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# Some Strategies for an Unlikely Task: The Progressive Use of Law

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# SOME STRATEGIES FOR AN UNLIKELY TASK: THE PROGRESSIVE USE OF LAW

*Harry J. Glasbeek\**

The Knights of Labour was a powerful labour organization in late nineteenth century North America. Its principles were rooted both in religion and in the anti-capitalistic notion that wage labour was simply an unacceptable social relationship. Its dream was to create a society whose members could all act as truly sovereign individuals in the production cycle. The Knights formed an all-embracing trade union to which they were willing to admit anyone, with three notable occupational exceptions: people who had anything to do with the liquor trade (this exclusion was related to the Knights' religious origins), bankers and *lawyers*. They knew that capitalist law and its functionaries defended everything they hated.

The Knights of Labour have gone; capitalism and its law remains.

## I. INTRODUCTION

I was asked to speak on an issue such as "Whither the Law?" In this presentation, I pose the question as to whether or not law can be used progressively — that is, to further the causes of the disadvantaged. As I will be speaking to people who will soon be lawyers, I have sought to formulate responses to the questions as to what it is that impedes practitioners from using law progressively and as to what kinds of tactics are available to practitioners who have such a laudable objective.

## II. EVERYDAY DIFFICULTIES IMPEDING THE PROGRESSIVE USE OF LAW

The victims of repression, oppression, discrimination, deportations, evictions and denials of compensation and welfare are all around us. This is so despite the fact there are many statutes, and even some judicial pronouncements, which purport to afford protections against attacks on the poor, the old, the injured, the unemployed, women, immigrants, native peoples and other politically weak and economically deprived segments of the population. This troubles people with a social conscience. Many of these socially conscious people are lawyers and some (not all that many) practice law in order to redress the plight of

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the disadvantaged. Because they are lawyers, they very often tend to treat these victims of capitalism as victims of law. There is an inclination to believe that problems arise because either the law does not provide a protection it could afford, or because courts and administrative agencies interpret, apply and administer existing protective legal schemes wrongly or meanly. Lawyers who want to improve conditions for these victims thus tend to concentrate their activities on two major fronts; they push both for the introduction of laws which will yield better benefits and for the better implementation of existing laws. They join networks, lobby groups and political parties, and they appear before legislative committees and the like. They also try to bring claims to courts and tribunals in the hope that, by highlighting the gaps either found in legislative protection or caused or perpetuated by supposedly neutral judges and agencies, they will educate the public and politicians and buttress their own calls for legal change. That is, they participate in electoral and group-interest politics and in legalized politics. Being lawyers, they do more of the latter than of the former.

All of this is necessary, but is it enough?

On the face of it, the answer must be "NO". After all, as noted, the very problems that are sought to be solved persist, despite these valiant efforts. From a theoretical point of view, the answer must also be "NO". In part, this is because the very tactics used by progressive lawyers are also available to the immediate opposition — lawyers who, in their private lives, might see themselves as having as much of a social conscience as anyone else but who, in their professional lives, act as champions for those who have the most to gain from maintaining the *status quo*. It is this *status quo* which impinges so nastily on the quality of life of the marginalized people, that is, on those people who are to benefit from the progressive lawyers' endeavours. These non-progressive (dare I say anti-progressive?) lawyers also push for legal change. The changes they seek are meant to result in the better implementation of existing legal schemes from *their* clientèle's perspectives. They, too, belong to networks, lobby groups and political parties, and appear before legislative committees and the like to try to get the kinds of laws their clients want and need. They, too, can bring clever, bold and novel arguments to courts and tribunals, thereby educating the public and the politicians and creating a climate for the development of what they see as an ideal state of the law.

The wealthy classes' lawyers are not better lawyers than those who act on behalf of the oppressed sectors of society. Neither are they worse lawyers. They do, however, have great advantages in legal contests:

(i) Lawyers for wealthy people have clients who can pay. They need not rely on the state's willingness to fund their battles against the state. Here, I interrupt the flow of the argument to make an incidental, but nonetheless important, point. One of the most serious difficulties in seeking to use the law as a weapon to relieve oppression is that the

immediate enemy will, all too often, be perceived to be the state. Progressive lawyers are mostly engaged in attacking the state for its lack of proper respect for their clients or for its miserliness in the administration and/or provision of benefits. What is frequently lost from sight is that these state-created benefit schemes have usually been established to mitigate the more obviously harmful effects of capitalism. I do not have the time to tease out the argument fully. It suffices to note that, for instance, people are not unemployed merely because there is no worthwhile work to be done. Rather, in a private ordering system, the job of creating employment falls to those with private means. If they cannot see a profitable way to deploy their means which also requires employing people, they will not create employment. On another front, race, ethnicity, nationality, gender, and other such characteristics cause people to have different interests. This may lead them to engage in, and suffer from, discriminatory practices, no matter what the nature of the political economy under which they live. There is evidence, however, that the owners of private wealth profit greatly from emphasizing the differences and distinctions between people. The point here is that, while individual capitalists may not be racist or sexist, they may nonetheless gain a great deal from a society which fosters the fragmentation of the population into minorities which have to compete with one another. Hence, targetting the state as the oppressor of these minorities — which constitutes much of progressive lawyers' work — shields capitalism and, all too often, particular capitalists from scrutiny and challenge.<sup>1</sup> To return:

(ii) The fact that progressive lawyers must rely on the state for funds to launch their clientèle's challenges to the law has a profound influence on what these lawyers do. The state is reluctant to provide much funding for direct attacks on its schemes and plans or to support efforts which require it to set up new and costly programmes. It is even more reluctant to fund the politicization of communities, groups of tenants or of the unemployed. That is, the state is not eager to fund activities which, potentially, are electorally embarrassing; it is dead-set against funding organizations which want to bring about radical change. Anyone who has ever done any legal clinical work knows the pressures this generates. There are endless debates between clients, paralegals

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<sup>1</sup> For good discussions of the constitution of minorities and the utility of this to capitalism, see E. Laclau, *POLITICS AND IDEOLOGY IN MARXISTS' THEORY* (London: NLB, 1977); C. Leys, J. Saul & E. Laclau, *POPULISM AND POPULAR IDEOLOGIES* (Toronto: Latin American Research Unit, 1980); R. Breton, *Ethnic Stratification Viewed from Three Theoretical Perspectives* in J. Curtis & W. Scott, eds, *SOCIAL STRATIFICATION: CANADA*, 2d ed. (Scarborough: Prentice-Hall, 1979); G. Filson, *Class and Ethnic Differences in Canadians' Attitudes to Native People's Rights and Immigration* (1983) 20 *CAN. REV. OF SOCIOLOGY AND ANTHROPOLOGY* 454; H. Glasbeek, *A No-Frills Look at the Charter of Rights and Freedoms or How Politicians and Lawyers Hide Reality* (1989) 9 *WINDSOR Y.B. ACCESS JUST.* [forthcoming].

and lawyers as to whether grassroots political organization should be fostered or whether winning entitlements for particular clients and, occasionally, bringing test cases should be emphasized. Such discussions are conditioned by the way the clinic is funded. Given this framework, it is easy to understand why progressive lawyers, influenced by the socialization they have endured at law school and as members of the profession, will not frequently advocate direct political action and will come to see judicial struggles against the state as the cutting edge of political activity.<sup>2</sup> Concentration on the courts as a terrain of struggle makes it even more difficult than it otherwise might be to use the law progressively. I will elaborate this point later.

(iii) In addition to the difference in the source of their resources, there is also a sizeable gap between the number of resources available to progressive and non-progressive lawyers. This does not only mean that lawyers representing dominant-interest groups have greater access to the fora through which legal change may be promoted or the administration of law sought to be upgraded. It also means that these dominant-interest lawyers have more time to work on specific issues. They have more books, more computers and more people who are well paid to do research; they can travel more and buy more experts; they can attend more conferences where they may mingle with important decision-makers, and so on.

(iv) When dominant-interest lawyers make arguments on behalf of their clientèle, they are known to represent people who are well connected to law-givers, administrators and adjudicators. Their clients, in popular parlance, are pillars of the community; they are business leaders and entrepreneurs whose endeavours benefit all of Canada. More pertinently, they donate to political parties. While wealthy people, just like poor people, send delegations to appear before legislative committees, they also call on ministers in person or have ministers attend on them in person. They are the ruling class. No matter how much credence one may want to give the conventional assumption that the legal system is neutral, there can be little doubt that people who make (legally) clever and acceptable arguments on behalf of such a clientèle start with an advantage in that they will naturally get a more sympathetic hearing. This is also true, perhaps particularly true, when the forum is a court or an administrative agency staffed by people culled from the ranks of the professions (more often than not the legal profession). If this needs illustration, ask yourself: how many judges

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<sup>2</sup> For a discussion of the socialization of lawyers in law schools, see text accompanying notes 12 and 13. See generally H. Glasbeek & R. Hasson, *Some Reflections on Canadian Legal Education* (1987) 50 MOD. L. REV. 777.

has the Law Union of Ontario movement spawned? How are judges selected and from whose ranks?<sup>3</sup> These questions are rhetorical.

Here I pause again. I believe that I have recently detected an undue rush of enthusiastic blood to the collective head of legal practitioners who want to promote progressive causes. The reason: the *Charter of Rights and Freedoms*. Yet, caution is needed. The exposition, so far, has shown that anti-progressive forces have built-in advantages when going to court and, therefore, when employing the *Charter*. They have more funds and their claims strike a more responsive chord with judges. Apart from class identification with rich litigants, there is an institutional reason for this empathy. My colleague, Reuben Hasson, has made the point neatly. He argues that much of the legislation which adversely affects would-be progressive lawyers'

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<sup>3</sup> A variety of studies has shown that appellate court judges have had close ties and relations with the dominant political parties, have never been trial judges (that is, have come straight out of practice to the superior court benches) and that, until recently, for every three people appointed to the Supreme Court of Canada, two have come from the corporate-commercial side of practice for every one who has come from the criminal, civil libertarian side. See, e.g., D. Olsen, *THE STATE ELITE* (Toronto: McLelland & Stewart, 1980) at 42-64. The superior court judges are vital role models for lower level trial court judges.

An interesting way to get a feel for the way trial judges are likely to behave is by taking a glance at their self-perception. In August 1985, the *Globe and Mail* reported that the Canadian Bar Association believed that judicial salaries were a scandal and should be raised from \$94,000 to \$119,000 *per annum*. The Bar Association was quoted as saying, "[t]he present situation is absolutely unacceptable and is doing the Canadian judges a glaring injustice." M. Strauss, "Judges' Salaries an Injustice" *The [Toronto] Globe and Mail* (19 August 1985) A8. Presumably, the idea is that decent lawyers cannot be attracted away from their lucrative practices to become judges and that we may get only mediocre members of the profession offering themselves for elevation to the judiciary. To equate "good" with "highly paid" is, of course, a natural extension of capitalist logic. As only people who work for, and accept the values of, the rich can believe that \$100,000 per year is chicken feed, the nature of a judiciary's bias, drawn from such ranks, becomes manifest. This point is emphasized by yet another report on the anger felt by provincial court judges in Ontario. They are upset because their salaries, at \$81,500, are well below those of provincial court judges in several other jurisdictions, way below those of Supreme Court justices and not as high as those recommended by an independent consultant. The latter's recommendation was that judges' salaries should be in line with what they could have been expected to earn in private practice — about \$105,000 annually in 1987 dollars. The judges are talking about striking because they feel that their needs are being flagrantly ignored, thus denoting a lack of respect for their work. K. Makin, "Provincial Court Judges Seek Ways to Push for Better Pay Conditions" *The [Toronto] Globe and Mail* (14 April 1989) A14. Note the comparison groups they use. At the very least, this story reflects a serious problem for progressive lawyers who hope that they can make judges appreciate the plight of their clientèle. For theoretical arguments to the effect that this kind of identification with the disadvantaged is a way that the judiciary can become a force for positive, democratic change, see generally B. Wilson, *The Making of a Constitution: Approaches to Judicial Interpretation* [1988] PUBLIC LAW 370 and M. Minow, *The Supreme Court 1986 Term — Foreword: Justice Engendered* (1987) 101 HARV. L. REV. 10.

clientèle — for example, insurance and consumer law — would not have become law unless it were acceptable to business groups. Indeed, the consumer's voice is not often heard in the law-creating process and, if heard, is very muffled. Once enacted, more often than not, the remedies needed to overcome the adverse impacts of the law require the taking of positive steps — for instance, enacting better consumer protection legislation, lowering interest rates or providing greater benefits.<sup>4</sup> It is unclear whether that sort of relief will be forthcoming from courts.<sup>5</sup> It is much easier for progressive lawyers to persuade courts to set aside a section of such a law because it discriminates against a person or group or because its implementation denies rights of due process. In contrast, business groups who want relief from the effects of what they believe to be overly-generous social legislation (such as that which sets minimum labour standards, provides unemployment insurance benefits, requires food and drug testing and labelling, sets occupational health and safety standards) do not require positive decisions. They will only have to argue that the legislation is unconstitutional. It is a lot easier for a court to agree with this than to fashion a remedy that requires elected officials to make an allocation of resources in order to render it effective.<sup>6</sup> As Hasson points out, the

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<sup>4</sup> See R.A. Hasson, *The Charter and Social Legislation*, Address at the Edinburgh Conference on the *Canadian Charter of Rights and Freedoms*, 21 May 1988 [available on request]. See also R.A. Hasson, *How to Hand Weapons to Your Enemies — The Charter of Rights Fiasco* (June 1982) No. 5 STEELSHOTS [available on request], a particularly prescient piece as it was the only one written before the *Charter* was proclaimed which indicated that the corporate sector would be the greatest beneficiary of *Charter* largesse. Professor Hasson has been proven right.

<sup>5</sup> In a recent aside, the Ontario Court of Appeal noted that “[p]ublic funding of daycare facilities is a social problem which is beyond the reach of the court.” *R. v. King* (1988), 64 O.R. (2d) 768 at 774, 50 D.L.R. (4th) 564 at 569. It was a neat summation of the endemic problem posited in the text.

<sup>6</sup> In these *Charter* days, it is conventional wisdom that the courts will take a more progressive approach towards such issues because the document itself, the *Charter*, instructs them and educates them to that effect. It is useful, therefore, to note the history of *Brown v. Board of Education of Topeka*, 347 U.S. 483, 98 L.Ed. 873 (1954) [hereinafter *Brown v. Board of Education*]. This case is usually perceived as the high water mark of progressive judicial intervention in the United States. The American Supreme Court ordered the integration of schools, with all deliberate speed, thereby fanning the hope of the anti-discrimination forces. In 1981, a case was making its way through the courts in which the local residents of a municipality were asking the courts to enforce *Brown v. Board of Education* against their local school board's trustees who had not integrated the local schools to their satisfaction. The county in which this was occurring was Topeka county, the very county which had given rise to the *Brown v. Board of Education* litigation. See R.A.L. Gambitta, *Litigation, Judicial Deference and Policy Change* in R.A.L. Gambitta, M.L. May & J.C. Foster, eds, *GOVERNING THROUGH COURTS* (Beverly Hills: Sage, 1981). In Canada, too, some lower court decisions have shown that positive decisions in courts do not necessarily cause legislatures to implement these decisions. Indeed, the contrary may be true. See, e.g., the legislative history of *Phillips v. Social Assistance Appeal Bd (N.S.)* (1986), 76 N.S.R. (2d) 240, (*sub nom.* *A.G. Nova Scotia v. Phillips*) 34 D.L.R. (4th) 633 (S.C.A.D.); *Reference re Family Benefits Act (N.S.), Section 5*

irony of all of this is that, very frequently, well-heeled business applicants will be able to claim the costs of such litigation as a business expense. This is seldom possible for impoverished claimants.

In sum, because of who progressive lawyers are, and because of the source and relative lack of funding, they will find it hard to get new legislation and legal interpretations and applications which will constitute breakthroughs for their clientèle. Their difficulties are compounded by the fact that both the law and decision-makers' interests and predilections are much closer to those of progressive lawyers' opponents. More importantly, the forum in which they concentrate their efforts is not institutionally designed to make the kinds of dispositions which are needed.

This pessimistic outlook has been offered in response to an as yet unchallenged premise that changes in, or different interpretations and applications of, the law can confer valuable, positive benefits. But that premise *is* contentious. In part, it raises empirical issues; in part, it raises the theoretical question as to whether the existing legal system is capable of yielding anything but relatively minor ameliorations.

### III. BUILT-IN LIMITATIONS ON CHANGING THE WORLD BY THE USE OF STANDARD LAWYERS' LAW

In this section, I want to raise three interrelated points. The first is self-evident. It is not easy to predict whether or not an attempt at legislative or judicial reform will yield the benefits sought. Second, assuming that there are reformist legal rules and readings which are capable of alleviating the plight of the disadvantaged and the oppressed and assuming that progressive lawyers have an important role to play in obtaining such favourable legislation and decisions, it is plausible that lawyers' involvement may have a fettering effect on the possibility of obtaining more profound changes, the kinds of changes which the disadvantaged and oppressed need to become true sovereign participants in our society. This raises the third point. It is my argument that while some reforms are obtainable through judicial activity, they are limited in scope and impact because fundamental changes cannot be yielded by our legal system. The ultimate purpose of law is to prevent radical change and, most importantly, the judiciary has a leading part

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(1986), 75 N.S.R. (2d) 338, 186 A.P.R. 338 (S.C.A.D.); *Silano v. British Columbia* (1987), 42 D.L.R. (4th) 407, [1987] 5 W.W.R. 739 (B.C.S.C.), and the uncertainty resulting from the holding in *Schachter v. Canada*, [1988] 18 F.T.R. 199, 3 F.C. 515 (T.D.). See also the discussions in J. Fudge, *The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation in Further Feminist Struggles* (1987) 25 OSGOODE HALL L.J. 485 and A. Petter, *Legitimizing Social Inequality: The Early Charter Cases* (1989) 34 MCGILL L.J. 358. This is not to suggest that *Brown v. Board of Education* had no effect, or no progressive effect, but it reminds us that getting a favourable judicial decision is not the same as getting a favourable political result.



to play in the maintenance of the general *status quo*. This poses a fourth and very troubling question: what should progressive lawyers do? This last issue will be tackled in the final section of this paper.

#### A. *Measuring the Benefits of Reformist Law*

When progressive lawyers seek to have legislation or a rule of law altered it is done in the belief that the enactment of a new law and its application, or the adoption of a new reading of the law, will have particular effects. But there is, in fact, no certainty that particular rules and decisions will have the consequences we hope they will have. For example, a ruling which says that employers shall not be racist may or may not have an effect on employers' attitudes towards racism. If we could be sure that the very existence of such a legal pronouncement would have a positive effect of this kind, we could say that the passing of the law or the making of the ruling has a direct effect. But, our concern with such a rule in real life is whether or not it forces employers to stop *practising* racism. We therefore must scrutinize the new legal ruling's likely and actual effect on the people charged with administering it. Are enforceable rights created? Are means of enforcement put in place? Are these functioning well, thereby reducing racist practices in employment? The fact is that we cannot know, at the time of its creation, whether a legal rule or ruling will have a particular effect, no matter what its appearance and language suggest. Allocation of resources, the nature of the existing and potentially changing political will, attendant publicity, acceptability of the ideology embedded in the rule or ruling, will all play a part in determining its impact. The point is simple. The obtaining of a reformist rule or ruling is something to which a progressive lawyer can contribute. This is useful in its own right, but will never be enough. It may even have a "downside".

#### B. *The Schizophrenic Aspect of the Progressive Lawyer's Role*

Once a political decision is couched in legal form, lawyers will be involved.<sup>7</sup> One certain outcome of couching a political decision in legal form is that it will be mediated by existing legal culture. This includes the likelihood that the rule will be interpreted by reference to existing legal categories and rhetoric. For instance, the word "reasonable" will be interpreted in line with concepts of "reasonableness" found elsewhere in the law.<sup>8</sup> More importantly, it will mean that the

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<sup>7</sup> See generally J. Griffiths, *Is Law Important?* (1979) 54 N.Y.U. L. REV. 339. This section and the previous section of the paper rely a great deal on this very informative article.

<sup>8</sup> I do not have to tell lawyers that this gives any one interpreter a great deal of room to manoeuvre. For one account of the indeterminate nature of legal cultural interpretation, see generally H.J. Glasbeek & R.A. Hasson, *Fault — The Great Hoax* in L. Klar, ed., *STUDIES IN CANADIAN TORT LAW* (Toronto: Butterworths, 1977) 395.

interpretation and application of the rule will be based on rationality, rather than being political and/or subjective in nature. This is the result of moving the struggle from the sphere of interest and electoral politics into the judicial and quasi-judicial domains. Associated with this transportation and transformation of struggle will be an emphasis on the need for due process and the enhancement of participatory rights for those who are to be subjected to the rule of law as applied by the courts. All of this is often — usually, if the observers are lawyers — perceived as a positive development because the weak will be given due consideration by rational, neutral decision-makers. Thus, it may be that an important aspect of casting a political decision in legal form is that the ensuing legal politics and prestige of the legal profession endow the political decision with a legitimacy it might not otherwise have. It makes political decision-making acceptable to the electorate, precisely because the implementation of the political decision *appears* to be non-political.

Certainly, a lot of the trappings of our profession, our tribunals, our mythologies about the separation of power within government and our notion of the political independence of legal decision-makers, all seem to be aimed at achieving this effect. Note here that many of the challenges which are made by progressive lawyers are challenges which seek to enhance participatory rights and to provide for a fairer process of decision-making by obliging executive officers, agencies, decision-makers and tribunals to play by the rules devised to create fairer processes and better participatory rights.<sup>9</sup> Progressive lawyers, there-

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<sup>9</sup> Eighty to ninety percent of *Charter* litigation is concerned with the legal rules of the *Charter of Rights and Freedoms*; see generally F.L. Morton, *The Political Impact of the Canadian Charter of Rights and Freedoms* (1987) 20 CAN. J. POL. SCI. 31ff; see also P. Monahan, *POLITICS AND THE CONSTITUTION: THE CHARTER, FEDERALISM AND THE SUPREME COURT OF CANADA* (Toronto: Carswell, 1987) at 33ff. These cases are ones in which the state and its agents, rather than private property owners, are the enemies. Moreover, they are cases in which wide-ranging language can be used to express our society's belief in respect for the dignity of all individuals and in the citizenry's complete freedom, and our society's abhorrence of arbitrary brutality and oppression. But in no way does this kind of decision-making affect what conduct is characterized as criminal and this is vital. Such definitions and the state's allocation of resources to criminal law enforcement lead to poor people, racially different people and politically troublesome people being subjected to the coercive powers of the state far more than members of the dominant classes. While there is neither time nor space to elaborate on this straightforward point, it is of some significance that progressive lawyers have gained much hope for the potential of *Charter* litigation because the possibility of mounting challenges to the state and its functionaries has become a reality in this setting and, therefore, it is assumed, in other spheres. Yet, caution ought to be exercised. Despite the judges' *Charter*-inspired rhetoric of respect for the dignity of suspected and accused persons, Canada's prison population, overwhelmingly constituted of the members of progressive lawyers' clientèle, is increasing. Mandel has calculated that, per 100,000 of population, there are as many people incarcerated in Canada today as there were during the Great Depression. See generally M. Mandel, *READINGS IN CRIMINOLOGY* (Teaching Materials, Osgoode Hall Law

fore, contribute to the enhancement of the legitimacy of political decision-making once it takes on an appropriate form — a legal form.

In sum, to obtain a specific legislative or judicial reform *may* be worthwhile; it *may* turn out well. It *may* even be useful to achieve less tangible results. Thus, to demonstrate in court that the state of the law victimizes the poor or favours the rich *may* lead to beneficial changes or, at least, *may* raise political consciousness about some important issues. Progressive lawyers *may* be able to make important contributions in some or all of these ways. But these efforts will necessarily support the legitimacy of the legal system and, more particularly, the judiciary as an institution. What if, in the end, the legal system, and more particularly the judiciary, are there to make sure that the dominant classes remain dominant and the exploited remain exploited? These are the horns of a well-known dilemma.

### C. *Law and Essential Relationships in Capitalism*

While most legal rules could be turned upside down without seriously affecting power relationships in a capitalist society, this is not true of all such rules: some are vital to the working of capitalism. Let me demonstrate this to this legal audience in a way which, I trust, will underscore how an idealized version of competitive capitalism, unencumbered by reference to the actual workings of Canada's capitalism (dominated as it is by non-competitive actors), is embedded in the fabric of the matter which you study and practise as law.

Milton Friedman's capitalism envisages an economic society in which every individual can decide for himself<sup>10</sup> how he should utilize his abilities and resources. The most efficient use will be that which will give him a maximum return and which will enable him to purchase everything he wants from others behaving in a similarly ideal fashion. In a society in which this occurs, all demands for goods or services will be met if a return on production or delivery can be garnered by

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School, 1987) [unpublished]. This is startling because contemporary governments hold themselves out to be wedded to a policy of decarceration. Further, Mandel shows that there are as many people kept under state surveillance (parole, probation, halfway houses, community service, etc.) as there are in gaols. This goes to the heart of the argument in the text: getting better legal procedural rights may legitimate a system which undermines substantive political rights. The *Charter* may be the cutting edge of this trojan horse-like effect.

<sup>10</sup> The masculine pronoun is chosen deliberately; the notion of human beings as aggressively self-gratifying creatures harmonizes neatly with the image of "machoman" conquering everything and all around him. See generally C. Gilligan, *IN A DIFFERENT VOICE* (Cambridge, Mass: Harvard University Press, 1982).

potential suppliers. If that return is large, in relative terms, other rational economic actors will seek to enter into the same supply business in order to obtain a share of this "excess" profit. The ensuing competition will ensure efficient satisfaction of all demands, in the sense that goods and services will be provided at the lowest possible cost. An efficient mechanism for the allocation of resources is thus provided. In this ideal economy, there is little need for the state to impose rules, because people's freely chosen preferences will be satisfied via the market mechanism. As most needs will be met in accordance with personal preferences, there will be little need to tell people what to do or how to do it. The need for political decision-making by central authorities is reduced sharply, and indeed, rendered relatively negligible.

Government, however, will still be needed to ensure that there is a free market. The idea of competition is that there shall be winners and losers. Monopolies might result. By definition, monopolists, as rational maximizing individuals, will exploit their non-competitive position to the detriment of the promotion and maintenance of an ideal market economy. As individuals can only exercise sovereignty in a truly free market, this is not acceptable, neither economically nor politically. Furthermore, for individuals to be able to act as much as possible like idealized market actors, there must be accurate and costless information so that everyone will know what to demand and how much to pay for it. The state, therefore, is to ensure restrictions on anti-competitive practices and to provide for a free flow of non-misleading information. Our state has enacted laws which seek to attain these objectives. This is acceptable, indeed necessary, to the ideology of free enterprise. More than this kind of patrolling of the market by government, however, would make the state a wanton interventionist. The starting point, then, is that the state will undermine economic and political liberty if it goes beyond the boundaries which stem from the logic of the economic system itself. That logic, however, does mandate some other state imposed-rules and laws.

The system requires that there be people out there who have the capacity to act as sovereign, maximizing individuals who, by exercising their free will over nature, are enabled to act as agents of supply and demand. To this end, law creates juridical autonomy and equality. Our law, therefore, creates rules which bolster the idea that every person is equal to all others, regardless of their starting position, their actual abilities and their resources. Transactions between people are, therefore, the unquestionable outcome of the exercise of their sovereign, free will and, as such, deserve the support of the legal system. Moreover, for this economic model to work, these juridically equal individuals must be able to control resources so that they can use them as they see fit: to consume them, meeting their own demands, or to supply other individuals' demands. They also need to be able to assert private property rights. It is important to note that it does not matter what the rules defining private property rights are, provided they are relatively

certain and constant at any one time.<sup>11</sup> The question of how such property rights were originally acquired turns out not to be a burning question. We can start from an existing position and go forward from there. That is what we do.

But having the capacity to own property is not enough. A major premise of the scheme is that there shall be exchanges of property or of the products of that property's exploitation. It is necessary to determine, therefore, when an exchange begins and when it ends, in order to permit the supply and demand regime to remain in perpetual motion. The law of contract has now found a *raison d'être*. Again, it does not matter all that much what the actual rules of contract are, provided that they are relatively certain and constant at any one time.

Because the legal system pays no attention, in theory, as to who has property and who has not and as to why that might be so, property has come to be unequally divided. There is, therefore, a strong temptation for those who do not have any property to seize it from others who do, so that they too might participate profitably in market activities. But this does not fit well with market ideology: there would be no certainty with respect to property ownership and this would be a disincentive to the efficient use of property. It follows that property-holders should have rights which protect that property from forcible takings. To a large extent, criminal law serves that function.

Another problem for the model is that, for the supply-demand exchanges to be efficient, all costs of production must be included in the prices charged for goods and services, else the goods and services will be underpriced, thus increasing demands for them when efficient allocation of resources might very well mandate another use of property. To illustrate: if nickel mining causes acid rain, the price of nickel ought to reflect the cost of cleaning up the environment, lest nickel be underpriced in the direct supply-demand exchange. This underpricing will occur precisely because the suppliers and demanders are rational actors; unless third parties affected by the production of nickel have a means of shifting the costs which pollution imposes on them to the exchangers, the exchangers will pursue the less costly course of pollution. This internalizing of costs can be achieved by direct government intervention (the regulation of neighbourhood effects) or by allowing third parties to bring an action against the producers. The law of torts has just raised its head.

As an academic who is long in the tooth, I can tell the boring story of my participation in an endless number of law school curricula reviews, creating ever more options, advocating more clinical teaching, teaching students how to be sensitive people, and so forth. However, despite this great flurry of continuous activity and the seemingly unabated interest in creating variations on a theme, no common law

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<sup>11</sup> The guru, Milton Friedman himself, acknowledges this point; see generally M.R. Friedman, *CAPITALISM AND FREEDOM* (Chicago: U. of Chicago Press, 1962).

school, to my knowledge, has abandoned any of the following subjects from its core compulsory curriculum: property, contract, criminal law, and torts. What a coincidence!<sup>12</sup> Note what else these subjects have in common: primarily, they pit individual against individual, without differentiating between them in respect of their wealth and power. The forum in which they are pitted against each other is the court, a state emanation which is to be seen as separate from, and independent of, the state. Although this is not as obviously true in the Canadian criminal law sphere as it is with respect to property, contract and torts, an analogous argument can be made with respect to criminal law. In criminal cases, the state appears both as individual complainant and as decision-maker, while preserving the myth that criminal justice is administered by an independent decision-maker between *individual* disputants. Some procedural safeguards are created to offset the great power of the state. This dovetails with the ideology that a powerful state is the enemy of private individuals, whereas powerful individuals present no equivalent serious threat.

The foregoing goes some way towards explaining why it is that the subjects of property, contract, criminal law and torts are part of the core curriculum in all common law school teaching. Inasmuch as these branches of law are functionally necessary to capitalism, law school curricula reflect aspects of the essential relations of capitalism. Lawyers are socialized from day one to accept the unvarying nature of the verities embedded in these subjects — that is, the truths of a capitalist political economy. Law students are exposed to subject-matter overtly dealing with collective and/or public law subjects *after* they have had this immense dose of ideological reinforcement. Furthermore, when they do get around to these supposedly quite different subjects, they will find that, for the most part, such subjects are taught on the basis that they are, in fact, aberrations in the legal system. For example,

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<sup>12</sup> Note that the explanation the text offers for the inclusion of these “common law” subjects in every curriculum in every law school in the country is far more satisfactory than others available. These other explanations include such things as the fact that these subjects are basic to the understanding of all other subjects. This would only be true if law is taught on the basis of the understandings offered in the text. This is not usual and the argument that these subjects are necessary prerequisites becomes untenable. Another common justification for the inclusion of these subjects as the core of all curricula is the fact that they are the historical basis for common law. If this be so, one would have expected them to be taught historically. They are not. Inasmuch as common law methodology and judicial reasoning have to be learned, and these subjects are claimed to be the best vehicles, I would merely point out that legal methodology and reasoning can be learned in any subject. Thus, do taxation law or labour law not involve case analysis? That is, the commonly offered reasons are empty ones, especially when they are put in the context of the actual teaching of these subjects in law schools in Canada. For a more expanded argument to this effect, see H.J. Glasbeek, *Why Corporate Deviance is not Treated as a Crime — The Need to Make “Profits” a Dirty Word* (1984) 22 OSGOODE HALL L.J. 393; *Menopausal Musings of a Law Professor* (1977) THE ADVOCATE (Students’ Law Society of the University of Toronto) 6 [available on request]; Glasbeek and Hasson, *supra*, note 2.

administrative law is usually presented in such a way as to suggest that the major issue is whether or not boards and agencies protect and guard individual rights, both substantive and procedural, in a way acceptable to common law courts. Law students<sup>13</sup> are trained to see statutory intervention as something which has to be controlled, preferably by the judiciary; that is, by undemocratic, irresponsible tribunals,<sup>14</sup> or at the very least overseen by agencies, such as labour relations boards, which, in the end, exhibit the same respect as the courts do for basic concepts such as individualism and private property.

The argument so far has been that progressive lawyers have less resources than their opponents, and that they must go to institutions which intuitively are more responsive to their opponents and are more accustomed to giving the kind of redress they seek than that which the progressive lawyers pursue. Moreover, the attempts to effect statutory or regulatory changes, to enforce due process, to ask courts for better dispositions (even when successful) will not, without more, advance progressive causes because the fundamentals of capitalist relations of production are unlikely to come under serious challenge in this way. Capitalism is the real enemy. What must be done by progressive lawyers, then, is to seek means by which to confront the essential relations of capitalism as expressed in law; in particular, the notions of juridical equality and the concepts and ideology of private property and contract.

#### IV. TACTICS FOR THE PROGRESSIVE LAWYER

Law is not a revolutionary instrument. Would-be progressive lawyers cannot kneecap capitalists with a writ. Moreover, in their everyday work, they have to tackle the problems as they arise. By and

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<sup>13</sup> Legal professional rules and admission procedures are of such a kind that they ensure that the bulk of law students are fertile ground for the sowing of such seeds. Admission requirements ensure that law students are drawn from the wealthiest (and most conservative) strata of society. Do not be fooled by the ten percent or so of working class members of a law school. Most students come from professional or "business" family backgrounds; see B.D. Adam and K. Lahey, *Professional Opportunities: A Survey of the Legal Profession* (1981) 59 CAN. BAR REV. 674.

<sup>14</sup> My students often oppose my suggestions for legislative intervention schemes — such as comprehensive compensation policies — on the basis that they are too bureaucratic in nature. I am fond of telling them that nothing is more bureaucratic than the judiciary. A bureaucrat may be described as a person who is not responsible to the public in any direct sense. There is only an attenuated form of accountability to an elected government official. By these standards judges must be seen as super-bureaucrats. They are not responsible to anyone, not even to elected politicians. The worst thing that can happen to them is to be overruled by some fellow judge and, even then, this will always be done on the basis that they have made an understandable error in a very difficult and complex situation. There is no chance of their salary being diminished, of their being dismissed, nor of their incompetence or biases leading to any slowing of demand for their services. They are irresponsible, in the true sense of the word, as well as unaccountable.

large, they cannot set the agenda. This means that, more often than not, law has to be used defensively; progressive lawyers will be constrained to attempt to retain what has been won in the past, to fight for better processes, to have nasty decisions set aside. Naturally, they must do their best, but this is not enough. Occasionally, they will get their opportunity to attack. When this happens, the focus should be on confronting the legal bases which underlie capitalism. While the problems for the progressive use of law outlined earlier remain because such confrontations will largely take place in the courts and administrative agencies of the state, the idea is to have an organizing principle. This organizing principle, following the argument made, should be to attack the legal underpinnings which favour the rich over the poor, or more precisely, wealth owners over the property-less. Inasmuch as the state furthers this domination and inequality, it can be the target of such challenges, but it should always remain clear who the real oppressor is. This means that no single reform attained is ever enough. It should be made clear that it is only acceptable for the moment — further attacks are warranted if the causes of oppression and inequality remain. Exhortation of this kind is easy. We must ask what tactics are required to translate theoretical slogans into action.

The first thing to identify is what this approach negates: reliance on the *Charter of Rights and Freedoms* as a positive tool. In addition to the difficulties referred to earlier (namely that, while the judiciary can give symbolic victories it is seldom willing or able to bestow material gains), it must also be remembered that the *Charter* is an instrument reflecting liberal capitalist values which are entrusted to an institution whose historic mission it is to maintain the *status quo*. In particular:

(i) The fundamental rights and freedoms which it purports to guarantee and on which most of the progressive lawyers' claims will be based, are characterized by the fact that they are *abstract* and *universal* in nature;

(ii) The role of giving these abstract rights content falls to the judiciary. Two quick points, in addition to the others already made in this talk, must be made. First, the judiciary did not, in several centuries of common law decision-making, develop any of these abstract, political rights. To the contrary. They are rights which have their origin in extra-legal activities, in revolutionary movements, specifically the French and American revolutions. Our courts have never shown much inclination to reinforce them. This leads to the second point: inasmuch as claimants to such rights have come to court and their claims have clashed with the interests of private property owners, courts have protected the latter. Why should progressive lawyers believe that this will change? Possibly, they think that the manifest rhetorical goals of the *Charter*, aided by rational argument, will lead to a more progressive approach by the courts. I will not stop to meet this argument head-on



but simply note that the goals of the *Charter* are far from easy to discern and, further, that there is no compelling evidence which underpins an argument that something called rational argument has ever had much sway in the courts. In any event, the results thus far indicate that the hoped-for new approach by the courts has not emerged.<sup>15</sup>

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<sup>15</sup> See Glasbeek, *supra*, note 1. There is no particular reason to believe that Canadians now have more free speech rights than they did before the *Charter of Rights and Freedoms* was enshrined. In particular, have Canadians won the right to more public space in which to exercise this right? Have the owners of the mass communication media given up the almost total monopoly they have had for a long time on news and opinion dissemination in this country? See H.J. Glasbeek, *Entrenchment of Freedom of Speech for the Press — Fettering of Freedom of Speech of the People* in P. Anisman and A.M. Linden, eds, *THE MEDIA, THE COURTS AND THE CHARTER* (Toronto: Carswell, 1986) 101, where the effect of this monopoly on the exercise of freedom of speech in Canada is discussed. On the other hand, it is true that some censoring boards have been curtailed: see *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1984), 45 O.R. (2d) 80, 38 C.R. (3d) 271 (C.A.), *leave to appeal granted* (1984), 3 O.A.C. 318; and that Nazis have been able to attack restrictive legislation seeking to inhibit the propagation of hatred: *R. v. Zundel* (1987), 58 O.R. (2d) 129, 31 C.C.C. (3d) 97 (C.A.) (legislation valid); *R. v. Keegstra* (1988), 43 C.C.C. (3d) 150, [1988] 5 W.W.R. 211 (Alta C.A.) (hate propaganda provisions invalid), *leave to appeal granted* [1989] 4 W.W.R. 1xx. Compare *R. v. Andrews* (1988), 65 O.R. (2d) 161, 43 C.C.C. (3d) 193 (C.A.) *leave to appeal granted* (1989), 68 O.R. (2d) x. It is also true that the corporate sector has been enabled to attack legislative efforts to restrict advertising; the effects of these attacks are still incalculable. After the recent decision in *Irwin Toy Ltd v. Québec (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, it is clear that advertising is to be regarded as an exercise in free speech. The tobacco industry is gearing up to use this to defend its right to advertise the dangerous drug it sells. Similarly, it is still a matter of serious legal contention as to whether or not a trade union can raise funds for political purposes, a right which was not challenged before the advent of the *Charter*. At the moment, a union seems to have the upper hand in one such piece of litigation: see *Lavigne v. O.P.S.E.U.* (1989), 67 O.R. (2d) 536, 56 D.L.R. (4th) 474 (C.A.), but the matter has not been finalized. The Supreme Court of Canada has yet to speak. Further, the Ontario Court of Appeal decision is based on the fact that what a union did was a matter of private law. This is both contentious in law and, more significantly, politically undesirable from a union's perspective. There is no doubt, however, that bodies such as the National Citizens' Coalition now have the freedom to express themselves on political issues, free from the would-be restrictions of electoral financing legislation: see *National Citizens' Coalition Inc. v. A.G. Canada*, [1984] 5 W.W.R. 436, 32 Alta L.R. (2d) 249 (Q.B.).

In another sphere, there seems to be no evidence that Canadians enjoy more freedom of religion than they ever did. Certainly, one group of serious people whose religion dictated that their children should undergo a non-conformist school experience were denied this right to exercise their strongly and sincerely held religious preference: see *R. v. Jones*, [1986] 2 S.C.R. 284, 28 C.C.C. (3d) 513. Is this anti-religious freedom holding offset by the fact that a corporation's freedom to open a store on Sunday was upheld by a purposive reading of the same phrase, "freedom of religion", by the Supreme Court of Canada? I refer to *R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295, 18 C.C.C. (3d) 385, *aff'g* (1983), 9 C.C.C. (3d) 310, [1983] 1 W.W.R. 625 (Alta C.A.).

On yet another front, neither the workers' right to associate, nor their freedom of speech when it takes the form of picketing have been enhanced by the *Charter*: see *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery*

This is not such a puzzle if we remember the second feature of the guaranteed rights and freedoms — their universality;

(iii) Universality means that all individuals have a rightful claim to these rights and freedoms. This suits the disadvantaged as they are not to be met by arguments that they have no entitlements of this abstract kind. It also means, however, that property owners can make those same claims. The imbalance of resources now raises its head; so also does the bias of the judiciary, peopled by persons who, for the most part, have spent their professional lives serving the propertied classes. Most important, the concept that the abstract *Charter* rights belong to all formally equal persons means that the assumptions of the common law which reflect capitalism's needs are embedded in the *Charter*. The central idea which allowed courts to favour the ruling classes over the centuries — namely that class and history do not count, that all individuals are, for adjudicative purposes, the same, whether they are rich or poor, male or female, white or black — is replicated. The results thus far show the regrettable impact of these truths, especially in the areas where capital and labour clash directly, that is, where (rich, propertied) individuals are confronted by (poor, property-less) individuals who have formed collectives;

(iv) Whatever the *Charter*'s goals are, one directive is that the claims of rights and freedoms are to be made against the state, not against private individuals. While the distinction between the public and private realms is far from clear and, therefore, will be hard to maintain, the concept involved is detrimental to the would-be progressive use of the *Charter*. It focusses concentration on the state as the oppressor; it suggests that, politically, the real danger to democracy and to individual welfare and sovereignty is the tyranny of the majority. Again, I will not stop to examine the full implications of this conceptualization. A few points will have to suffice. First, the minorities which are said to need this *Charter* protection form the core of the progressive lawyers' clientèle. If the differences between them were seen as being less important than the things which they have in common, namely, their

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*Ltd.*, [1986] 2 S.C.R. 573, 51 Alta L.R. (2d) 97. and the right to strike cases: *Reference re Public Service Employee Relations Act (Alta)*, *Labour Relations Act (Alta)* and *Police Officers Collective Bargaining Act (Alta)*, [1987] 1 S.C.R. 313, [1987] 3 W.W.R. 577; *P.S.A.C. v. R.*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249; *Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 v. Saskatchewan*, [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277. The piece also argues that *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449, and section 15 jurisprudence have provided relatively little by way of amelioration. For a detailed critique and thorough analysis of the abortion and equality issues, see M. Mandel, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* (Toronto: Wall & Thompson, 1989).

lack of property and their exploitation which serves the wealthy, they could be seen as *the* majority. The only true minority with an underlying commonality of interests would be identified: the wealthy. Is this what we fear: that *this* minority of the wealthy might be tyrannized by the now-oppressed majority? Second, even if it is granted (as it should be) that there is cause to be worried because our existing democratic processes might lead to the oppression of different-thinking and different-looking people, why would we not improve those democratic institutions rather than seek amelioration by reaching out to the most unaccountable, elitist institution we have? Third, another way to question the oppression of minorities by the unwashed majority argument on which *Charter* proponents rely, is to note the upside-down effects generated by *Charter* politics. I will give only one instance. Trade unions, to protect workers' interests, have pursued closed shop arrangements. Their denial of membership to a worker is easily characterized as an exercise of a majority's tyrannical will, denying a dissenting or different kind of individual the sacred right to work. A *Charter* challenge by a disaffected worker is plausible, even though, in the long run, the logic of the industrial relations' scheme may doom it to failure. The denial of work to that individual by an employer for something called economic reasons, however, is untouchable by the *Charter*. Yet, that is where the real problem lies. The *Charter* makes the union the potential enemy of workers. The ironic logic of all of this is that the union, to win these kinds of cases, has to argue that its activities are those of a private, commercial actor beyond the scope of the *Charter*, rather than those of a political organization whose goal is to further the working classes' political causes.<sup>16</sup>

The public/private distinction, in association with the emotion-tugging appeals to protect hopeless individuals and minorities from the tyranny of the reactionary, unthinking masses, inheres in the use of the *Charter* and constitutes a serious roadblock to its progressive use.

This does not mean that *Charter* politics can never yield positive results. After all, the very abstract nature of the rights and freedoms "balloons"<sup>17</sup> may well cause them to be filled up with useful stuff every now and again. But, the emphasis is on "every now and again". To exploit these good results they must be sold as legitimate ones to the politicians who have to act on them. This means that all *Charter* results must be treated with respect. As most will be harmful to the oppressed of this world, this is not politically useful. Nor is the fact that, as I noted, to win, progressive lawyers may have to use reactionary arguments. Inasmuch as proponents of *Charter* litigation think of these as educational/organizational exercises because the courts

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<sup>16</sup> See Lavigne, *ibid.*

<sup>17</sup> The expression and idea comes from P.H. Russell, *Canada's Charter of Rights and Freedoms: A Political Report* [1988] PUBLIC LAW 385.

provide a forum for the advocacy of symbolically useful political arguments, the political utility of obtaining "good" language from judges in losing causes will be dampened by the fact that often "bad" language will be used by courts who bestow victories. At best, this is a tendentious kind of politics.

I must enter a caveat at this point. My pessimistic analysis stems from my view that most of today's ills are traceable to the fact that Canada is a class-divided society. There are many progressive people who believe this to be too crude an approach. They argue that patriarchy and race are causes of much of the oppression and discrimination which exists. And they are. My antagonism to the use of the *Charter* may have caused me to underemphasize this point. All I can offer in this brief presentation is the assertion that class analysis may be more useful than a more particularistic race or gender approach to the question of whether or not *Charter* litigation constitutes progressive politics. However, as I know this to be contentious, I will satisfy myself with making lesser debating points which, I feel, help bolster my position.

The results of *Charter* politics so far suggest that the public/private distinction, the emphasis on abstract, individual rights and the judiciary's institutional inability to provide positive relief have not been at all helpful to feminist causes.<sup>18</sup> A great deal of money and organizational effort has been poured into legal politics which might well have yielded better results if marshalled for efforts in the wider political sphere. This leads to an associated argument, one raised earlier in this talk. I suggested that lawyers who depend on the state for funding will be curtailed if they prove dangerous. It is of some interest that much of the funding to use the *Charter* for progressive causes by organizations such as Legal Education and Action Fund (LEAF) comes from the state. Is it possible that the state understands full well that *Charter* challenges are not radical in nature?

In the end, progressive lawyers would be better off to avoid *Charter* politics. Rather, they should use the arguments which inhere in law and use them as the basis for attacking the support mechanisms of capitalism. This can be done because it is in the nature of legal reasoning never to admit that the existing rules, doctrines and principles

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<sup>18</sup> In fact, some feminists who urge the use of the *Charter* have acknowledged the poor record they have compiled: see Canadian Advisory Council on the Status of Women, COMMUNIQUE, 17 April 1989; K. Ruff, *The Canadian Charter of Rights and Freedoms: A Tool for Social Justice?* (1989) 13:2 PERCEPTION 19. For critical analysis by progressive lawyers of how women have fared under the *Charter*, see A. Petter, *supra*, note 6; J. Fudge, *supra*, note 6; J. Fudge, *The Effect of Entrenching a Bill of Rights Upon Political Discourse: Feminist Demands and Sexual Violence in Canada* (1989) INTERNATIONAL J. OF THE SOCIOLOGY OF LAW [forthcoming, available on request]. This last piece shows that women have suffered losses under the *Charter* with respect to advances they had made legislatively in respect of rules which govern the conduct of sexual offence trials.

favour one group over another. Once it is understood how these legal rules reinforce capitalism, they are to be used to exploit the contradictions which the papering-over of substantive differences inevitably creates. The best place to wage this kind of warfare is outside the courtrooms. Even though one does not need lawyers once the fight is removed from the courts, progressive lawyers are useful to such a project because they have an intimate knowledge of the way in which law supports capitalism; this knowledge can provide a sound basis for activism. This approach makes lawyers feel less like lawyers and they are prone to resist this line of attack. Nonetheless, I think it is the most useful thing a progressive lawyer can do. Just as it is positive for such progressive lawyers only to use the *Charter* when it is foisted upon them and to discourage their clients from using it to change the world, it is positive for progressive lawyers to expose the way the law perpetuates inequality and to help develop a legal politics approach on the basis of that understanding. I offer a few suggested lines of attack.

One of the central ways in which law helps maintain capitalist relations of production is by inhibiting any inquiry into how sacrosanct private property rights were acquired. Yet, there is no moral argument which underpins the legal sanctioning of the original capture of property rights. As to new property rights, the only question which the law permits to be asked is as to whether or not they have been acquired by means of a legally acceptable contract, transaction or gift.<sup>19</sup> Consequently, when people are adversely affected by the possession and/or use of property by its owners, they are given a very burdensome onus to discharge. They are required to prove that the owners of private property exercised their property rights improperly. This puts non-property owners behind the eight ball. I suggest, therefore, that progressive lawyers push for a reversal of the onus of proof in all circumstances where such an argument can be made sensibly. It is true that, in some cases, this will not attack capitalism squarely but, if this tactic could be universalized, real benefits are obtainable. A brief sketch of the theoretical basis on which such claims can be made and of the potential advantages the reversal of the onus of proof would offer follows.

The conventional justification for imposing the burden of proof in the way it is done by the judiciary pervades most of our decision-making bodies. It is said to be an argument of convenience: the person who asserts must prove. The perceived difficulty is that, if it were otherwise, innocent actors would be selected at random by aggrieved citizens seeking some redress, from someone, from anyone, for their

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<sup>19</sup> See B. Mensch, *Freedom of Contract as Ideology* (1980-81) 33 STANFORD L. REV. 753.

ills.<sup>20</sup> Moreover, it is harder to prove a negative than a positive, or so it is argued. The argument is that it is harder to prove that harm was not caused by one's act than it is to prove that harm was caused to one by a particular act of another. A victim is assumed to be in the best position to gather the data (note the prominent position given to notions of capitalist incentives here) as to how the harm was inflicted. Whatever one thinks of the merits of these arguments in a setting where individuals are supposed to sue other individuals, that is, the property, contract and torts judicial setting,<sup>21</sup> why should these arguments be thought to be applicable in other settings? For example, why should we not assume that occupational harm is due to profit-garnering activities and hold these activities responsible until they are proved to be otherwise? If convenience is the justification for imposing the burden of proof on the plaintiffs in contract and tort situations, there is a compelling argument for reversing the burden of proof in the context of occupational or environmental harm infliction. By definition, in these contexts the victims are not as well-positioned to establish causal connections between harm and the usage made of unknown substances and complex processes by conscious economic actors as those who are in control of the selection and usage of the processes and substances.<sup>22</sup>

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<sup>20</sup> This kind of argument is typical of law: it is a flood-gate argument, one which appeals primarily to paranoia and only secondarily to logic. Further, it has embedded in it a value which is unspoken and, therefore, unchallenged — it assumes that it would be wrong for innocent victims to be compensated unless they can find a person at fault, whatever that may mean. And, if you scratch the surface a little further you find another real fear, namely that aggrieved and uncompensated victims might do what every plaintiff's lawyer does right now: look for a rich potential defendant rather than a truly faulty one. It is obvious that this would imperil property owners in a way that they are not now imperilled.

<sup>21</sup> It may be a more useful concept in the criminal law setting where it means that the state, being treated as an individual, has a burden. But as criminal defence lawyers know, the burden of proof imposition in criminal cases is rendered almost nugatory by the facts of life. Accused people are poor people; this leads to guilty pleas. In addition, the biases of lower level court judges with respect to credibility issues favour the prosecution witnesses despite the burden of proof rules. There are also real disadvantages for accused people who have prior convictions, despite the burden of proof rules. Incidentally, this has been reinforced by the decision of the Supreme Court of Canada, armed with the *Charter of Rights and Freedoms*; see *R. v. Corbett*, [1988] 1 S.C.R. 670, 41 C.C.C. (3d) 385.

<sup>22</sup> It is only lawyers and, of course, the self-interested parties whom they represent, who would think an argument that it has not yet been proven that Inco's emissions of sulphur dioxide are related to acid rain is anything but inane. Note also the stereotypical result of this kind of argument: it leads to a reification which serves capitalism well, namely that the substance or process (contrast a human being) is innocent until proven guilty. In some areas of the law, the burden of proof is *de facto* shifted, for the very reasons that are offered in the text. Thus, in products' liability cases, while the *de jure* burden rests with the victim, in fact the producer would be very foolish not to seek to establish that it took all reasonable care. The advantage of a reversed onus of proof has been brought out by R. Sullivan, *Trespass to the Person in Canada: A Defence of the Traditional Approach* (1987) 19 OTTAWA L. REV. 533.

It can be anticipated that, as the argument of convenience makes no sense in the kind of setting which we have just been discussing, defenders of the *status quo* who are beleaguered by the progressive lawyers' aggressive argument for a reversal of the burden of proof, will use a fall-back position. Most likely, this would entail arguing that a reversal of the onus of proof would inhibit economic activity because property owners would not be as enterprising as they now are in the use of their property. This is, in fact, the real argument underlying the existing burden of proof rules. But if we can force this argument to become the principal and explicit defence of those who insist on the burden of proof remaining as it is, a victory of sorts will have been won. It will no longer be a perfectly moral justification to use private property as the owner decides. Rather, the argument will be that the owner should be permitted to do so because it is economically inefficient to make certain people — property owners/enterprisers — bear the full costs of using *their* private property as they decide, even if this imposes costs on the workers or neighbours they affect by their whimsical and selfish uses.<sup>23</sup> If the debate takes place in this context, it could be argued that Pareto-type efficiency is not everything and that there are other values.

The issue that common property is a value to be protected would, thus, be put on the agenda in a way that it seldom is now. The rights of the victims (workers, neighbours, and so on) could be said to be based on the *right* to have clean ambient air, clean water, a noiseless surrounding; the property which no one single person owns would start off with as good a claim to be sacrosanct as does the property right allocated to private individuals. The absolutism of private property ownership could be questioned.<sup>24</sup> In this sense, then, arguments to augment strict liability schemes become very important. They should be used as levers for universalizing the idea of reversing the onus of proof. Thus, progressive lawyers should be in the forefront of comprehensive no-fault accident and disease compensation schemes not because they will, by themselves, bring capitalism to its knees,<sup>25</sup> but

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<sup>23</sup> I will not digress here, but it can be relatively easily shown that, in the aggregate, economic benefits would ensue from reversing the onus of proof in the way that I argue it should be. See P. Rohan & B. Brody, *Frequency and Costs of Work Accidents in North America, 1971-80* (1984) 9 LABOUR AND SOCIETY 165; see also R. Kazis and R. Grossman, *FEAR AT WORK: JOB BLACKMAIL, LABOR AND THE ENVIRONMENT* (New York: Pilgrim Press, 1982) at 18-35.

<sup>24</sup> Here I note that attempts to put property into the *Charter* as a fundamental right and freedom is a real ideological threat. While courts already protect private property rights without such entrenchment, should entrenchment occur, an argument that property owned in common is as deserving as private property rights would be much harder to make. Further, note that the tactic suggested leads to the development of a language to claim concrete rights to well-being, rather than the abstract rights provided for in the *Charter of Rights and Freedoms*. This, too, would be impeded by specific entrenchment of *private* property rights.

<sup>25</sup> "No-fault" with respect to traumatic injuries has left New Zealand capitalism alive and well.

because they address problems as social rather than individual ones. Furthermore, such schemes lead to a greater socialization of costs and tend to arrest the accumulation of capital in private hands by making it logical to have state insurance, rather than private insurance, schemes. Social insurance, quite simply, is cheaper, a powerfully persuasive argument in a capitalist economy. Once an insurance scheme becomes state-run, it becomes politically possible to seek to direct the disposition of its funds (although, of course, in a capitalist state, it is not easy for the working classes to capture the state even to this limited extent). In addition, and not incidentally, such schemes will benefit the working classes as a whole, in the sense that compensation will be far more evenly and widely spread than it is now.

What does this line of argument mean for progressive lawyers in practical terms? How should they act? I believe that if the foregoing analysis is accepted, then, using no-fault as an example, certain strategies and tactics become self-evident. In working toward the objective, there should be an attempt to debunk private insurance, to de-mystify judicial decision-making in torts,<sup>26</sup> and to act politically in support of comprehensive schemes which assume that integrity of limb and life is a paramount value in our society. This would put the onus on those whose activities threaten the integrity of life and limb to defend their unholy position. This strategy requires support for comprehensive disability schemes, public pension plans, sick pay, paid paternity and maternity leave, and so forth<sup>27</sup> — once the analysis is accepted, a co-ordinated set of tactics in related areas suggest themselves.

Let me give some other examples. In the consumer setting, the argument ought to be made that anyone who buys a product is entitled to have it replaced as soon as it is found to be defective, with the

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<sup>26</sup> For example, this could be accomplished by showing how ineffective the torts system is as a deterrent; how uneven it is, how unfair, how sexist, and so on. All of this can be done on the basis of decided cases. See Glasbeek & Hasson, *supra*, note 8, and on the basis of results; see Report submitted to the Minister of Labour, PROTECTING THE WORKER FROM DISABILITY: CHALLENGES FOR THE EIGHTIES by P. Weiler (Toronto: Queen's Printer for Ontario, 1983) at 53-83; T. Ison, THE FORENSIC LOTTERY (London: Staples Press, 1967).

<sup>27</sup> It is in this context in particular (but not exclusively), that I would argue that well-meaning people who challenge the pre-emptive nature of workers' compensation legislation are seriously misguided. More recently, a report to the government of Ontario recommended improvements in welfare benefits' delivery: see Ontario, REPORT OF THE SOCIAL ASSISTANCE REVIEW COMMITTEE (Thompson Report) (Toronto: Queen's Printer for Ontario, 1988). Progressive lawyers were at the forefront of the movement urging the government to implement the recommendations of the Report. However, they all but ignored that part of the Report recommending a comprehensive disability compensation scheme, which, if implemented, would reduce the welfare rolls considerably. This is a good illustration of how a failure to engage in a thorough analysis of the way in which law works can hinder the development of truly effective strategies.



onus shifting to the retailer and/or manufacturer to show that it was abused. More important, perhaps, is the idea of changing the onus of proof in the workplace. In that situation it ought to be argued that, until the employer has proven that it had a right to discipline a worker, the employer must continue paying the worker of whom it disapproves. As well, a worker should be entitled to close down a production line until the employer proves to everyone's satisfaction (workers, the state) that the workplace is safe. Until this is done, all employees should continue to be paid.<sup>28</sup>

In this way, daily legal-political facts can be manipulated so as to make a difference. Note that these arguments can be made within the framework of accepted legal reasoning. For instance, in the case of the consumer, it is just as easy, if not easier, for the manufacturer and/or retailer to prove that goods were reasonably manufactured and/or stored, than it is for the plaintiff to prove that they were not. The argument to be met will be that consumers will abuse this new power of enforcement of their rights. This can be countered by a typical legal riposte: use litigation costs as a deterrent to consumers who might act as vexatious litigants. From an economic efficiency point of view, those retailers who devised means to verify that the goods in question left their care in good condition would obtain a competitive advantage. In this way, all the arguments supporting the *status quo* could be used to support a position in direct opposition to it.

Reversal of the onus of proof is a useful organizing principle, but it is not the only one. It is part of a more general set of tactics with the central theme of using those aspects of law which, if pushed to their extreme, will create pressures on capitalism. Taking the argument into those areas of law with which I am most familiar will clarify this point. Some of the tactics are Saul Alinsky-like, that is, they are

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<sup>28</sup> At the time of writing, the Ontario government is proposing that specially certified workers be allowed to stop production lines when workers' lives are endangered. The impetus for the proposal is that the existing scheme (which imposes the burden of proving that workers are endangered on the government and on the workers) has made carnage in the workplace a human tragedy and a political albatross for governments. The remedy offered, however, will leave an employer representative free to countermand a certified worker's order — the burden has hardly been shifted. Furthermore, any certified worker's decision to stop the production line will mean that their colleagues will be left without pay. The real burden will still be imposed on workers. See Bill 208(G), *Occupational Health and Safety Statute Law Amendment Act, 1989*, 2nd Sess., 34th Leg. Ont. 1989. Acceptance of the argument in the text would cause progressive lawyers to react to this proposed amendment and to be in the forefront of the fight to bring these issues to the public's attention. Some trade unionists have raised these arguments. See N. De Carlo, *The Right to Refuse Bill 208* (May 1989) OUR TIMES 9; see also B. De Matteo, *Bill 208 May be Dangerous to Your Health* (Summer 1988) WOSH NEWS 1. But, as this is a non-litigious sphere, it does not seem to have attracted lawyers' attention, with the notable exception of the Toronto Workers' Health & Safety Legal Clinic, which submitted a brief to the government on this issue in November 1988 [available upon request].

guerilla-like tactics. It must be remembered that the argument is that *we cannot use existing law and its institutions as instruments of revolution*. They can be used, however, in such a way as to heighten contradictions in a meaningful way. The best we can do, as lawyers, is to raise consciousness about the way law and its functionaries have helped create a hegemony which makes the inequality in our polity look natural.

In labour law, there is little that a lawyer can do about the reality of the inequality of bargaining power which exists as a result of the fact that a few own the means of production and the many *must* sell their labour power. In the long run, this can only be changed by the working classes themselves. Yet, in part, their weakened position and their lack of co-ordination is due to the effects of the ideology of law. Workers are often educated to this effect by their trade unions and believe in the values said to be reflected in law. They adhere, with oft-proclaimed pride, to notions of trust, to the idea that contracts should be honoured and that fair processes (in particular grievance arbitration) should be supported by them. The values of trust and fairness are worthy ones indeed but, as they are to be given life by capitalist law, in practice they turn out to be inimical to working class interests. The values of adherence to voluntarily entered-into contracts and of the commitment to fair processes are promoted in a setting where workers are fettered by severe legal limitations on their use of economic power, whereas the employer faces no equivalent restrictions. For example, strikes can only take place during given periods. While it is true that there is a similar restriction on lock-outs, the employer can always take its collective goods and walk out, something which workers, as a collective unit, cannot do. Similarly, trade unions are limited in the use of their co-ordinated strength to a particular employer's enterprise, whereas there is no limit on integrated capitalist activity.<sup>29</sup> Similarly, employers, though acting as individuals, often hold themselves out to represent large segments of the corporate sector. They can, and often do, threaten a capitalist strike against the state by saying, *as individuals*, that they will not invest because they lack confidence. They are merely stating *their* opinion and *their* intention about the development of *their* goods. *Legally*, Canadian trade unions cannot threaten *economic* action of a co-ordinated kind when they

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<sup>29</sup> In Ontario, when the steelworkers were battling Radio Shack, the Steelworkers local was limited to its local economic power. The workers in Barrie could not rely on all of the Steelworkers' members all over Canada and the United States to remove their labour from all of Radio Shack's stores. Radio Shack was not so limited; it could call on the administrative and financial support of its parent company, the mighty Tandy Corporation. But it was not just administrative support it could obtain; it could also get direct economic support by shifting inventories to, getting supplies and importing financial and physical assistance from, these related entities. Thus, there is no real limitation on capital's mobility and integrated power but there is on the use of collective labour power.

want to obtain benefits from the state. Similarly, when an employer decides to act on its wishes during the life of a collective agreement, disputing workers must accept an employer's decision and then litigate it; that is, they must obey now and grieve later. This formula is not a favourable one for workers.<sup>30</sup>

The traditional uses to which law is put cannot help very much to redress these imbalances. But, the understanding that "neutral, facilitating" law has contributed significantly to the maintenance of the inequalities does suggest some tactics which might put a little pressure on the fundamentals of capitalist relations, thereby heightening workers' awareness. This is a necessary first step. What follows are a few examples of the kind of tactics which might be worth engaging in as a progressive labour lawyer. None of these leads us to the courts or, indeed, requires professional skills other than critical insight:

(i) The content of any prerogative or management clause is, *de facto*, always in contention during any negotiation and in the administration of the collective agreement. But its scope is very wide in Canada, given the structural impediments which exist (a limited right to strike, the unions' acceptance of the culture of arbitral jurisprudence and their belief in the sanctity of contract). There is very little that can be done through the collective bargaining mechanism, then, to attack the managerial rights embedded in any collective agreement situation. However, it is possible to try to set an agenda which will lead to a change of attitude of (a) arbitrators, (b) trade unions and (c) eventually, workers themselves. One idea is to ask for changes in contract language. The argument would be that "prerogatives" belong to gods, despots or kings, not to human beings who call themselves employers. Therefore, while negotiating, trade unions should be urged to ask for a retitling of the prerogative of management clause. The demand should be that it be called, for example, "the limitations on workers' rights clause". The implication of such a demand would be that workers have inherent rights which are not recognized by the specific provisions of the collective agreement, rather than that employers have inherent rights which have been cut down by employee demands. As well as making a small, but useful, political point, such language would also permit a legal argument to be mounted to the effect that the employer ought to bear the burden of proof when it claims the right to change work conditions during the life of an agreement. In the same vein, trade unions ought to be encouraged to have other clauses renamed. For example, health and safety clauses might be labelled: "limitations on the rights of the employer to maim workers"; seniority clauses might be renamed: "the rationalization of the employer's right to lay-

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<sup>30</sup> See H. Glasbeek, *The Utility of Model Building — Collins' Capitalist Discipline and Corporalist Law* (1984) 13 *INDUST. L.J.* 133.

off, promote and demote employees". Note that these would be relatively cost-free battles. Progressive lawyers and/or trade unions would tell workers why they are asking for these new names for standard collective agreement provisions. Then, by finding out how fiercely employers will resist them (as they will), consciousness may be raised without having to ask workers to go on strike or to suffer. In addition, this tactic emphasizes that bargaining about language is not just a question of professionalism or legalism. This would be a giant step forward. If lawyers take this stand they would be helping to provide a much-needed political education.

(ii) While negotiating agreements, trade unions should be told that they ought to negotiate at the place of work, in an open forum, if at all possible. At the moment, trade unions occasionally report back to their membership during negotiations; the employer does so every night. This is important because many trade unionists have a view of what is reasonable, a view informed by their acceptance of a managerial role for unions, which, in turn, is enhanced by their sense of being professionals. All too often they bargain away demands which they consider to be silly claims made by workers from the shop floor. An on-site and open negotiation process would force professional unionists to take workers more seriously — if it turns out that trade unions have been right about the futility of making certain claims, they will have the opportunity to educate their workforce accordingly. Again, the lawyer's role would be one of political education by explaining and supporting the legal right of trade unions to conduct their affairs in a more grass-roots-oriented way.

(iii) Likewise, grievance arbitration should always take place where the dispute arose and should be open to the workers. Lawyers should strongly suggest this concept to their clients. This would enable workers to see various aspects of the "justice" of the system, for example, its emphasis on legalism: the application of hearsay rules, refusal to let a grievor give evidence, removal of witnesses from hearings, and so on. In addition, it will save on costs and emphasize the trivial nature of much of the so-called professional know-how which lawyers promote.

(iv) Grievance arbitration should not be permitted to contribute to the wealth of lawyers and arbitrators (who are frequently lawyers). Trade unions should be encouraged to refuse to pay more than a particular fee. Note that, unless the unions agree to an arbitrator, there can be no grievance arbitration system. They are in a good bargaining position. Furthermore, individual employers are not vigorously opposed to paying cheaper rates. Inasmuch as the argument would be that "good" people would no longer be available, it is the job of progressive lawyers to show workers that the professionalism which they are currently buying at considerable expense is bringing them very poor

results. For instance, in discipline and discharge cases, workers win everything they ask for roughly seventeen percent of the time; if partial victories are included, they would roughly break even; but partial victories are also partial losses or, if you will, partial employer victories.<sup>31</sup> These results are appalling. Once workers have become aware of this, they will appreciate any tactic which diminishes the cost of the process and which will give them more control.

(v) Every effort should be made to ensure that grievance arbitration is a process which belongs to the workers. Accordingly, lawyers should be active in promoting trade union by-laws and processes which ensure that an elected grievance arbitration committee should not only raise the issue of a grievance, but should be able to fight it right through to the grievance arbitration itself. This approach could help answer the oft-heard plea for structural changes in trade union organization. There is, after all, no good reason why unions should adopt the hierarchical model of employer structures, which is what they presently do with respect to the grievance arbitration process.<sup>32</sup>

The kind of strategies which are being suggested ought to be manifest by now. They consist of using the existing system to emphasize, firstly, the value of democratic practices, and secondly, the limitations on workers' rights, which stand in direct contradiction to the claims being made both by employers and deceived (and self-deceived) trade unions.

A similar line of argument can be made with respect to the use and application of criminal law in our capitalist political economy. A real difficulty for progressive lawyers in this area is that they are defending unemployed and semi-employed people against the application of law which protects property rights, as well as certain kinds of bourgeois morality (that is, anti-freedom of choice, anti-drug, anti-pornography). More often than not, the progressive lawyer is forced to make points about overwhelming and unacceptable police conduct

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<sup>31</sup> See G.W. Adams, *GRIEVANCE ARBITRATION OF DISCHARGE CASES* (Kingston: Industrial Relations Centre, Queen's University, 1979) at 42ff; J. Stanton, *LABOUR ARBITRATION: BOON OR BANE FOR UNIONS* (Vancouver: Butterworth, 1984); P. McDermott and I are undertaking a study of ten years of private sector grievance arbitration in Ontario and the preliminary results yielded by a check of the results in the first two and one-half years of the 10 year sample tally with the numbers cited in the text.

<sup>32</sup> Typically the steps in a grievance arbitration process are that a worker raises an issue which goes to a grievance committee member, who then takes it to the grievance committee, who then takes it to a union representative, who then takes it to a full-time trade union grievance arbitration administrator. This mirrors the hierarchical structure on the other side: foreman, supervisor, personnel manager, and so on.

and about biased and unfair judicial and administrative processes.<sup>33</sup> All of this, by definition, is defensive. It does nothing about reallocating resources of law enforcement; it does nothing about creating more efficient and helpful regulatory systems inhibiting socially harmful activity such as consumer fraud, the production of poor quality products and services, the pollution of the environment and the infliction of occupational harm. This sphere of regulation is to be left to administrative agencies which have very poor enforcement powers and which, occasionally, impose low penalties on offenders in non-stigmatizing processes. In addition, these agencies are given confusing guidelines because they are meant to enhance private capital accumulation while legitimating activities which lead to such accumulation. Very seldom are criteria set up by the state which indicate how the balance between these contradictory aims is to be struck. The balancing is done in a relatively private setting, with an imbalance in resources between the lobbyists-capitalists, on the one hand, and workers-consumers, on the other, making the outcomes inevitably disastrous. This quick summary of how it is that so much goes wrong with our society<sup>34</sup> raises a question as to how a progressive lawyer might seek to show that much of what is seen as normal capitalist activity is, in fact, criminal activity, as defined by the existing legal system. If this can be done, attention can be drawn to the fact that an economic system relying on the profit motive as its basic incentive will not adequately supply needs and may leave a trail of innocent victims in its wake. How can lawyers aid in mounting such an attack?

As you may know, I teach a course called "The Corporation as Criminal". It is my hope that it may help to prepare people for such a challenge. It basically makes the argument that, given the normal definitions found in the *Criminal Code*, many economic actors are recidivist criminals. This can be shown relatively easily by pointing out that in Fortune's list of the 500 largest corporations, forty percent do not breach statutes or existing laws in any one year. That is, *sixty percent* do! Moreover, they do so very frequently. Inasmuch as they are recorded as offenders, they are punished by having licensing fees called fines levied against them. They are set at a very low level and, most frequently, imposed on the corporation rather than on the flesh and blood profiteers who benefit from the corporations' activities and who often manage them. This is quite unacceptable. In many contexts, the nature of the offence is a deeply perturbing one. To return to my favourite setting, health and safety, the infringement of the physical

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<sup>33</sup> Of course, the impetus to make these arguments has been increased by the legal rights included in the *Charter*, as the likelihood of success is enhanced. Who is not tempted by the chance to win against the police, the bureaucracy or the legislators? But, the extent to which poor people will be protected from the rigours and stringency of the criminal law is very dubious, *see supra*, the text of note 9.

<sup>34</sup> For a much longer argument to this effect, *see Glasbeek, The Need to Make "Profits" a Dirty Word, supra*, note 12. The facts and figures which follow in the text are documented in more detail in that article.

integrity of workers is seen as a materialized risk of generally beneficial activity, a risk supposedly shared between the employer and the worker. It is acknowledged that, sometimes, worker harm is due to an employer's overzealous drive for profits. The fact that the legal system is not repelled by this set of propositions is due to the notion that workers have sold their labour power and, therefore, have, in some sense, consented to the harm inflicted on their persons. This view can be shown to be an outrageous distortion of the normal, liberal-moral precepts on which criminal law is said to be based. A powerful polemical and legal argument can be mounted to the effect that real crimes are committed at the work site. I make that argument as follows.

If a sadist promises a needy person ten dollars if that person lets the sadist punch her on the nose, that needy person can, even after receiving the ten dollars, go to a court and ensure that the contract not be enforced because it is an illegal contract: no one can consent to the infliction of violence on her person. Not only that, it is such an immoral contract that the court will let the loss lie where it falls and permit the potential victim to keep the ten dollars. Why is it then acceptable to argue that workers, for a *notional* amount of premium pay, have accepted an extra risk in their workplace?<sup>35</sup> Analogies of this kind are relatively easy to make in other areas.

This kind of argument can be added to by showing that the economic cost of corporate criminality is fantastically high. In 1974, in the United States, it was estimated that corporate crime cost the nation something like forty billion dollars, many times the cost of "ordinary" crime in respect of which so much of the nation's law enforcement resources are spent.<sup>36</sup> In addition, I have already alluded

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<sup>35</sup> In *R. v. Bergner* (1987), 78 A.R. 331, 53 Alta L.R. (2d) 159 (C.A.), the Court held that there can be consent to an assault where the physical violation is the result of a fight and the physical force used is somehow proportionate. This only reinforces the argument in the text. If, to be rendered non-criminal, the workplace situation is to be analogized to a bar-room fight, the basic conflictual nature of employer-worker relationships is made manifest, for all to see! Any notion that liberal pluralist theorizing adequately explains labour law's inequalities would disappear. See H. Glasbeek, *A Role for Criminal Sanctions in Occupational Health and Safety*, in *NEW DEVELOPMENTS IN EMPLOYMENT LAW* (Cowansville, Qué: Les Éditions Yvon Blais, 1989) 125.

<sup>36</sup> In a *HANDBOOK ON WHITE-COLLAR CRIME* (Washington: U.S. Government Printing Office, 1974) the U.S. Chamber of Commerce reported the cost of white collar crime (very narrowly defined) as \$42 billion, ten times the total amount taken in all thefts reported in the F.B.I. Index and 250 times the amount taken in all bank robberies in the U.S. in that year. See J.H. Reiman, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS AND CRIMINAL JUSTICE* (New York: John Wiley and Sons, 1979) at 106ff; see also M.B. Clinard & P.C. Yeager, *CORPORATE CRIME* (New York: The Free Press, 1980); United States of America, Task Force Report of the President's Commission on Law Enforcement and Administration of Justice, *CRIME AND ITS IMPACT — AN ASSESSMENT* (Washington: U.S. Government Printing Office, 1967); J.E. Conklin, *ILLEGAL BUT NOT CRIMINAL: BUSINESS CRIME IN AMERICA* (Englewood Cliffs, New Jersey: Prentice Hall, 1977); S. Box, *POWER, CRIME AND MYSTIFICATION* (London: Tavistock Publications, 1983).

to the fact that the law allows corporations to take the brunt of the blame whenever profit-oriented activity causes harm to society as a result of criminal behaviour. This is done both to avoid stigmatization of the actual profiteers and to shield the real wrongdoers from those same penalties which are imposed regularly on the poor in our society. A gross example of this was the Amway case.

The Amway Corporation had deliberately defrauded Customs and Excise of Canada to the tune of many millions of dollars over many years. The court found that the two major shareholders and directors were conspiratorial lepers but, as the Crown had permitted charges against them to be dropped in return for a guilty plea by the corporation, no punishment could be imposed on them. The company was fined an enormous amount of money in absolute terms but, in relative terms, it was like a slap on the wrist. In particular, note that the two owners who were condemned by the court were among the four richest men in the United States. Moreover, they were Reagan supporters and, after the corporation's conviction, Reagan appeared with them on a political podium although they had had to conceal (as a result of the conviction) that the corporation was paying for the meeting. Shortly thereafter they hired former U.S. Secretary of State, General Haig, as a "consultant".<sup>37</sup>

I tell this story in this way to show that the capitalist classes are well aware that stigmatization is dangerous for their activities and that they will seek to counter it in as strenuous a manner as they can.<sup>38</sup> There is no reason why progressive lawyers should, therefore, not seek to exploit this potential weakness. They should insist that charges always be laid against individuals. This can be done, using either a regulatory regime or the *Criminal Code*. Furthermore, while the wrongdoers who committed the criminal acts may be low-level functionaries in the corporation, a legally acceptable argument can be made to go after major shareholders who are in a position to control the activities of the corporation's employees. I have teased out that argument elsewhere, and I will not weary you with technicalities. But do note that to get at the real owners of corporations makes sense in Canada where 322 of the major 400 companies on the TSE are controlled by one or two major owners.<sup>39</sup>

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<sup>37</sup> Glasbeek, *The Need to Make "Profits" a Dirty Word*, *supra*, note 12.

<sup>38</sup> The Ford Pinto story illustrates this. Ford Motor Co. spent more money and effort on defending the criminal charges against it than it expended on hundreds of private law suits it faced as the result of its exploding car. When Ford was acquitted, General Motors sent it a congratulatory telegram and the Reagan administration bought up all the remaining Ford Pintos it had in stock; see B. Fisse & J. Braithwaite, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* (Albany: State University of New York Press, 1983); M. Dowie, *Pinto Madness* in S.L. Hills, ed., *CORPORATE VIOLENCE: INJURY AND DEATH FOR PROFIT* (Totowa, New Jersey: Rowman & Littlefield, 1987).

<sup>39</sup> Glasbeek, *The Need to Make "Profits" a Dirty Word*, *supra*, note 12.



All of this suggests that progressive lawyers, as well as defending their ordinary clientèle in criminal cases, should seek to become prosecutors of the real wrongdoers in our society. This would mean that, for a change, they would be setting the agenda. It may cause the state to allocate its law enforcement resources quite differently. A tangential benefit of such a reallocation would be that progressive lawyers' normal clientèle would be less harassed. More importantly, however, progressive lawyers, by having corporate criminals prosecuted, would advance the necessary political attack on the legitimacy of profit-making. Profit would become a less noble motive. Such tactics could diminish the reification of corporations, a fact which obscures the reality of class relations in our society. In turn, this may alter a perception the working classes have of this society which, I fear, is the prevailing one: that this is a consensual, non-class society.

## V. CONCLUSION

In sum, despite my reservations about some tactics, I do believe that progressive lawyers have a role to play. But what is needed is serious analysis of the function and purposes of capitalist law. It is only after this has been done that strategies can be devised which, while compatible with the logic of the system, attack it at its extremes, creating the kinds of dialectic tensions which may help to undermine the system. The task, then, is to find those points which will touch the nerve centres of the material advantages created by the law for capitalism and capitalists. That is where the action is.