that it was not neutral, that it indeed served some purposes and that in its historical, social, and political context it expressed a system of beliefs which we now call ideology. The statement itself clearly expresses an ideological shift. If it had said: "The idea of law was crucial in sustaining the English form of social order," it would have been well within the rule of law conception. By introducing "hegemony" and "ruling class," it not only introduces concepts of power and social and political differentiation but also another ideological perspective which challenges what is taken for granted.

Critics of the Report often object to what they take to be a belittling of legal scholarship, and particularly doctrinal analysis.<sup>42</sup> This evidences a misunderstanding of the whole thrust and purpose of the Report. In essence, the Report argues that legal scholarship

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<sup>40</sup> In The English context this becomes especially apparent in the connections of the Bentham, Mill, Austin and Stephen families and their relationship to the Colonial Office.

<sup>41</sup> D. Hay, "Property, Authority and the Criminal Law" in Hay *et al.* eds, *Albion's Fatal Tree*, (London: Penguin, 1975) 17 at 56.

<sup>42</sup> See, for example, T.A. Cromwell, "In the Matter of an Arbitration Between the Union of Doctrinal and Theoretical Legal Scholars and the Consultative Group on Research and Education in Law" (1984) 22 Osgoode Hall L.J. 761.

has been too narrowly circumscribed, and that much of legal scholarship flows from the perceived need of current practice, current education, and what we currently call law reform, and not enough flows from the kind of enquiry which reaches out to other disciplines and other methods, and indeed, other needs in society. The Report positively notes "the significant efforts made by law professors to produce law reform and other commissioned studies, and teaching materials;" and it accepts "the intrinsic legitimacy of each of these other types of writing," and concedes that they "may also reveal high intellectual attainment."<sup>43</sup> In terms of its own thrust, however, it also notes: "But in important respects they are not scholarly. They too are prepared for a particular purpose that necessarily constrains the direction, methodology, scope, length and intensity of the inquiry."<sup>44</sup> One could have assumed that, particularly for academics, this would be self-evident. Judging from the response, it obviously is not.

#### IV. PERCEPTIONS OF SCHOLARSHIP

In a sense, even the negative responses legitimate the Report. To the extent to which they are overly defensive they disclose what the Report in fact castigates. The point is not whether one agrees or disagrees with certain directions the Report indicates in terms of legal scholarship or education. These should indeed be discussed critically because they are by no means clear at this point in time. The professional/academic dichotomy only makes sense to the extent to which it spells out the limits of these pursuits. A professional opinion is not likely to be appropriate if it is based on an entirely different set of assumptions from those current in practice. Equally, the more fundamental scholarly work which the Report finds in short supply is not likely to answer "practical" questions in the present process. The doctrinal/interdisciplinary dichotomy is only fruitful to the degree it sheds light on its respective assumptions. So, for instance, much of the work in

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<sup>43</sup> Report, *supra*, note 1 at 136.

<sup>44</sup> *Ibid.*

critical legal studies is also centered on doctrinal analysis, albeit in a different form and informed by interdisciplinary studies.<sup>45</sup>

A report on law and learning, at this point in time, can only be a beginning. It is surprising to see that it is so often perceived as a closure. Reports, by tradition are bound to make recommendations. This creates a dilemma when we are faced with such a variety of perceptions as to what is important in and for law. There is hardly a law school that has not for years debated and experimented with curriculum reform. To accommodate the variety of perceptions, curricula have become filled with optional courses, especially in second and third year, giving credence to the critics of the Report who claim that legal education is not as narrow as the Report perceives it to be, and that it in fact already offers the wider perspective the Report claims is needed. There is an apparent paradox because the "Law and ..." courses — usually followed by the name of another discipline — have indeed proliferated.

The very first recommendation of the Report addresses this issue: "Law faculties should substitute for their present elective curriculum a series of clearly defined alternatives...."<sup>46</sup> The issue for the Report is not one of topological variety, but of "alternatives based on intellectual insights, social goals, pedagogic approaches, or professional specialities."<sup>47</sup> Some critics are now concerned that intellectual insights and pedagogic approaches would thus fall under institutional control, although the Report explains:

The premises of eclecticism were both negative and positive. Its negative premise was that students should be released from the bondage of the old "classical" curriculum; its positive premise was that they would use their new freedom to choose individual courses of study reflecting their academic interests and professional aspirations. In our judgment, the negative has proved itself but the positive has not.<sup>48</sup>

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<sup>45</sup> A clear example is the work of Duncan Kennedy.

<sup>46</sup> Report, *supra*, note 1 at 56.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

Eclecticism was to be replaced by pluralism "which offers a genuine choice of identifiable alternatives."<sup>49</sup>

For many academics, this raises the spectre of another round of laborious and tedious curriculum reforms at a time when they would rather devote their energies to the individual development of courses which meet their academic aspirations and problem definition, or to the re-development of content and method of old courses in this direction. These can be accomplished individually without structural changes, which need a much higher level of consensus. Yet the Report is hardly wrong when one considers the common complaint that in spite of the apparent richness of options, courses appear to be repetitive. They tend to share the common stock of legal theories and methods or where they do not, their relevance to law tends to be questioned.

The second recommendation already states: "Among the alternatives offered should be clearly defined scholarly programmes...."<sup>50</sup> The supporting text anticipates what nevertheless became a major controversy by carefully stating that this is offered as a "conceptual model, an ideal type" and that it does not "presume to propose how, where or when such developments might be undertaken," nor does it intend "to describe the curriculum of the new scholarly stream...."<sup>51</sup> The opposition to this recommendation, which is central to the Report, exemplifies the dilemma. The Canadian Association of Law Teachers state, in their response: "Many would argue that it is precisely between the law's practical application on the one hand and its fundamental structure and forces that shape it, on the other, that gives the study of law its intellectual interest and vitality."<sup>52</sup> Thus, the question is not whether they should or should not interact; nobody would argue the latter, nor does the Report. The question remains whether we do have

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* at 155.

<sup>51</sup> *Ibid.* at 141.

<sup>52</sup> *Supra*, note 9 at 7-8.

two hands for clapping or essentially only one. As one faculty response reflects: "Inconsistency ... is debilitating ... [b]ut contradictions can energize."<sup>53</sup> All that theoretical pursuits can do in the context of professional concerns is to point out inconsistencies. To become a contradiction in the true sense, theory has to be grounded in a different understanding. Anomalies, as Kuhn expressed it, do not in and by themselves lead to a new paradigm.<sup>54</sup>

## V. THE RECOMMENDATIONS OF THE REPORT

The recommendations of the Report seem to have been less controversial than the text itself. They are organized under four headings: Legal Education; Promotion of Research; Professional and Judicial Needs and Contributions; and, The Public Interest in Legal Research and Education.<sup>55</sup> Of the seventeen Recommendations on Legal Education, the first two summarize the basic thrust of the Report. The remainder show a great deal of latitude in how the Report might be implemented. On the positive side, the recommendations call on the various law schools to build on their own strength and develop their own identity. On the negative side, they allow a host of interpretations, including the one that whatever is reasonable is already being done.

The twenty-three recommendations dealing with the Promotion of Research are largely structural and financial, in order to provide a basis for the kind of research envisaged in the Report. Scholars are asked to "make a conscious effort to diversify the approaches they take," to "turn to more fundamental studies using historical, theoretical, comparative and empirical approaches."<sup>56</sup> Objections have been raised against the apparent institutionalization

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<sup>53</sup> Response of the Queen's Law Faculty Committee drafted by M. Pickard at 4.

<sup>54</sup> Kuhn, *supra*, note 25 at 52ff.

<sup>55</sup> Report, *supra*, note 1 at 154-63.

<sup>56</sup> *Ibid.* at 157, Recommendation 18.

of scholarship, a function of the institutional nature of the recommendations. In fact, the Report stresses that legal scholars should as much as possible respond to "their own sense of intellectual priorities, rather than the priorities of governments and granting bodies,"<sup>57</sup> and that "[f]unding agencies should be aware of the particular need to respond to research priorities that are deemed most important by researchers themselves."<sup>58</sup>

The ten recommendations under Professional and Judicial Needs and Contributions also stress the development of a wider base for scholarship and research in practice. "We propose the development of a significant 'academic' constituency outside the law faculties...."<sup>59</sup> The last seven recommendations under The Public Interest in Legal Research and Education deal mainly with access to legal information, education, and practice. These sets of recommendations are largely derivative, since the Committee did not undertake an inquiry into practices or public needs. According to Statistics Canada, lawyers now are about evenly divided between the self-employed and the salaried, "many of the latter working for the organs of government and business as employees."<sup>60</sup> The percentage of "self-employed lawyers" decreased from 68% in 1961 to 51% in 1981. These are self-definitions and do not include graduates of law schools who no longer identify themselves as lawyers. "These figures taken together suggest that traditional autonomous practice is rapidly ceasing to be the usual occupational setting for Canadian lawyers."<sup>61</sup> This, however, must be seen in context. The registered membership of the profession has more than doubled between 1971 and 1981. The extent to which these developments serve the public interest remains an open question. It may well be that "[t]he professions (and most notably the legal profession) bring to bear dispassionate,

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<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.* at 157, Recommendation 38.

<sup>59</sup> *Ibid.* at 160.

<sup>60</sup> C. McKie, "The Law - A Changing Profession" (1986) *Can. Soc. Trends* at 30.

<sup>61</sup> *Ibid.* at 32.

informed and critical judgment on the maintenance of societal and personal order."<sup>62</sup> The question remains, whose order, *cui bono*.

Arthurs, in a subsequent report draws "A Map of Understandings about Law," in which he attempts to portray the ideological and intellectual perspectives expressed in legal work and legal writing.<sup>63</sup> He shows that, along both dimensions, the conception and expression of law is a narrow one in Canadian legal work. The very title of his book, *Without the Law*, makes problematic the standard formal concept (*the law*).<sup>64</sup> The legal pluralism which Arthurs stresses is strategic in opening up the question of law, rather than being definitive in answering it. This is also true of the Report. Since its focus is on legal scholarship and legal education, it seeks to lay out the conditions under which the plurality of legal forms and conceptions becomes visible as a basis for a new understanding of law. It does not provide a unified theoretical framework. "Pluralism" is mainly an empirical response to "rule of law" assertions, to its centralism and hegemonic properties.

In stressing empirical and interdisciplinary studies, the Report – in my view – is looking for a critical base upon which doctrinal assumptions can be re-examined. If taken as an ultimate aim, law would appear as an epiphenomenon, a super-structure, which cannot be understood on its own grounds but only on the grounds of politics, economics, psychology, and even biology. This reductionism

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<sup>62</sup> *Ibid.* at 29.

<sup>63</sup> Royal Commission on the Economic Union and Development Prospects for Canada, "Law as an Instrument of State Intervention: A Framework for Enquiry" Vol. 46, J. Bernier and H. Lajoie eds, *Law, Society and the Economy* (Toronto: University of Toronto Press, 1986) at 85.

<sup>64</sup> *Without the Law – Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985). This work, although starting from similar premises, develops a very different thrust from J.S. Auerbach's *Justice Without Law* (Oxford: Oxford University Press, 1983). For a rudimentary comparative analysis see my review of both in (1986) U.N.B.L.J. 248.

is curiously shared by the left and the right, by critical legal theory, as well as the law and economics movement.<sup>65</sup>

In the Canadian context, the *Charter*<sup>66</sup> has brought with it the unfortunate consequence of increasingly side-tracking the essential concerns of the Report in terms of both scholarship and education. The *Charter* has given a new life-line to doctrinal work, as well as to the eclecticism of "Law and ...," which has now been transformed into "... and the *Charter*."<sup>67</sup> The judicial domination of law in the "rule of law" paradigm, leading to the centrality of caselaw in doctrinal scholarship and in legal education has, if anything, been extended. Rather than a politicization of law we experience a legalization of politics.<sup>68</sup>

On the positive side (grudgingly acknowledging the legal reality of the *Charter*), one can at least assume that the essential questions of legal theory and its empirical base will re-appear in every *Charter* challenge, even if it may take some time before the need for a coherent legal theory becomes apparent in contradictory results. The next section will address the question of legal theory in the light of the doctrinal/empirical split raised in the Report and bemoaned by its critics.

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<sup>65</sup> Duncan Kennedy has addressed this problem in what is still an "incomplete and preliminary draft" of "Freedom and Constraint in Adjudication: Toward a Critical Phenomenology of the Rule of Law" (personal communication).

<sup>66</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>67</sup> Although the *Charter* appeared as a resolution of Parliament in December of 1981 and was proclaimed in April of 1982, it had no impact on the Report.

<sup>68</sup> See, for example, A. Potter, "The Politics of the *Charter*" (1986) 8 Sup. Ct. L.R. 43; H. Glasbeek and M. Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" in R. Martin, ed., *Critical Perspectives on the Constitution* (1984), 2 Socialist Studies 84.

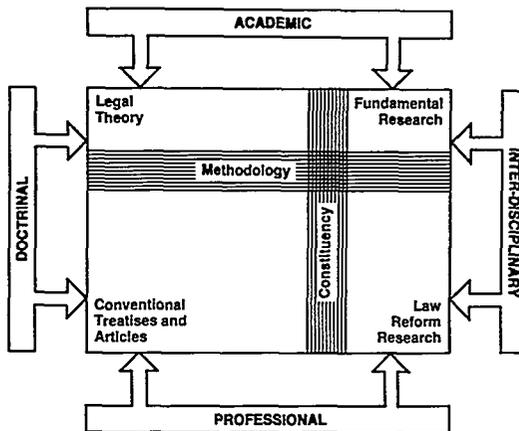
## VI. DEFINING THEORY AND RESEARCH

The Report develops a typology of legal research most concisely expressed in what has been dubbed the "Arthurs Box."<sup>69</sup>

This typology is derived from a topological analysis of legal writings.<sup>70</sup> It arrives essentially at four types:

1. conventional texts and articles – research designed to collect and organize legal data, to expound legal rules, and to explicate or offer exegesis upon authoritative legal sources;
2. legal theory – research designed to yield a unifying theory or perspective by which legal rules may be understood, and their application in particular cases evaluated and controlled; this type would include scholarly commentary on civil law, usually referred to as *doctrine*;
3. law reform research – research designed to accomplish change in the law, whether to eliminate anomalies, to enhance effectiveness, or to secure a change in direction;
4. fundamental research – research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical philosophical, linguistic, economic, social or political implications of law.<sup>71</sup>

Figure 4 Types of Legal Research



<sup>69</sup> Report, *supra*, note 1 at 67.

<sup>70</sup> For a further development of this typology see Arthurs, *supra*, note 64 and *infra*, note 72.

<sup>71</sup> Report, *supra*, note 1 at 66.

The forces operating on this field clearly disclose the major dichotomies discussed thus far: Academic/Professional and Doctrinal/Interdisciplinary. The distribution of space in the field also discloses the major concern of the Report, namely, that not enough attention is paid to legal theory and especially to fundamental research. In a later "Map of Understandings about Law," Arthurs rearranges this topology along two dimensions; Intellectual Perspectives and Ideological Perspectives, which he then applies to "Assumptions of Legal Functionaries about Law."<sup>72</sup> "Intellectual Perspectives" are categorized as: "Law as Rule;" "Law as Tool;" "Law in Context;" "Systematic Empiricism;" and "Deep Theory." Although those topologies can be defended as descriptive topologies they present an analytical problem. In terms of theory we must assume that, underlying every practice, there is a theory. Thus, we may re-interpret "Law as Rule" as Settled Theory; "Law as Tool" as Applied Settled Theory; "Law in Context" as Settled Legal Theory Meets other Theories. Systematic Empiricism also depends on a theory which is now generally defined as positivism (if, as in "Law as Rule," theory is seen as settled). We are then left with "Deep Theory," which Arthurs defines as "concerned to identify the organizing principles or constituent forces which give shape and meaning to law."<sup>73</sup> In our present understanding of theory we can give it two meanings: unified or general theory, or critical theory. With the demise of positivism, which leaves systematic empiricism high and dry (and makes problematic the meaning of "Law in Context"), we only seem to have critical theory available to us as "Deep Theory." In Kant's *Critique of Pure Reason*, he writes at the end of his analysis of Deep Theory: "Concerning the observers of scientific method, they have now the choice to proceed either dogmatically or sceptically: in any case they have to proceed systematically. — The critical path alone is still open to us."<sup>74</sup> There

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<sup>72</sup> Figures 2-1 and 2-2 in Arthurs, *supra*, note 64 at 85, 88, resp. See also App. A.

<sup>73</sup> *Ibid.* at 86.

<sup>74</sup> I. Kant, *Kritik der Reinen Vernunft* (Werkausgabe, Suhrkamp, Frankfurt 1968) BD.IV, at 711-12, translated as *Immanuel Kant's Critique of Pure Reason* by N.K. Smith, (London: Macmillan and Co., 1956).

is, however, a special problem with law. It neither fits into the natural sciences nor into the social sciences; we cannot deduct its general nature simply from its institutions and their workings. It is neither pure logic nor accumulated experience, neither subjective nor objective. It cannot be deducted from a metaphysics of morals nor from empirical events. Further, law is too old and too important in human affairs to be simply seen as an epiphenomenon. It is not likely to wither away as a concept although specific forms and understandings may.

In the context of the Report and the discussion it aroused, I submit that we should consider law as a theory *sui generis*, not autonomous — no real theory is such unless it is reified — but on the contrary, a theory of theory, an epistemology, a theory of knowledge. A theory as we generally speak of it in science is characterized by the question: A theory of what? And the answer is generally referential to some empirical phenomenon. In other words, how can one know this or that. But if we ask the question, what is law a theory of in relation to empirical facts, we will not easily arrive at an answer. It is at this point that we now tend to turn to other disciplines which apparently have a stronger claim on addressing the empirical world. We see this in the proliferation of "Law and ..." courses, conferences, institutes, et cetera: Law and Society, Law and Social Theory, Law and Economics and so on and so forth; or their naturalized offshoots such as Women and the Law, Children and the Law, et cetera; or their praxis implications such as clinical legal education, social advocacy, and the legalization of politics. (An answer that law is a theory of justice or a theory of rights only converts empirical facts into analytical components and deprives us of an epistemology of the phenomenological characteristics of law, of what divides questions of law from questions of justice.)

It is a rich field of investigation which the Report recommends to us. However, both friends and foes have tended to construct its thrust too narrowly. It is a field necessarily fraught with tensions and frustrations, at least at this point in time. The basic problem is that the empirical and interdisciplinary thrust tends to make law derivative and some indeed claim that is all that law is. In the words of Marx, law is a superstructure. But all Marx can claim is that on the basis of his analysis, the law as well as the state

ought to wither away — not a very encouraging conclusion for law schools and legal scholars even though there may be a lot of critical mileage in it. Tushnet expressed it in a whimsical way that shows the embarrassment: "Legal Scholarship: Its Causes and Cure."<sup>75</sup>

The relationship of law and fact has always been problematic. Coke, for instance, said long ago that there was no such thing as criminal law, there was only a law of murder, theft, and so on. What such a statement intends to do is, of course, to draw our attention to the empirical referents and their differences. Substantively he clearly has a point. We all feel that we should treat murder differently from minor shoplifting. But in the adjectival sense Coke's statement is problematic because our principles and procedures are largely the same for all offences. If this were not so we would indeed have no criminal law. This law's self-understanding is almost exclusively derived from its adjectival form and not the nature of substantive offences. It is this adjectival form which one can claim to be a theory of theory, an epistemology, and further that it is perennial and intrinsic.

Although historical and cross-cultural comparisons usually stress differences in the conceptions of law, basic similarities are far more stunning. Some references to our tradition make this point. Plato's *Laws* is indeed his last work following the *Republic*, this fount and foundation of political theory. His *Laws* has always been somewhat of a puzzle to philosophers; political theorists have tended to ignore it and legal scholars have not said much about it because it is rather self-evident to a lawyer, and it is very difficult to recapture the monumental effort it must have been to cast the results of his philosophical investigations into a legal form.

Aristotle's *Ethics* is as much a deontology as an ethics in the English sense of the terms (in French, *déontologie* is often used for the English "ethics;" its derivation from *deontos* (right, needful) clearly shows that it relates itself more toward what is right and necessary than what is good and desired). Aristotle's *Politics* especially demonstrates that it owes much more to the kind of discourse we would now identify with legal forms rather than those of philosophical or political discourse. We know that Aristotle had

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<sup>75</sup> (1981) 90 Yale L.J. 1205.

an abiding interest in constitutional law and an extensive collection of constitutions even though the authorship of *The Constitution of Athens* is still debated.

The *Decalogue* has rightly been hailed as a monumental achievement, compared with its oriental predecessors such as the *Code of Hammurabi*, even though it may appear to us as a much more primitive legal form. The accounts we have of the trials of Socrates and Jesus contain all the adjectival elements one may possibly want to get across in a criminal procedure course.

The point is that there is substance to the claim of an autonomy of law if we consider law as a theory of theory, a meta-theory if you wish, which expresses itself as an epistemology, a form of ordering knowledge which cannot be reduced to the level of scientific theories with their claim on the production of a specific set of empirical facticities. Science also uses the word "law," but in the sense that describes the order of things in the light of the very theoretical perspective it uses. What is right and what is good is not located in the theoreticity of science, only in the nature of its work and its effects. Law, on the other hand, although we have claimed it to be value neutral, must form its very notion of theoreticity on the basis of competing value claims and factual constructions. If law enters directly into the production of facticities and purports them to be factualities (and it now largely does), it is in danger of abandoning its own intrinsic values as a synthetic theory.

In contemporary parlance the praxis of law does not produce facticities but produces texts which the theory of law must deconstruct. In order to do this, law must move beyond critical theory and phenomenology, which are the basis of critical legal studies, to a hermeneutics which is very much in the tradition of law although it is now largely espoused by other fields, from sociology to literary criticism. Law is not only in the business of ordering facts; it is primarily in the business of ordering consciousness and conscience to make sense and give meaning to the "dense facticities of everyday life," to use Schutz' poignant term.

Having spiralled law into high theory and almost out of sight, what about empiricism? If it wants to give sense and meaning to what becomes problematic in the dense facticities of everyday life, law must address itself to facts and the social order, and must

understand the ideological and political forms underlying this order. Law puts people behind bars; determines what is whose property and what promises must be honoured; gives us negotiable rights; and so on. Surely we can say that the law, at least as a practice, produces its own set of facts and transforms them into a factuality, which in turn becomes a social actuality. And that is a fact. The prisoner behind bars is not just a symbol of deviance as sociologists would have it. The sheriff who carts away our goods or closes our business, or the welfare officer who takes away our children, do not just symbolize power. They *have* power, legitimated by law, which changes the very condition of people's lives. There is nothing esoteric about that.

Curiously, even cases, the epitome of the law/fact combination, tell us little about that. Legal analysis generally stops with the judgment, the finding, the sentence; most often as refined by appeals which generally stay away from re-considering facts. So, how much do we actually know about the factual basis of legal decisions and especially their factual consequences in everyday life? Only by chance do we learn that some of the leading cases of the highest authority quoted in our casebooks have very little to do with what actually occurred. For instance, I happened to learn only by chance that in a leading custody case in which the court awarded the children to the mother, she subsequently returned the children to the father. Where we do have empirical work we know, for instance, that awards for maintenance are never collected in the majority of cases. Many more examples could be added, even without considering cases settled during the course of a legal proceeding because the judgment would have been undesirable for both parties. I am by now slightly amused by the hostility I can draw from well trained students when asking after they cite a case: "What happened then?" As one answered rather curtly and I am afraid correctly: "This is not the point." It amuses me less that in a criminal case the judge is *functus* as soon as he signs the committal papers. The law has done its work no matter what the consequences are.

The Report admonishes us to find out about these things and this makes good sense. We ought to know what the law is actually doing rather than just what it claims to be doing. And there are ways of finding out. Unfortunately, it seems that if we

engage in empirical research to build or even to improve law, it is as dicey a business as the doctrinal emanations of the Rule of Law. Empirical research can only show what the law does, it cannot determine the structure of its reasoning.

Further, the law has largely lost its traditional legitimacy because of the loss of credibility in the expression of its theoretical foundation. Law now wants to acquire legitimacy by good works. This needs to be questioned. Empirical work can do that and at present there is almost no other way to test this particular claim on legitimacy, aside from the attacks on the grounds of political theory.

Empirical findings can show us, in Kuhn's sense, anomalies. It is, for instance, fairly easy to show now that the criminal law's claim on providing security and safety for the citizen is largely erroneous and many of those involved in the criminal law process will admit it, at least in private. But conversations of this kind invariably end with: "What else can you do?" Naive social scientists think they can provide solutions and naive law reformers tend to take them seriously; for a while anyway. These solutions often tend to exacerbate the problem because they muddy even further the theoretical basis of the law in question.

Empirical research can only sharpen the problems for law, it cannot answer them. To find answers, law has to make empirical findings an occasion for enquiry into its own theoreticity and its own doctrines. Law cannot stand in a direct explanatory or actionable relationship to empirical facts; only in a dialectical one. The life of the law, to paraphrase Holmes, is not in consensus but in conflict. Theory and empiricism in the field of legal action are vectors of tension which have to result in new concordances. Law is not a theory of what ought to be, nor of what is, but a theory of the relationship between the two, generating new characterizations of both.

The value/fact problem is a dilemma we all share and there are at present no commonly shared methods as to how to resolve it. The Report recognizes this in its first recommendation on the Promotion of Research:

Legal scholars should make a conscious effort to diversify the approach they take in their research, as much as possible responding to their own sense of intellectual priorities rather than the priorities of governments or granting bodies. They should

turn to more fundamental studies using historical, theoretical, comparative and empirical approaches.<sup>76</sup>

One should add that legal scholars need to find again what is peculiar or intrinsic to law — its own formal unity and coherent discourse, which is not achieved by homogenizing the empirical world, and not derivative from the social order of things. Rather, it is an expression of order *sui generis* which makes interpretation possible for the valuing human agent (the legal person) and makes the plurality of the empirical world visible. Our recent heritage of legal positivism, which views the essence of law in "the big stick," in its enforceability, is not an accomplishment but a failure of law. It makes law dependent on its over-against which is power, no less so when dressed up in liberal democratic garb. The Report is right in cautioning us not to respond (as much as possible) to the priorities of government or granting bodies, which are in the field of power but to our sense of intellectual priorities. In ending the Chapter "Toward a Scholarly Discipline of Law," the Report says:

We wish to end on a note of candour. Adequate funding is a necessary but not a sufficient condition for the development of Canadian legal scholarship. What is indispensable for the cause is imagination, determination and passion.<sup>77</sup>

But this also indicates the impasse we experience at present. The Report focuses predominantly on institutional and structural factors. There is, as always, a good deal of determination to be found in legal work as well as in legal scholarship. Imagination and passion are not institutional, they are instead personal attributes which legal education tends to tame and set aside already in first year. What remains of imagination and passion tends to be socially and ideologically informed and not by the very nature and workings of law. It would be difficult, for instance, to bring the work of one of the more imaginative legal scholars, Roberto Unger, into the context of law as we know it.<sup>78</sup> There are increasing efforts to bring new intellectual perspectives to bear on the law, perspectives

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<sup>76</sup> Report, *supra*, note 1 at 157.

<sup>77</sup> *Ibid.* at 150.

<sup>78</sup> R.M. Unger, *Passion: An Essay on Personality* (New York: The Free Press, 1984).

which indeed touch the imagination and passions in other fields. But the reverse is rarely the case. In the most advanced work we ask what light the social and political sciences, as well as the humanities, can throw on the understanding of law, but rarely do we ask what light law can shed on our understanding of human, social, and political behaviour. If law cannot do this, we indeed have to ask the question whether it is an intellectual discipline in its own right or rather the kind of trade as it is often portrayed. History speaks against this. Law has been one of the founding members of the university tradition even if, as in Canada, most law faculties have been a recent addition to the university. The major demand of the Report that law must claim a place in the intellectual and academic community is not an idle one. It cannot be just the place of a consumer, seeing its provider function only in terms of the profession. Law is indeed too important to be left to the lawyers. As outdated as the epistemic ground of the *Charter* and of rights-talk may be, the need for justice-talk is perennial. It is the binding discourse of every community, its shared categorical imperative. Without a common understanding of what constitutes property, contracts and wrongs, public and private, no community from the family to the state can have an honest self-understanding and is subject to arbitrary forces with or without legal institutions. How, in the academic context, the social sciences can explain anything without these basic conceptual structures, is a mystery if not a mystification. Classical sociologists such as Durkheim and Weber have been deeply aware of this need. Most of the teachings in the social sciences no longer are largely ignoring the conceptual structure of law, even when they address subjects such as the sociology of law, which tends to be at best a sociology of legal institutions. Even history which is increasingly making imaginative use of legal sources, in the end remains puzzled when it comes to the question of law itself.<sup>79</sup> Economics, which takes basic concepts such as property or contract for granted, or crime for that matter, cannot possibly effect any major change in social relations (no matter what its political persuasion is).

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<sup>79</sup> A striking example is E.P. Thompson's often discussed reflection in *Whigs and Hunters* (New York: Pantheon, 1975) at 258ff. See, for example, M. Mandel, "Marxism and the Rule of Law" (1986) 35 U.N.B.L.J. 7 at 18ff.

One could go on. The point is that there is not only a deficiency in the academic pursuit of law, which the Report stresses, but a deficiency of law in academic pursuits. Interdisciplinary research and especially empirical research which does not address doctrinal structures is not likely to cure this deficiency. Doctrinal work, on the other hand, which does not see itself as a theory and fails to test itself empirically, will not even recognize this deficiency. Thus, the doctrinal/interdisciplinary split is an unfortunate one. The professional/academic split is not, since law faculties must strive for a wider mandate than serving the current needs of the profession. Many of those needs are in any case better served by training and practice than by education and research in the scholarly sense. It is difficult to envisage any major development in this respect at the undergraduate level. There should be far less resistance to develop the academic side at the graduate level, which has been sadly neglected in law in any case.<sup>80</sup>

There have been no dramatic changes following the Report, though it is still too early to judge. There are many small developments such as the rapprochement of various disciplines, an increasing commitment to and search for theory, special projects and undertakings, as well as groupings of legal scholars, around certain issues and certain commitments which have yet to become a critical mass to transform institutional structures.

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<sup>80</sup> The subject of graduate studies, although an integral part of the Report has received little attention. I have attempted to develop a not-so-modest Proposal for Restructuring Graduate Studies in Law in November of 1982 and provided a commentary for the National Conference in 1983. The subject, however, is in need of a much more intensive as well as extensive analysis.