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LOOKING BACK TOWARDS A BLEAK FUTURE FOR LAWYERS

by
Harry Glasbeek*

During the 32 years of my formal academic career, I sought to get a better understanding of the nature of law. I hasten to add that I did not undertake these studies for the pure joy of understanding. I had an unhidden agenda.

My position was—and is—that capitalist relations of production require the exploitation and subjugation of the majority of people. As a lawyer, I wanted to identify how law and its institutions contributed to the maintenance and perpetuation of this undesirable regime. I wanted to help people dismantle it. It took me a little while to come to terms with the fact that law and its institutions do not provide fertile soil for the waging of transformative struggles. I now treat this as a verity and have much more modest ambitions for the uses of law as a tool of progress.

After all, if our political economy had been feudal—as it once was—we would have expected to have—as we did have—a legal system that made feudalism live and survive for as long as concrete economic conditions warranted this. If a socialist scheme should reign, we would expect to find a set of legal doctrines, practices and institutions that supported socialism's goals and values. Unsurprisingly, then, capitalism has demanded, and has spawned, a legal system which supports capitalism and which is not easily amenable to manipulations that undermine the structural and ideological needs of capitalism. In the present climate of capitalist triumph, it is much more likely that capitalism and thinking capitalists will be able to use law even more directly and efficiently than ever to achieve its and their aims. The potential for the progressive use of law is even more ephemeral than it ever was. Indeed, the major lesson that I draw from the last two decades is that Canadian law has been used effectively to blunt the possibility of radical change.

This piece sets out how I now understand why I began my academic journey with more hope than, objectively speaking, was warranted. It then turns to show that law's claim to be a liberal democratic institution, rather than a capitalist one, has enabled powerful economic actors to deepen their hold on the economic and political levers of power to the detriment of our democratic aspirations.

I finished my graduate work in 1965. At the time, profound changes seemed eminently achievable, if not inevitable. Capitalism was still enjoying the longest period of continued success it had generated, at least in those parts of the world to which we referred—rather revealingly—as the First World. But, it was not a quiescent time.

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Outside the realm of the advanced industrial nations, there were two major factors which affected the way in which the richer States could conduct their affairs. First, there was the political, social and economic impact of not only the apparent viability of the Soviet Union, but also of its ability to pose a credible military and economic counter to the expansions and adventures of the West. It provided a vivid example of the potential of alternate social relations. Second, and related of course, was the explosion of the drive for independence by formerly colonized peoples. These cries for liberty and autonomy had a marked effect on the way in which we began to think about the need for collective and individual emancipation, for them and for ourselves. The so-called "Bandung" project, or development theory, which emerged involved the formation of national democracies about whose nature fierce contests erupted. Were they to be bourgeois democracies or socialist ones? This became a focus of the Cold War struggles as the major blocs sought military, ideological and economic advantage. Contemporaneously, the significance of the nation state as an autonomous set of institutions was reinforced. The attempt to develop an alliance of non-aligned nation States to act as a third protagonist added fuel to this boiling cauldron. Among other things, these struggles were reflected in the evolution and moulding of the United Nations and its apparatus. All of this gave added impetus to already explosive domestic movements for a more profound and institutionalized respect for different identities, distinct cultures, etc.

In Canada and the U.S., the post-war period was very different from the pre-war one. The U.S. had emerged as *the* economic and military power. Its dominant economic role in rebuilding Europe and its burgeoning military-industrial complex delivered a veritable boom, at least when compared to the immediate pre-war period. The depression still had its stranglehold on the economy at that time. Canada's economy, so closely integrated with that of the U.S., was swept along on the wave of post-war relative prosperity. This, together with the evolving world-wide ferment over political rights gave a spur to already aroused hopes and claims for a different set of social relations. There had been promises that, after the war, things would be different, materially and politically. For instance, it is worth recalling that, in 1944, President Roosevelt had proposed a new Bill of Rights. It was to contain constitutional guarantees of jobs which would pay well enough to provide adequate food, clothing and recreation; it promised access to affordable housing ("the right of every family to a decent home" were the words used), the right to a good education and adequate medical care, as well as "protection from the economic fears of old age, sickness, accident and unemployment". While these proposals to constitutionalize a different set of rights came to naught, what is important is why Roosevelt made them. He candidly told us: "after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being." It is but one piece of evidence that populations, disaffected by the workings of capitalism, had been enticed to make sacrifices on the basis that they had the right to aspire to a new world order. It was now acknowledged by the elites that something had to be done to preserve the system.

This crude sketch of the well-known should suffice to understand the atmosphere of the period in which I began my academic journeys. In the United States and Canada there were strong pressures on the elites to respond to demands for economic and political changes, some of which were animated by what was happening elsewhere in the world. Not the least of these was the example of the relative, and apparently continuously improving, material security of people who lived in social democratic, democratic socialist or self-styled communist nation States. At the same time as a fierce ideological war—and, on occasion, a concrete war—was waged against these anti-capitalist regimes and models, concessions were made to demonstrate to our populations that material welfare and compassion were compatible with our political economies. The material wherewithal was there and, though they did not come automatically, the State intervened to provide an increasing number of safeguards against excessive economic insecurity.

This is not to look back through rosy glasses: the welfare State developed far more slowly here than it did in those western nations with a much longer history of democratic socialist/social democratic politics and it always did remain far less generous. Thus, in 1983, Canada and the U.S. ranked still only 13th and 14th on a list of 18 comparable economies in terms of spending on social programmes (O'Conner, 1989). Nonetheless, the scope and nature of the amelioration were impressive. By the early 1970s, a whole slew of benefit and entitlement schemes had been put in place in Canada. Many were new. For example, in the 1960s the CPP/QPP scheme began to take shape and, by 1970, the Canada Assistance Plan, a universal social assistance regime, covering the old, the disabled, etc., had been established. Schemes of older vintage, such as the Unemployment Insurance, workers' compensation and statutory collective bargaining regimes, were much enriched. In addition, huge State expenditures were undertaken to provide universal access to quality education and health care. The capitalist State was demonstrating that it could, and did, provide government for all the people and that it could, and did, deliver material well-being for the masses. There was no need to look to other political systems for democratic rights and economic sufficiency.

Of course, with the benefit of hindsight, it is possible to characterize these social wage advances as self-serving measures by the powerful. It is plausible now to argue that the captains of industry had learned their lesson from the depression: there was a need to maintain aggregate demand to underpin mass consumption and, hence, it suited them—while it was easily affordable—to give workers the means to bargain for a decent wage and to complement that with enhancements of the social wage. But, they remained intent on not giving away too much, either in material wealth terms or in terms of power sharing. This hindsight view has some merit: it is true that, even during those heady days, many people did not share in the national increases in wealth. In the midst of this period, for instance, Michael Harrington wrote *The Other America* (1962), in which he claimed that between 40 and 50 million Americans continued to live in poverty. This gives some plausibility to an argument that holds that the changes

were not very important, not reflective of a new beginning, but, rather, sugar coatings of the same old pill. Yet, this belies the context in which these changes were wrought.

The new and richer welfare regimes and the fuller provision of education and health care—in Canada, at least—were not obtained in isolation from other political and social struggles. People everywhere were demanding different ententes and relations. This stretched from uprisings in the Soviet Bloc—Hungary, Czechoslovakia—where the claims were for more national autonomy, more political democracy and improved consumer satisfaction, to the upheaval in Paris where the struggle was overtly anti-capitalist, to Quebec where the creation of a modern State evoked linguistic and cultural demands, at the same time as it evinced a thirst for a changed political regime. In Quebec, this sentiment was captured by the phrase “*maitre chez-nous*”, which denoted dissatisfaction with private economic control of the State, tout court, rather than opposition to the private economic control by *English/American* wealth owners. In the United States, the race issue became a central struggle. It, too, did not just revolve around one axis. Not only was there a push to end the repellent discrimination against black people in terms of their formal rights under and according to law, that is, in terms of their elemental civil liberties, but a great deal of the contest had to do with the grinding poverty of the black population, with their class position. Indeed, some of the more militant—and, for a short time, more successful—of the groups advocated a separate but equal politics, one which envisaged a totally different set of relations of production. In a similar vein, it is pertinent to note in this simplified account of this turbulent period that many of those who opposed the war in Vietnam did so on the bases that the war was racist (we all remember the stand taken by Muhammed Ali, then Cassius Clay) and served capitalists’ interests, as did all racism (we all remember Martin Luther King’s speech to that effect). Women found articulate and effective leaders to present the case that they had been systematically excluded from the political and economic world and that so-called liberal law did much to maintain their disadvantaged positions and to perpetuate patriarchal power relations. And, although still very muted, there were some stirrings about the oppression of indigenous populations.

To explain the advances in respect of the welfare State as minor concessions made by capital to solidify its economic hold, then, would be a decontextualized explanation. It would characterize the changes as economic ones, narrowly defined, when the period was one of turbulent political movements which questioned both the material outcomes of the dominant economic model and the political impact of the dominant political economic model on democratic aspirations. The changes were not just better trade union rights and a wider-based and more generous social wage to advance economic well-being; a massively different approach to race and gender relations emerged, as did a different discourse and set of practices around political participatory rights. Integration and equal opportunity were cornerstones of the new circumstance which gave a deeper meaning to the importance of improved economic protections.

It is this wider understanding of what emerged as a post-war entente

which explains why the notion that a new beginning had been made took hold, one which portended an unstoppable trend: the steady accretion of rights would lead to emancipation. Borrowing from the work of Marshall (1965), the idea of inclusive citizenship was portrayed as an achievable ideal. Marshall had defined citizenship as the complex of civil, economic, political and social rights and duties which gave individuals their status in their polity. The scope of citizenship, of the status of individuals, was always in a State of flux as the extent of rights and responsibilities, as well as the respect bestowed on their identity, were politically contested. But, the acknowledgement that these age-old battles now should be referred to as being struggles over the nature of something designated as “citizenship”, that is, that they could be characterized in a quasi-scientific way, denoted a belief that progress had been made and would likely continue to be made on the road to freedom and liberty. That is, the term “citizenship” was not thought of merely as a descriptive one which could aid the assessment of the State of rights and obligations, but it had a normative tinge. During this period it was implicitly assumed that we had set off on a positive curve, that there would be a steady upward march, an accretion of rights, culminating in the eventual sovereignty and autonomy of all peoples.

To give this abstract claim some substance, I refer to the language used by the leaders in my sphere of study, labour relations lawyers. By 1967, Harry Arthurs, a disciple of Bora Laskin (who had written in a similar vein in 1963), coined the phrase “industrial citizenship” to describe the status of Canadian workers. *Workers’ progress had been such that it was no longer useful to think of them as individuals subjugated by the unfettered power of the employing classes. Even workers who had not won collective bargaining rights—and the non-unionized still comprised the majority of workers!—had so many protections from crude exploitation that one could think of them as having considerable rights, as having citizenship rights, where citizenship was thought of as connoting autonomy and participatory rights in respect of decision-making about conditions of employment. The ever improving provisions for a minimum wage, limitations on working hours, the right to notice when dismissed, the guarantee of paid vacations, etc., as well as the development of anti-discrimination regimes which should protect workers from invidious treatment when seeking employment and/or promotion and/or trying to protect their jobs, were listed as evidence for the new status of employees. These constraints on the way the economically powerful could treat the economically vulnerable were a manifestation of the growing status of the formerly remedy-less and right-less members of the working class. And, when it came to the organized members of the workforce, this was true in spades. Not only had their bargaining clout for economic welfare been increased enormously, their right to participate in rule-making and decision-making—directly and indirectly via their unions—had been enhanced dramatically. Their right to the rule of law, via the grievance arbitration system, reflected their new status: they were industrial citizens.*

Similar claims were made in many spheres of social and economic activity. For instance, as it became obvious during these relatively bountiful

economic times that some large corporate actors were dominating the scene, giving them the leeway to exercise quasi-governmental powers and to make decisions which amounted to the making of public policy (Dahl, 1966, 1970), fears that this might lead to an undermining of democratic practices were rebuffed by pointing out that the citizenry had more than enough power to look after itself. It is in this way that we can understand Galbraith's sanguine—and much cited—belief that, through unions, consumer associations, political lobbies, pension funds, upgraded legal rights to challenge discriminatory practices and the like, people could exercise effective countervailing power to what once would have been perceived as the unchallengeable economic and political might of the wealthy classes. This was a democratization of sorts: private policy-making could be made accountable to private power brokers who did not own wealth. Americans had become citizens with muscle because of the aggregation of economic and political rights which had been bestowed on them. Large corporations would not be able to treat people with contempt. (Galbraith, 1958, 1979). In this spirit, the famous debate about whether corporations owed a duty to anything but their shareholders—colloquially referred to as the Berle/Dodd debate—was decided to have been won by Dodd. He had argued that corporations should act with a view to the good of society as a whole. In the 1960s this gathered an enormous amount of intellectual and popular support (including that of Dodd's adversary, Berle), putting more conservative economists and lawyers on the defensive (J. Wiener, 1964). The well-known work, *The Corporation in Modern Society* (Mason, 1960), reflected this growing belief that corporations should be socially responsible citizens. It is interesting to note that the most vigorous riposte, *The Attack on Corporate America*, (Johnson, 1978), came when the citizenship project was sputtering. Before that, in the early 1970s, the popularized view that corporations were to accept the responsibilities which came with the citizenship rights they enjoyed along with the rest of us was transliterated into forceful arguments that managers of large, publicly traded corporations should use their discretion to make decisions which take into account the interests of workers, their communities and environment, as well as those of the consuming public. Shareholders, it was bravely suggested, were just one worthy interest group (Cary, 1974). The thinking behind this approach was that, if corporations were alternative sources of government-type decision-making, then a polity comprised by citizens of equal standing required evenhanded treatment of all those citizens by these powerful citizens who had combined to form a corporation. Citizenship required all citizens to look after all other citizens. A sense of community, one which mirrored that underlying the creation of the welfare State, should pervade private decision-making.

It will have been noted that I used the term status to describe the idea of citizenship. This was done purposely. What use of the idea of citizenship signified was that there had been progress in the sense that there was clear evidence of a transcendence of class relations. It was a signifier that the polity was not a class-divided one in which one class necessarily and systematically oppressed the other. It was possible for a market economy to

treat all people within it as equals, as owing no allegiance or homage to any other person unless they chose, by freely contracting, to offer their allegiance or pay homage to another. All had the same status; all were citizens.

What this line of argument suggests is that responses by the elites to the economic and political demands made by the masses during the post-war period and which often were motivated by the hope of a different set of political economic relations, examples of which could be seen to exist, were concerned to counter any perceived need for a non-capitalist regime. As noted, these changes were occurring at the same time as nation States, such as the U.S.A. and Canada, were fighting real and ideological wars against communism, socialism and the independence movements of peoples who might reject capitalism or, worse, lend support to the Soviet Union or China. The adventures in Chile, Vietnam, Cuba etc., provide examples, if any are needed. At home, red-baiting, the purging of leftists from trade unions, universities, government posts, are on the record. In these contexts it was important to our elites to demonstrate that capitalism and democracy were compatible. The idea of a progressively richer citizenship supported this agenda.

The picture painted was that there were no distinct classes which were in perpetual conflict; there was but one class, that of the full-fledged citizen. Again, it is hardly worthwhile to marshal evidence of this well-known aspect of the agenda of the elites. Just as today we find ideologues who are trying to convince us that what we have is the best of all worlds and we should not try to change a thing—hence the absurdity of an argument such as that we have reached *The End of History* (Fukuyama, 1993)—the intellectual gatekeepers of the time were propounding *The End of Ideology*, (Bell, 1965) at the same time as an all-out ideological war was being waged against leftist tendencies. And, at another end of this paradoxical spectrum, (somewhat later, indicating how long and hard-fought this battle for the minds of the people was) one would have found Peter Drucker contend that those foolish enough to think socialism might be the answer were ignorant of their own circumstances. Not only was the welfare State looking after the working classes, the working classes were already in control of the economy through their private pension fund holdings. If socialism meant the ownership of the means of production by the workers, America was already a socialist State. (Drucker, 1976).

This crude sketch suggests that, for a while, an alternative vision to that which underpinned the existing relations of production presented a plausible alternative, one which had to be countered. Concessions had to be made. An enormous amount of effort went into the consolidation of capitalism's hegemony. In the process, a great number of economic, political and legal victories were won by the formerly severely oppressed classes and groupings. The fact that I now see these victories as blunting the edge of transformative politics does not negate the fact that the progress made was real and satisfying, particularly for lawyers.

Precisely because many of the oppressions and repressions had been endorsed by law—the limitations on collective actions by workers, the right not to contract with any particular person (which permitted racist and

sexist decision-making by powerful contractors), the right to pursue profits transliterated into a legal duty for corporate managers, etc.—they were to be alleviated by making new laws. This called for expertise and lawyers' participation. At the same time, lawyers had become increasingly involved with political activists as the existing laws were used to punish those who were seeking change by means of extra-legal methods—sit-ins, wildcat strikes, illegal demonstrations, political strikes by unions only endowed with economic strike powers, etc. Lawyers were involved in asking the judiciary (as the repository of *status quo* rules) to make new laws which better reflected the new socio/political entente which was nigh. All this made it look and feel as if law and lawyers were at the centre of the movement for change. The academic milieu in which I was working was undergoing a make-over which spoke to these palpable gyrations.

Apostles of the rather old Realist scholarship were coming to the fore. In an environment in which the courts were increasingly used as tools for change—with some notable successes, such as those won in the Earl Warren Supreme Court in the U.S., sustaining hope about this venue as a useful one for much longer than was warranted—the judiciary (certainly at the appellate level) was increasingly seen as a political institution. In this context, the mantra that formalistic reasoning *was* legal reasoning had less and less cachet. Increasingly, judges were seen to be law-makers. This meant that their political views and beliefs were all-important. Unsurprisingly, it became fashionable to do what had been unthinkable before: to study judge-made decisions as reflections of the background, experiences and predilections of the judges. Jurimetrics was “in” in law schools and social science studies. The popularly pervasive mystique of an ethereal judiciary, floating above the political system, was fading, at least, in law schools. More importantly, those who perceived the judiciary as a political decision-making venue were concerned about its inability and/or unwillingness to deal with the political demands made on it. One set of arguments was that, if the decisions sought required policy-making, not only the background, experience and predilection of a judge might get in the way, but also the nature of dispute-creation and resolution in the judicial forum was an obstacle. Policy issues, by definition, are polycentric and the adversary process does not lend itself very well to dealing with these kinds of issues.

In law schools, infected by the cries for more citizenship rights, self-styled progressive lawyers began to call for keeping the judiciary out of important decision-making. The reasoning was that legislators and administrative tribunals, which could employ non-judicial methods to deal with the difficult problems which were arising out of meeting the new expectations and aspirations of society, ought to be given more prominence. And, as new legal rights and obligations were enshrined, there was a more obvious need to consider their full impacts, political, social, economic, cultural, etc. In law schools, curricula began to reflect these sentiments. Lawyers-to-be were told that the law dealt with the plight of the vulnerable as well as with the welfare of the rich, even if it did not do so very well as yet, and it should be studied to identify its positive impacts and remaining lacunae. The implications were that law and lawyers were part and parcel of the

social upheaval and that, in law schools, the starting position was that interdisciplinary and empirical work needed to be done to understand and further the citizenship-enhancing rights of these social movements. A plethora of courses made their way into the curricula. Initially, they were "Law and..." courses, such as Law and Poverty, Law and Women, Law and Native Title..., now acknowledged and refined fields of research and teaching. Then these courses were radical departures and their introduction led to many fierce contests.

The law schools, imbued with a sense that it was part of their obligation to help along the very visible reform processes, set up clinical teaching streams. While, in theory, this was advocated as a neutral and sensible way to teach law in context, in practice, this development was largely confined to teaching students about the workings of law—mostly non-judicially administered law—as it affected poor people who needed services. In addition, academic lawyers were involved in such things as grievance arbitrations, the drafting and administration of human rights codes, the creation of operational rules for any of the many new administrative agencies spawned by the torrent of legislative changes, writing for law reform bodies, drafting of the recommended legal changes, etc. While some of the motivation may have been careerism and plain greed, there was also a good deal of noblesse oblige and, more pertinent to this account, a new sanguinity that lawyers were not mere politically disinterested technicians, but involved social scientists and engineers.

Academic work reflected these trends. There was a distinct movement to study law in context, albeit the scope of that context was not determined with much precision. Traditional lawyers who had made judicial decisions and the formal reasoning process to which judges claimed to adhere the centre of their universe, now were fighting to maintain their prestige which had been unquestioned for a long time. Law & Society became a recognized branch for scholarly research, basing itself on empirical inquiry into the impact of law, whether made by judges, legislators or regulators. The study of anthropology was coming to be seen as germane to an understanding of what was law and what its sources were, other than those which traditionalists in Western societies had presented them to be, etc.

Law appeared to be pivotal to a dynamic reform process which, procedurally and substantively, was giving liberalism a new fillip. Not only was there an increased awareness of the need to safeguard individualistic rights, but there was also a perceptible recognition that there was a need to respect collectives and groups to give meaning and substance to the enhancement of individualistic rights. This is the context which gave many progressive academics the notion that law could be used as a progressive tool. What is notable about this perception is that it was founded on two threadbare assumptions, at least they seem so in hindsight.

The vision was that a democratically accountable government, imbued with the dominant ideology of liberal pluralism, could be driven in the right direction by progressive activists. State intervention with the unfettered uses of private or public power was seen as the means and the norm. Lawyers involved in this process saw the legislature—and, to a lesser extent,

the executive—as the site of struggles and initiatives. The courts were to play supporting roles and, if they were obstructionists, should be marginalized. What tended to be downplayed—unconsciously, no doubt—was the relationship between capital and the modern State and the nature and role of judicially-made law in a capitalist political economy. A short discussion of these blind spots follows.

When the State is persuaded to intervene in the operation of the market, it makes this decision politically. To implement it, however, this political decision is given the form of a law. In this way it can be administered and enforced. Precisely because a law is not self-fulfilling, its administration, interpretation and enforcement matter. The role of the functionaries used to draft the law and set up the apparatus for its execution, administration, interpretation and enforcement, becomes pivotal to the way in which the original political decision will fare. As lawyers are deeply implicated in all these processes, they tend to be perceived as legal processes, rather than political ones. Thus, while activists did go to the courts to strike down discriminatory practices, administrative decisions and oppressive police behaviour—more so in the U.S. than in Canada—from an activists' perspective during this period, legislation was law.

In one sense, at least, lawyers were right about the significance of lawyers' participation in these political processes. Once a political decision takes the form of law, the discourse which governs the application of that decision becomes legal discourse. Lawyers are the controllers of that discourse. In the words of Maureen Cain—who described lawyers as “conceptive ideologists”—they are the agents and translators of the bourgeoisie and the “creators of the language into which they translate”. (Cain, 1979) In practical terms this means that, once a political decision takes a legal form, it will be mediated by the dominant legal culture. The decision, now cast as a rule or rules, will be interpreted by reference to existing legal categories and rhetoric. While this is a rather vague statement, some rather precise features of its implications can be identified.

Lawyers believe that what is special about law as an institution is that decision-making is based on rationality, in sharp juxtaposition to political decision-making which is founded on the outcome of power struggles, *i.e.*, the very opposite of rationality. Once a political decision takes the form of law, these conceptive ideologists will transform potential political contests over its scope and meaning into debates between protagonists who are presumed to be in dispute *only* over the proper reading of the rule according to criteria which lawyers—as advocates, tribunals or courts—have said are applicable. They are not to act as if there is no shared world view; they are not to question the legitimacy of the decision-makers, provided they are given participatory rights.

Here I note that, inevitably, a lot of the trappings of the legal apparatus are about portraying our legal decision-making bodies—administrative agencies and courts—as politically independent and indifferent. Further, it is a truism that many of the challenges brought by the would-be progressive legal actors are challenges which complain about the lack of real participatory rights of their vulnerable clienteles. There is an endless quest to

oblige officials, agencies and tribunals to play by rules devised to create fairer processes and better formal participatory rights. The model pursued is to make these functionaries act more like courts do in the strictly legal system because the judicial process is idealized as the guarantor of even-handed and fair treatment of individual contestants. Indeed, courts have been given the task to monitor non-judicial decision-makers and, naturally enough, they believe that the more the decision-maker approximates judge-like behaviour, the better the decision-making process is. This approach makes sense only if it is assumed that courts—and their established practices—are ideally suited to supervise disputes within a shared set of values and that this consensus underpins all political decisions which take the form of law. If the values were contestible in a deep sense, the judiciary's pose of neutrality would not be apposite to the settlement of disputes arising out of value-laden conflicts. They would have to be resolved politically, irrationally, by the exercise of power.

From the point of view of the vulnerable on whose behalf the would-be progressive lawyers sought to push their legislative initiative, this devolution of decision-making to a system based on rationality and formal due process has distinct advantages. It is devilishly hard to get any political change which helps the dispossessed and, having got it, it would be very tough to have to wage the same battle over and over again in the political sphere. Being embedded in the legal sphere gives a victory a permanence which is most helpful, both instrumentally and symbolically. However, there are also serious disadvantages which tend to be underestimated, in part because they are not easily calculable.

Fighting on the legal terrain costs money and time. Very often the adversaries, the so-called forces of conservatism, have more of both those precious commodities. More intangible, but more important, is the fact that once the political struggle is transformed into a legal one run by legal functionaries—no matter how sympathetic they are to the people and the causes they support—there is a loss of the need to act in solidarity, militantly—indeed, this is often discouraged by the supportive lawyers fighting for legitimacy as *lawyers*—and there may be an alienating effect. The very movement which was formed to bring about change and which might have been built on to bring about more change may lose some of its steam as its *political* activists become less central to the safeguarding of what had been won.

Another feature of this means of improving the lot of citizens is that, once a political victory has been won and the decision takes the form of law, the legal advocates representing the forces which want to limit the scope of that political victory are just as capable as those who represent the interests of the protected individuals or groups. More: while it is the progressive academics and practising lawyers who agitate for political changes which require new laws of this kind, they are not necessarily the ones charged with the implementation or decision-making tasks which will give life to those new laws. This role is most likely to be entrusted to lawyers who can be trusted to interpret, administer and enforce the laws in light of the conserving principles of rationality and fair process, that is,

who are willing adherents of the dominant legal discourse. Radicals are not wanted and will not be found on the judicial benches charged with the oversight of administrative and legislative behaviour.

Finally, in this short catalogue of the difficulties associated with treating legislation as the principal source of law and a progressive tool at that, note that the pretence that the enactment of legislation should be characterized as if it were primarily the making of law, rather than an essentially political act given a peculiar form, cannot wipe away reality. The impact of the new law will depend on the political-will which gave rise to it and on the politics which emerge around its implementation and enforcement. No one can know at the time of its creation whether a new law, or legal ruling made by a court or tribunal pursuant to it, will have a particular effect, no matter how the law is written or the ruling expressed. For a law to declare "there is to be no racism", does not translate into an eradication of racism *ipso facto*. Allocation of resources—which depends on political decision-making—the nature of the existing and potential political will, attendant publicity, the level of acceptance of the underlying philosophy, the level of support for, and resistance to, the law or ruling, all will play a part in determining the impact of the law or ruling. This banal point draws attention to another set of verities.

As noted, the functionaries of those who oppose legislative reforms which threaten to interfere with the profitable deployment of private resources are able to play a role in the drafting and application of the State intervention on behalf of vulnerable groups. This enables these opponents to limit the scope of the changes that are obtainable, aided as these defenders of the status quo are by the capacity of wealth owners to threaten an interventionist government that, if it steps too far out of line, the investment of private resources necessary to the generation of economic welfare will dry up. This is the starting position which the post-war activists were trying to get the State to buck. But, as long as the creation of wealth was left to the private sector and as long as the division of private resources remained grossly unequal, the limits on State interventionism remained and lawyers and tribunals drafting, administering and enforcing reformist laws were operating under *political* constraints which could be exploited by opponents of the reforms.

The fact that the overall political environment frames the use of law as a tool of progressive politics becomes even more salient when the courts are used as the site of struggle rather than the legislature. While the owners of wealth cannot use the implicit or explicit capital strike as a weapon and the judges have their own need to prove themselves independent of all interest groups—including the wealthy classes—political reality plays a subtle, but effective, constraining role. A judicial decision which declares a practice abhorrent or discriminatory or even illegal will have tremendous *symbolic* influence and, thereby, the potential to support necessary political change. But, it is potential for such change, not actual change, which will have been achieved. To concretize this: when the vulnerable win a decision that, say, they are being denied the opportunity to rent or buy affordable housing, or the welfare scheme gives benefits to one gender and not another or the pro-

vision of access to abortions is not administered evenhandedly, a valuable statement of principle from an authoritative source has been obtained; but no funds for affordable housing, more generous and equally applied welfare benefits or for publicly-paid abortions will have been allocated. This essential step still requires a political decision, political struggle. There is no guarantee that such a struggle will be won, even though the judicial win has provided a valuable new bargaining chip. But, the same is not true when the owners of private resources go to the same "aspiring-to-be neutral" courts to seek relief from government intervention with their deployment of their resources. A judicial win usually takes the form of striking down such interventionist legislation. No further political act is necessary for the wealth owners to get the benefit of such a decision. The return to the previous status quo works in their favour (Hasson, 1982). And it is impossible for would-be progressives who advocate both the appropriateness of decision-making based on rationality and the use of the courts as a site for progressive struggle to question the legitimacy of such adverse decisions.

This brings me to another aspect of judicially-made law, the source of law which, during the 1960s and early 1970s, tended to be downgraded in importance by would-be progressive lawyers. The argument which follows makes the point that judicially-developed law provided the boundaries for the massive, positive State interventions which characterized this period in our parts of the world. To use a somewhat awkward analogy, the argument is that judicially-made law provides the base of the legal system and legislatively-produced laws constitute its superstructural component. In line with this (oft-criticized) Marxian metaphor, the superstructure's contents and impacts are conditioned by the base. The proposition is that the legal culture which affects a political decision when it takes the form of law is itself shaped by the deeply embedded premises of judicially-made law, premises which progressive forces ignore, and did ignore, to their peril.

As flagged, capitalist relations of production have certain needs which, necessarily, will be provided by the legal system which supports them. Capitalism is a process of relentless accumulation of wealth. The mechanism is to allow individuals to use their wealth to pursue their own enrichment. In mature, liberal capitalist democracies, such as Canada, law not only supports the tenets of liberalism—as sketched above—but also facilitates market transactions that, in turn, enhance both the instrumental needs of capitalism and the ideological precepts of liberal democracy. There is no need to detail how the idealized market schema supports the accumulation of wealth. It is the populist dogma of the day: if each sovereign individual makes optimal use of her talents and resources, the laws of supply and demand will ensure the most efficient deployment of the aggregate of our talents and resources, *i.e.*, the generation and accumulation of wealth project will be advanced. As this mechanism relies on decision-making by free and sovereign individuals, it contributes to the liberty of all. Further, this liberty is given more scope because the more free decisions are made by individuals, the less need there is for co-ordinating planners, *i.e.*, governments, to make decisions. The role of government should be reduced to the enlargement of the scope of free decision-making by autonomous indi-

viduals and to those essential societal planning activities which individuals—for selfish or technological reasons—will not make. (Friedman, 1962; Hayek, 1976, 1982)

Now, law does not automatically reflect all the needs of capitalist relations of production. Their precise needs are not known at any one moment of political history. More importantly, law, as an institution, has its own need to retain its independence and legitimacy. This is largely achieved by holding out that judicially-made law treats all individuals as legal equals, regardless of whether an individual is a capitalist or not. The point here is, however, that law's ability to live up to this legitimating characterization is limited. Law's autonomy is relative; law's principal task is to maintain and perpetuate the dominant relations of production, capitalism, and it must do that when confronted with the choice of being neutral at the expense of system-maintenance. This choice is rarely that starkly before the courts and there is, therefore, a good deal of give in the system. It is this relative elasticity which was being successfully exploited during the period of State interventionism described above. But the basic *legal* requirements of capitalist relations of production were, and are, never given up and continue to condition any reforms proffered.

The basic legal requirements include the right for individuals to own private property. It is not possible for sovereign individuals to make decisions about the productive deployment of resources for the pursuit of private profit unless they have the right to exclude everyone else from that decision-making and from the appropriation of the fruits of that decision-making. Given that the relative autonomy of law and the state of politics may determine the extent to which private property may be owned, in-roads on ownership may be made. Historical struggles and material conditions dictate the contents of private property rights. It is a characteristic of mature liberal capitalist democracies that the right of property will have been cut down by State intervention in order to blunt the most adverse effects of the "natural" outcomes of neutral market operations in economies where wealth is very unequally divided. But this does not negate the exalted place of private property in the legal regime. Whatever its momentary limits, the principle is to be safeguarded at all costs. It is this starting proposition which led the Law Reform Commission of Canada (1976), to state that, while in a liberal, capitalist democracy, peace, order, good government and individual liberty were to be protected by criminal law to some extent, the right to own private property is the most important value of all, so that theft—the protection of the individual's right to exclude others from his/hers/its property—was *the* paradigm of crime.

In the same way, the right to enter into exchanges, the right to enter into voluntary, private contracts, is basic to a market economy. It, too, is instrumental in advancing the accumulation process and in supporting the tenets of liberalism by endorsing the sanctity of individual decision-making. Private contract-making, therefore, is a fundamental feature of capitalist-supporting law and is not to be legislated out of existence, although it may be possible to diminish the right of individuals to enter into any deal they like, e.g., to hire someone below a minimum wage set by the State, to refuse to

hire people because of their race, to enter into a deal structured so as to avoid an impost, etc.

While many legislative reforms of a kind never obtainable through the courts were won—and continue to be won—the fundamental premises of judicial law which underpin the basic needs of market capitalism remained firmly in place. Here I note that, during the period of immense changes in curricula in law schools referred to above, the compulsory core of law school pedagogy did not change. To the best of my knowledge, no common law school did away with prescribing Property, Contract and Criminal Law as mandatory subjects, usually to be taught in first year. Torts also remained part and parcel of this bundle of compulsory courses, no matter how *avant garde* the faculty thought it was. Torts, of course, primarily deals with the protection of physical and private property integrity threatened by the conduct of non-contract related individuals, that is, it is judge-made law which is a natural component of the basic legal structures needed by capitalism. Today, many of torts' functions have been usurped by regulatory agencies, but that does not deny the fact that torts law is perceived as a "basic" legal institution. While there are other arguments made for the retention of Property, Contract, Criminal and Torts Law as compulsory subjects in curricula despite their claim to be reformist, interdisciplinary and value-free, none of them make as much sense as does the one which holds that these subjects are compulsory because they are the building blocks of the legal and ideologic support systems for capitalism in a liberal polity. (Glasbeek & Hasson, 1987)

The argument, then, is that judge-made law—as opposed to political conduct which leads to decisions which take the form of law—provides the structures essential to the working of market capitalism and helps legitimate this kind of political economy by furnishing the means to develop a supporting ideological framework. The latter is done, in part, by normalizing relationships and conduct which otherwise might call into question our commitment to the principles of liberty and to the sovereignty of individuals. This is a point tellingly made by the Canadian political philosopher C.B. McPherson (1968).

In Canada, as in all other mature capitalist economies, wealth is grossly unequally distributed. One per cent of the population owns nearly 20% of all of Canada's wealth; the top 10% of the population own 54% of the wealth and the top 20% share 72% of the wealth. At the other end, the bottom 40% have 1% of the total wealth at their disposal. This provides the context for exploitation, an opportunity enhanced by the fundamental principles purveyed by the judicial system.

As capitalism is an economic system based on the legal principle that no owner of property should be told how to use it, wealth owners will do what suits them. They will not deploy their resources productively unless they believe this will yield a profit for them. As wealth owners have a clear choice as to whether or not to invest their property, they can take advantage of non-wealth owners who, in order to provide for themselves, must invest the only "property" they own: their talents, *i.e.*, their intellects and physical capacity, themselves. While some non-property owners—the vast majority

of people—may have a choice to which property owners they will sell themselves, they must sell themselves to one such property owner. The much-cited growth of individual entrepreneurship only *seems* to be a contra-indication. Most such self-employment is due to the failure to find a willing purchaser for the labour power of individuals who would rather be employees. (This argument cannot be made in full here; it is merely flagged lest the assertion which preceded it is thought to be too crude, too sweeping; for a discussion of the nature of self-employment, see J. Stanford, 1999). It is this very disadvantageous circumstance which has forced workers to form unions and to fight off the judicially-made law which, given its predilections, attempted to outlaw and, later restrict, trade union activities. It is this built-in inequilibrium which has caused non-property owners to seek protection from the State by outlawing certain “freely” bargained-for conditions, such as below poverty level wages, unending working days, unsanitary and systemically killing workplaces, etc. In short, the employment contract is one in which workers *must* enter and, even if the contract’s conditions are ameliorated by the legalization of some form of collective bargaining and/or legislative safeguards, *conceptually and concretely* the employment contract is a coercive contract. It is not the outcome of a voluntary agreement between two individuals who, as sovereign political and market actors, both determined that to enter into such a contract was in their best interest. Yet, this is what judicially-made law pretends and has managed to normalize. It has made natural something which is essential to capitalism as a system, a system which thrives on the private appropriation of the wealth yielded by a socialized mode of production of that wealth.

To elaborate this crucial point: wealth owners need non-wealth owners to produce more value than they get for their productive efforts. Courts help them. Basic law allows them to own wealth and to exclude others from its uses; it allows individuals to sell part of themselves as if they were selling beans they had grown or bought, as if they were the owners of a commodity. The monstrosity of this starting point in a polity and within a legal scheme supposedly based on the primacy of the individual is well-understood, but it is pretended away if its existence raises its ugly head. This is why, when legislating against trade combinations—as every market capitalist regime must do—combinations of workers formed to regulate working conditions are excluded from the strictures of the pro-competition legislation. These combinations are not to be perceived as organizations to limit competition in respect of the ordinary subject-matters of trade. In the language of the Clayton Act: “Labor is not a commodity”. But, the fact is that both the logic of capital and judicially-made law do treat labour power as a commodity. Further, because the wealth owner/employer has bought that commodity, it is his/its to do with as he/it wills. A whole range of useful (to the capitalist) “natural” rules and beliefs now become self-evidently sensible and, therefore, their logic and sacredness unchallengeable. A short list will do.

The employer’s problem is that although, in law, he owns the labour power he has bought, functionally it remains under the seller’s, the

worker's, control. This contradiction lies at the root of all legal capital-labour conflict. Judicially-made law has come in to create a basis for resolution of this capitalists' problem by loading the dice in favour of employers. It has normalized the assumption that the worker has agreed to subject her intellectual and physical capacities to the needs of the employer who has bought them. Thus, while judges readily agree that we no longer tolerate slavery, they hold out that, because contracts of employment are not coercive, *despite the material facts to the contrary*, the starting point of all employment relationships—whether governed by collective bargaining statutes, employment standards legislation or the individual contract of employment regime—is that they are relationships in which one party (as a result of voluntary agreement) is under the command of the other. This has been internalized by policy-makers. As the Woods Task Force (1968) stated, in a matter-of-fact way, the relationship is one in which it is necessary to maintain a superior-inferior nexus. It is necessary because it helps the employer extract surplus value or, to put it colloquially, helps the employer make the worker who controls the sold labour power to work longer and harder than she might otherwise do.

Note here how deeply embedded the judge-made approach is. When workers who have the benefit of a formalized grievance process are enabled to challenge the authority of the employer by fighting penalties the employer imposed on them for disobedience, for insolence or insubordination, this is seen as a major breakthrough. That this employer right to punish for "offences" of this kind is a premise of the employment contracts of even the best-protected of our workers, tells us how effective the courts have been in legitimating what, objectively is, a profoundly anti-liberal regime. They have done this by using their legitimacy to give the pretence that employment contracts are just like any other contracts an aura of truth.

The impact of this judicially-made make-believe world is also felt when activists seek to have the State intervene with the private contract-making sphere. The influence on the way in which collective agreements are to be viewed has been noted above. Similarly, the normalization of the selling of oneself as a commodity has led to the judicial and political assumption that a worker, as a sovereign individual, has assumed, voluntarily, the risks to life and limb which inhere in productive activity as an employee. This is the basis on which common law courts refused to award compensation for workplace injuries to workers. Gradually, workers won the right to be compensated by having the State create statutory workers' compensation regimes. Precisely because these do not confront the untruth of the basic assumptions about risk assumption, they are limited in their coverage and are always easy to attack as "distortions" of the natural state of things. And, when it comes to the prevention of harm to workers, the road has been even more difficult. The sticking points are, first, that workers, as voluntary contractors, should be primarily responsible for the evaluation of the risks which are acceptable to them and, second, that the State—acting on behalf of the workers—should not be able to dictate to the employer how he/it should deploy his/its resources. Consequently, the standards of behaviour imposed reflect the overwhelming evidence supplied by the egregious and

repetitive infliction of particular harms. No more, and the enforcement of even those minimal standards is undertaken reluctantly by the State. New technologies and processes which might present dangers for the workers are treated as innocent until proved well and truly harmful, again, as evidenced by the mounting body count. This makes sense only if the worker is seen as a voluntary risk-taker and the employer as inherently entitled to do with his/its resources as he/it sees fit. And this is the very bill of goods which judicially-made law has made acceptable.

What is emerging is that judicially-made law not only materially structures the way in which market capitalism operates, but it also provides a powerful ideological framework which infects other arenas of political and legal decision-making. One more illustration is offered to make this point clearer.

The collection of taxation involves a government, democratically endowed with this power to take away property owned privately by individuals, deciding to do so. But the sanctity of private property, as laid down and defended materially and ideologically by judicially-made law, imposes restraints on governments' ability to tax as they see fit. To take individuals' money and to deploy and distribute it in ways they would not have chosen themselves requires continuous justification. Consequently, the taxation of wealth owners always is under challenge and enforcement of existing taxation rules is a lukewarm exercise, at best. Note, interstitially, that the taking is, ideologically speaking, just as contentious to judicially-based ideas when it is the taxation of wage earners' income which is at issue, but that the enforcement problem is non-existent because the monies due are collected before they come into the hands of these non-wealth owners, that is, workers. The same line of reasoning, posited on judicially-propagated principles and the attendant ideology, favours the rich when they are to be taxed but yields very different results when it is applied to non-capitalists. This has an eye-catching aspect when the entitlements of the very poor are at the centre of legal-political wrangles.

When democratically-mandated governments create welfare benefits' schemes, they will be distributing monies obtained from individuals and using it to satisfy other people's needs. While this may accord with the wishes of the majority of the taxpayers, there will be many who oppose such uses of *their* money. The government will be under constant pressure to justify the welfare scheme; there will be politically persuasive pushes to make the benefits less generous, or to abolish them altogether. Indeed, this is why it is easier for governments to create and maintain universally available benefits' regimes than targeted ones. Welfare schemes are also resisted because they interfere with the "natural" operation of labour markets, as envisaged by unmediated judicially-made law. They enable potential workers to avoid having to sell themselves for below- subsistence amounts, even though an unfettered "free" contract regime would cause them to do so. Hence, such schemes tend to be restricted to recipients who are not candidates for the "free" labour markets or those who have shown themselves willing to sell their labour power but have truly found no one willing to buy their intellectual and physical talents. Consequently, welfare recipients

must prove *their* eligibility. They, and not the State, have the burden of political and, therefore, of legal proof. When it comes to the collection of taxes, however, the State must find a plausible justification to convince taxpayers that it is entitled to impose the tax. It has the political and, therefore, the legal burden of proof when enforcing its tax laws. The rules of welfare regimes, in sharp contrast to those which regulate taxation, are enforced enthusiastically, even cruelly. It should suffice to note that welfare cheats are twice as likely to be imprisoned as are taxation cheats.

To recapitulate: in the immediate post-war period, political and economic conditions were such that capitalist elites came under serious pressure to make concessions to the majority. The idea of citizenship as a liberal, progressive status was promoted and enriched. Many of the changes came after fierce extra-electoral and parliamentary actions had been taken, leading to legislative initiatives which took the form of law. Even the courts were encouraged to take part in the dynamic movement to accord respect to the different and the vulnerable. In the U.S., the active role played by the Warren Court is well-documented and, in Canada, there were judicial baby steps, such as the efforts to imply a bill of rights in the constitution. In the main, however, the legal progressive and academic was involved in legislative and associated administrative reform movements. In large part this was due to the fact that the courts, because of their institutional role and the nature of dispute resolution in which they engaged, had never provided any of the advances now deemed to be essential and which had become winnable in the public, political sphere.

What tended to be relegated to the back of the minds of lawyers of my ilk was the fact that judicially-made law had established the structures—individuals as the lynch pin of social organization, the ownership of private property as a sacred right of individuals, private contract-making as a fundamental institution which ought to be left to private governance, the right to sell one's labour power—which maintained the material conditions necessary to the workings of market capitalism. Moreover, this judicially-made law underpinned an ideological framework which aided the maintenance of capitalist relations of production. And, while this was not obvious during this halcyon period of liberal pluralism, the judicially-propagated ideology was more libertarian than pluralist. It supported individualism over collectivism; it promoted the liberty furnished by self-regulation over the State's regulation of behaviour; it safeguarded the right to do with property as owners wished, free from infringements by collectives and democratically elected governments. While this could not prevent an avalanche of regulatory reforms which undermined these starting positions, it did help to curtail the extent of those reforms and, more importantly, it stopped reformers from being more than that, *viz.*, reformers. The basic legal precepts of capitalism were not challenged seriously, let alone overthrown. The legal structure and ideology which would permit a return to a more primitive accumulation process, one less mediated by legislative regulation, remained in place. This potential reversal needed new political and economic conditions. When these came, the remarkable thing is that the progressive legal communities turned to the courts for help as they saw the

gains made during the mid-1950s through the early 1970s disappear. This is the trend which has made me so pessimistic.

The capitalist economic boom began to fade in the early 1970s, indeed, some argue that the downturn commenced circa 1968. The dating is not as important—although it is noteworthy that it began when the progressive forces still felt that they were making great strides forward—as the fact that the dimensions of the downturn were staggering. Globally, growth and investment rates fell to half their previous levels; unemployment soared, reaching proportions close to those which obtained when the outbreak of the second world war brought relief; pauperization of the periphery, both globally and in the nation States of the advanced industrialized world, intensified. Number crunching is out of place in this essay, but a reminder that, since these economic changes took hold, food banks have become institutionalized in Canada—in the year 2000, 130,000 Torontonians use food agencies every month to survive—anecdotally illustrates what we all know: the economic recovery, which we are said to enjoy, is one which reflects the fact that the redistribution efforts of the post-war reform movements have had to be rolled-back sharply, if not reversed.

There has been an economic recovery. Like previous ones, it is based on the fact that new technologies have been spawned which have permitted arguments to be made that, for the efficient use of these new technologies, fundamental changes in labour organization and political and social relations are necessitated. This, combined with the failure of the socialist/communist experiments in the Soviet Bloc and the radical changes in China, established the conditions for an assault on the progressive trends of the preceding past.

Germane to the tale being told, the changing economic logic has put pressure on the organization of work and, thereby, on the relevance of trade unionism. A return to individual, competitive bargaining has been advocated. Concretely this has been aided by the ability to produce in foreign parts where labour is unorganized and cheap. This capacity has increased exponentially by the availability of new technologies and by the tearing down of State boundaries as the capitalist agenda is less and less seriously challenged by alternative political models. On the home front, this has meant concrete and ideological attacks on specific trade unions and unionism in general. The famed dissolution of Patco by the Reagan regime was a powerful symbolic act which echoed the assault on the coal miners in the U.K. and which was replicated by the imposition of many statutory restraints on collective bargaining in Canada (supported by the Supreme Court of Canada exercising the traditional judicial anti-union role by its predictably pro-capital reading of the *Charter of Rights and Freedoms*), the abrogation of collective bargaining by the New Zealand government (now reversed in part) and the more recent privileging of individual employment bargaining over collective settlement of disputes in Australia. Individualism of the kind envisaged and preferred by judicially-made law was back on the agenda. This was prepared for and fostered in many ways.

Politically, one of the concerns for capitalism in mature liberal democracies is that the universal franchise allows majorities to hold sway over

minorities. As the ownership of wealth is confined to a tiny minority, the reason for the fear is manifest. As capitalism's elites tried to contain the sweep for change which followed the end of World War II, their think-tanks acknowledged the need to cut-down the reach of electoral democracy. The flip-side to the movement to make corporations act more socially responsibly, more democratically, was a drive to make the electoral system less effective. It is in this context that writings such as the very influential, and tellingly entitled, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (1975), appeared. Its frank argument was that there was too much democracy in the advanced industrialized world, impeding the restructuring of the corporate world necessitated by the investment and growth crisis. It is this kind of thinking which laid the ideological groundwork for the overt and extremely successful attempts to reorganize macro-economic policy decision-making, taking it away more and more from electorally sensitive governments and lodging it increasingly in collaborating globally mobile corporate controllers. An early example was the formation of the Trilateral Commission (Sklar, 1980). Today, there has been an institutionalization of this trend. The FTA and NAFTA were nothing but examples of governments agreeing—forced?—to give up their rights to tell private property owners how to behave, diminishing the power of their electors. The ability of capital to dictate policies directly through its financial organizations—IMF, World Bank, WTO, BIS, etc.,—which, in turn, are directed by the rulers—using this term in its Real Politik sense—of the major industrial nations, has furthered this hollowing-out of State-bound democracy. These organizations, known primarily to the world as acronyms, exercise their ability to fund or not to fund needy governments in order to promote the wants of transnational corporations as they search the less and less boundaried globe for cheap resources and labour. The governments of those States, and even those of the first world States, are reduced to facilitating the access of those TNCs to the resources and labour markets. As this imposes hardships on their own citizens, they must help capitalist elites build a new hegemonic understanding, one which requires each individual to rely on the market for sustenance and happiness, rather than on a planning scheme which seeks to provide for people according to their needs. In part, this has led the State everywhere to use coercion to convince the citizenry to accept the new entente. The State is being turned into the enemy of the people.

To return to the legal setting: it was not long after their initial successes that progressive lawyers and academics were met with opposition. In law schools and in courts—especially at the lower levels—the residual formalistic schools sought to re-establish themselves. While support for this position was rhetorically based on the limitations of law as a non-political institution and the soundness of a jurisprudence based on the methodology of reasoning posited on analogizing by reference to established precedents, it was always a plea for a reinforcement of an ideological take on judicially-made law. This perspective was that courts should act only on the basis of a shared consensus about social relations, a set of values which transcend any particular political formation. It always was, therefore, a plea

to hang on to those very judicially-developed principles which gave libertarianism and capitalism what they needed. But, given years of criticism of formalism, the popularity and success of those who treated judicially-made law as anachronistic and the occasional activist—that is, deliberately non-precedential—approach by superior courts, the cry for a return to narrow formalism had relatively little resonance, certainly in law schools. There was, however, a modern-looking jurisprudential school which pushed the same line but did so more sophisticatedly and which, therefore, sounded better.

This was the Law and Economics school of jurisprudence. Its tenets are well-known. Its adherents—as do pure economists like Milton Friedman—claim that they believe in democracy and, therefore, will live with any democratically-imposed limitations on the operation of market capitalism, which, they assume, is best left unfettered. Their interest is the promotion of economic welfare by ensuring that legal regulation, whether it stems from judges or from legislators, is drafted so as to ensure the greatest amount of efficiency within the limitations imposed by democratic will. The attraction of this strand of scholarship is that it purports to provide a neutral, empirically-based approach to the regulation of market activities. Its links to another discipline—economics—make it difficult for progressive lawyers to discard it as old-hat formalism. Simultaneously, its basic view that the purpose of law should support the goals of market capitalism, allows the Law and Economics proponents to support the very legal constructs which judicially-made law developed to embed libertarianism and capitalist relations of production. On the positive side, this means support for the individual as the subject and object of society and individual property ownership and private contract-making as sacrosanct aspects of the centrality of individualism; on the negative side, it means highlighting the aberrational nature of binding majoritarianism and the planning and co-ordination of resource deployment for anything but individual advancement.

As the courts already accepted all these premisses, their standing is enhanced by this school of thinking. The real danger to “efficiency” within this Law and Economics model is the State. It follows that its advocates and the many effective and well-heeled lobbyists who fund and hire them—scholars all over North America get funded by outfits like the American Enterprise Institute, the Heritage Foundation, the Olin Foundation, the Liberty Fund, the Donner Foundation, etc.—ceaselessly urge governments to show that their regulations have been analysed on a costs-benefits basis and to start from the position that there should be no authoritarian regulation at all. Governments, always under political pressure by the threat of capital strikes, have been bombarded with respectable-sounding ideas about the limitations of giving political demands concrete legal forms.

In law schools, courses on Law and Economics sprang up everywhere. Many of North America’s law teachers—like many American judges—have been invited to special seminars in really spiffy places, like Palm Beach, to study Law and Economics with gurus such as Henry Manne. Many courses and materials are imbued with the postulates of Law and

Economics thinking; for instances in one of my areas of research one need look no further than the two leading teaching books on corporate law (Buckley et al., 1995; Ziegel et al., 1994). While there was something of a counter-movement in law schools which identified itself as the Critical Legal Studies school (CLS) and which was loosely informed by Marxism, this school has remained on the fringes of law schools—especially in major U.S. schools. In part, it is the continuing fear of being labelled a Marxist in the United States—and to a lesser extent, Canada—which contributes to this lack of prominence; in part, it is due to the fact that the CLS does not get the kind of financial and institutional support lavished on Law and Economics and, relatedly, in part it is due to the fact that, given the changing political and economic milieu, the progressive reform agenda pretty well has run its course and the CLS has less resonance in concrete conditions than does the Law and Economics movement. Further, a new school of thinking, postmodernism, has soaked-up much of the leftist, Marxian thinking which undergirded the work of would-be progressive academics.

Progressive academic lawyers and their allies were being overrun by a new set of circumstances. From the perspective of this narrative, the most significant changes included a powerful economic and ideological push to return to a state of affairs which had prevailed in the early 1900s. There was a new industrial revolution then, too, which launched a drive for a re-arrangement of social relations. That industrial revolution was centred on the development of electricity, the availability and uses of petroleum, the invention of the automobile, increased facilities for cross-boundary financial transacting, etc. The new-found confidence it bred soon led to the establishment of the gold standard, a reflection of the belief in the permanence of the new entente. An earlier form of globalization had evolved and, with it, a pervasive notion that market capitalism was natural and invincible. Depending as it notionally did on individualistic enterprise, society was presented as a multiplicity of individuals, requiring no interventionist regulation. The markets for goods, services and labour were best left to self-regulation (Walras). Today, as had been the case for at least 20 years or so, everything combines to drive us into accepting these verities again.

Academic lawyers and their progressive allies have been confronted by governments which are being pushed, materially and ideologically, to adopt a position which is the exact opposite to that which pertained when they scored their victories. Governments are under incessant pressure to cut the social expenditures which provided a social wage, shielding the citizenry from the more egregious outcomes of the unfettered market. Governments are assaulted on a daily basis to cut taxes which, they are told, reduce the opportunities of private property owners to hunt for profits. Contemporaneously, governments are hounded mercilessly to remove the regulatory framework which, allegedly, interferes with the self-governing deployment of resources which private property owners should enjoy. Further, governments are urged to stop providing services which the private sector could supply for a profit—and, therefore, more efficiently—albeit not universally, as the State is obliged to do.

While different governments respond differently to these pressures on

them and, therefore, the success rate of the private sector elites differs in various jurisdictions, the last two decades have seen some serious erosions of the collective rights of the working class, of the social wage and of the quality of life which had been achieved by material and economic advances. As noted, collective bargaining rights have been diluted and, in some sectors, lost altogether. Or, for another telling example, the minimum wage has dropped as a proportion of average wages: from the late 60s to the late 80s, the minimum wage entitlement in Canada was reduced somewhere between 20 and 30% and, recently, the situation has worsened. Unemployment insurance benefits reached an all-time high in both levels and coverage in the early 1970s and have now been cut-back savagely (Drache & Glasbeek, 1992; Yalnizyan, 1998). There has been a dilution of competition-promoting laws to “help” entrepreneurialism (Stanbury, 1987, 1995), a reduction of the progressivity of income taxation (of which the introduction of the GST is the most visible manifestation), the setting-up of watchdogs to ensure that governments do not regulate without giving serious consideration to wealth owners’ concerns and/or get rid of irritating regulations and requirements, for example, Ontario’s Red Tape Commission, the 1994 federal threat to introduce a *Regulatory Efficiency Act*, based on a U.S. statute which planned to leave it to corporations to decide for themselves how they should comply with existing regulations, the vetting of the regulatory structures and proposals for new regulations to ensure that the prescriptions of the *Charter of Rights and Freedoms*—a private individual’s safeguard against State powers—are honoured.

All this, plus cuts in the levels and availability of welfare benefits schemes and attacks on funding for public health care and education, have become what governments do, what electoral politics have been about, for more than two decades. In this context, it is not plausible to think of using the State to act as a positive force for the improvement of material conditions for the wealth-less classes. The idea of being involved in political activism in order to get a government to make a decision which, when translated into legal form, will become a tool for lawyers to use on behalf of the vulnerable and dispossessed, has become a romantic notion. Reliance on public support to persuade governments to act on behalf of the majority has lost impetus. Electoral democracy is in retreat. Progressive lawyers have shifted the ground on which they fight.

One agenda is to hold the anti-people, frankly pro-capitalist, State to account. A large part of what contemporary progressive academic lawyers and their allies do is to ensure that welfare schemes—or, more commonly, cut-backs of welfare schemes—are administered without overt discrimination or arbitrariness. Legislators, the executive and administrators are to abide by the Rule of Law notions developed by the judiciary as it established its legitimacy as an “apolitical” overseeing institution. In short, much of the progressives’ push is for the maintenance of the procedural safeguards of liberalism. They have a firm platform on which to operate. The legacy of the huge strides made in the post-war period in the advancement of liberal pluralism is real. The elites, policy-makers and the public at large espouse their commitment to the principles of citizenship developed

during this era. And, there are many new situations to which these broadly shared views can be extended.

Not surprisingly, the new economic conditions have generated a novel view of social relations, one which fits in with, and lends support to, the new entente. This leads to a paradox: many of the most important of the battles which have to be fought in these new milieux are fought by them in the very forum which had become marginalized during the previous reformist times—the judicial regime. Here lawyers' expertise is prized and progressive academics and lawyers can feel that they are playing a central, albeit different, role in progressive politics. However, this role is one which is not intent on changing the hegemonic hold of capitalism, nor is it intended to play a part in making material gains for the non-propertied classes. Rather, progressive academics and lawyers are engaged in moral/cultural/symbolic contests, or to use the language of the metaphor employed earlier, they are active at the level of the superstructural components of law. These assertions need a little elaboration.

As to the assertion of the novel nature of the circumstances which engage progressive lawyers, it is to be noted that there has been an explosion in the number of nations at the same time as the rather imprecisely labelled phenomenon of economic globalization is taking hold. This has made nation-bound political rights and entitlements more precarious, more difficult for each nation State to maintain. The task is made more complex by the outbursts of cross-nation ethnic reclamations—*e.g.*, Albanians in Kosovo—and the evolution of extra-national trading blocs and relatively autonomous regional governing institutions. The ensuing assertions of previously underplayed differences, the new mobilities associated with technological and economic developments, the de-coupling of traditional relations to land and the creation of extra-national labour markets, have created social and political turmoil. In the context of porous political borders and invigorated ethnic, racial, gender and nationalist consciousnesses, waves of immigration, flows of refugees, claims of sex and race-based discrimination, the issues of citizenship, of rights and responsibilities and respect for different identities, cultures, races, gender and sexual preferences, are raised in acutely troubling ways for mature liberal democracies. Their rhetorical and formal legal adherence to the principles of equality of treatment make them hypersensitive to the exponentially increasing complaints about unfairness and discrimination which the new circumstances are throwing-up. Enter the progressive legal community.

Academics and their allies have fought very hard to establish a scheme based on rational criteria which can embed, and enlarge the scope of, the incidents of citizenship of the Marshall kind. In this context, struggles to have such entitlements entrenched in the polity by obtaining human rights legislation and by amending the constitution of the land have real appeal to would-be progressive forces. Once embedded in this way, they will be safe from governments which can no longer be trusted with the protection of the civil rights of the vulnerable. Both human rights agencies, subject to judicial review, and the courts directly, when adjudicating constitutionalized protections, are to be left to patrol the rights and duties of citizens. Much of

the legal safeguarding of citizenship will be focussed on keeping the now oppressive State in check. It is majoritarianism, as reflected in governmental decision-making in the new economy, which has become the enemy of the people, even as the social wage gains made through the State's previous interventions are sought to be protected. This is a complicated political position to maintain. The ensuing struggles are suffused by tensions and confusion as progressive lawyers try to make their mark. The tensions due to the contradictory stance taken are intensified because the liberalized economic milieu has given augmented resonance to the arguments made by right wing elites and their think-tanks.

At the same time that the progressive lobbies are urging the expansion of citizenship rights to deal with the intensified and ever more visible needs of immigrants, refugees, the racially, sexually, ethnically and nationally distinct, the more conservative forces are arguing that such interventionism is unacceptable. There is a vigorous, well-funded effort to repulse the ideology of mutual support which underlies this attempt to enrich the Marshall model. The reasoning is that to treat differences differently is itself a form of discrimination. There should be a return instead to a more pristine model of self-reliance by individuals. Once individuals are provided with an equal opportunity to participate in market activities, the chips should be allowed to fall where they may. Specially tailored treatment of people on the basis of gender, sexual orientation, race, ethnicity, nationality, culture, religion, etc. is in itself said to be discriminatory. It fragments communities by catering to special interests, rather than building communities by according each individual member of any community the respect of being treated as an equal in that community, one who does not need to be given any assistance to thrive. Equality of opportunity to participate in market activities and reduction of the State role to that of a facilitator of unfettered market activities will enhance citizenship more than any planning, interventionist programme. While there will be some losers in this grand game, the winners may—but not must—want to help out these unfortunate people. Private charity is to pick up the pieces and this, in and of itself, will further community spirit.

There is a push and pull, then, between, on the one hand, citizenship rights which need a political and social rights' regime which gives scope to the notions of sharing, altruism, a sense of responsibility to, and respect for, groups who are "different" and/or which have special needs and, on the other hand, citizenship rights which reflect the ideological values and concrete needs of a less mediated market capitalistic regime. Progressive academics lawyers and their allies press to establish the primacy of the former view. But, while they have a number of positive outcomes to which they can point, their struggles are circumscribed by the limitations of the vision they pursue. This brings me to a pervasive theoretical/ideological approach found in the writings and activities of would-be progressive legal academics, an approach which helps them justify their new-found belief that the possibilities for fundamental change are severely limited.

One of the paradoxes of capitalist relations of production is that, during this moment of ascendancy, it has had remarkable success in having itself

portrayed as an anarchic regime, that is, as not providing a basis for a theoretical explanatory framework. The world is characterized as it was in the early 1900s, namely, as constituted by a multiplicity of individuals. The notion that a polity is made up of social classes, State institutions, active political parties and social organizations whose interactions are more or less predictable and, therefore, permit the development of a theoretical framework to explain and to predict the workings and possibilities of that polity, is considered wrongheaded. It is unacceptable in a world in which fragmentation and difference are to be seen as the major characteristics to offer "grand narratives". The "grand narrative" of capitalist relations of production as *the* basis of oppression, of class analysis as *the* starting point for transformative action, is now considered passé, if it ever was seen as key to the relief of exploitation and subjugation. Today's progressive lawyers' prescriptions for action tend to focus on the establishment of rights of, and respect for, the "different", rather than on an all out attack on the unequal ownership of wealth and the right of wealth owners to subjugate others in their endless pursuit of more wealth. It is the State's worsening, or maintenance, of inequalities which emerges as a central issue, not the creation of such inequalities by private economic activities. The redress of civil rights' values, rather than the alleviation of the impact of the operation of the anarchic markets, becomes the focus of attention. Government, rather than the private property owner, becomes the immediate target of the progressive reformer.

Clearly, this is an oversimplified picture. Progressive academic lawyers and their allies have fought for, and won, some significant battles against the private sectors. For instance, human rights statutes apply to the private sector. But, by and large, these legislative schemes are complaint-based and relatively ineffective, although their symbolic significance is considerable. The application of those human rights statutes are always circumscribed by such criteria as economic and technological feasibility, meaning that they are to be applied with respect for the needs of private profiteering, for the prerogative of management. The starting position is that the property owners' interests come first and that the systemic creation of oppressions and discriminations by the supposedly neutral operation of the market are—while not ignored—relegated to a back burner. Inasmuch as systemic discriminations are to be taken into account by affirmative actions of one kind or another, they have had little impact. Employment equity legislation, for instance, imposing requirements to employ a certain number of discriminated-against people—women, aboriginal people, disabled persons, people of colour, to use the categories found in the ill-fated Ontario experiment—never requires the private sector to create more jobs. Rather, employers are limited in their ability to exercise their economic power to hire anyone they like, but not inhibited in any serious way from exploiting the abundance of labour power which will hardly have been altered. (Glasbeek, 1995) It is preferred workers—non-aboriginals, white able-bodied males—who will bear the brunt of redressing systemic discrimination from which their predecessors "profited". Similarly, the power of the women's movement has forced governments to do something about the gross ine-

quality in wages between males and females. But, apart from the Ontario experiment, equal pay for work of equal value—with all its definitional difficulties—has been applied only to the public sectors, the private sectors being left to be regulated by the much less effective human rights and employment standards schemes.

In short, private economic activity has not been ignored altogether as a focus of oppression but it has not been tackled as directly as have other sources of discrimination and exploitation. The economic and political circumstances which have led the State to roll back the material aspects of the Welfare State also have helped give life to an ideological and theoretical framework which discourages today's progressive lawyers from confronting capital on a class basis. The ever more apparent cleavages between people based on sexual preferences, gender, colour, creed, race, ethnicity, nationality, etc., are seen as an argument for conducting a legal war on the basis of a politics of culture, morality and identity. And, overwhelmingly, this is what lawyers of my ilk—who once saw the State as a democratic site for the aggrandisement of citizenship and material welfare—do: eschew the State as the locus for positive intervention and turn to the courts for such advances. In Canada, the advent of the *Charter of Rights and Freedoms* gave this shift in focus a big push.

Earlier on in this piece, attention was drawn to the fact that, in the immediate post-war period, progressive lawyers tended to see law which was the outcome of executive and legislative political decision-making as *their* terrain. Their culture infused those decisions with meanings and legitimacy. Now, instruments such as the *Charter*—and Mandel (1994, 1998) has recorded the advent of similar instruments in all advanced industrialized and industrializing nations as their elites seek to avert the impact of mass democracy on the restructuring efforts of capital—have driven academic progressives, who now feel governments to be impotent and potentially despotic, back to the courts. There, of course, they have to deal with the familiar old problems: the difficulty of translating court victories into substantive gains and the inapposite nature of the forum for the making of polycentric decisions. More significant to this paper, to this lament, is the fact that the *Charter* only protects citizenship rights against the State, not against the private sector. In addition, the *Charter* rights are abstract in nature, e.g., freedom of association, of communication, of religion, etc., like empty balloons (Russell, 1988) which need to be filled by the courts. This has several inevitable consequences.

As the identified enemy is the State, all citizens, regardless of their *class* position can use the *Charter* to attack democratically made decisions. The way in which corporations—behind whose veils the wealth owners of the nation hide—have been able to use the *Charter* is well-documented. (Mandel, 1994; Glasbeek, 1989(a), 1989(b); Fudge & Glasbeek, 1992; Bakan, 1997). Precisely because the balloons can be filled by the judiciary, they tend to be filled so as to dovetail with the tenets of judicially-made law, that is, in line with the advancement of private property/contract rights. Almost inevitably, under the *Charter*, wealth owners have had their right to speak enlarged so as to protect their right to fund political parties in ways which

help them safeguard their property interests; commercial speech has been protected because it aids wealth owners to pursue profits as they are supposed to do, turning political speech rights—like everything else in mature market capitalist polities—into a commodity; wealth owners have had their right to privacy enhanced to enable them to better ward off regulators who have the temerity to inquire into the way in which they deploy their property; wealth owners have been able to use the rubric of religious freedom to trade on any day they choose, regardless of the desire of other people to keep some days sacred or heedless of the workers' historic struggles to limit the power of capital to force them to work on any day it chooses, for any length of time it decrees; corporations, which are accumulations of wealth, have been able to exploit the guarantees of the *Charter*, that is, the intended outcome of capitalism's project—accumulation for its own sake—has gained a sort of formal recognition under this liberal political instrument, etc.

The same logic of the base of law, that is, of law developed by the judiciary to maintain and perpetuate capitalist relations of production, has made it very difficult for the non-propertied classes to win decisions under the *Charter* which have redistributive economic effects. Workers' collectives, trade unions, explicitly supported by democratically elected governments to off-set the power of wealth owners to a limited extent, have been de-toothed by *Charter* decisions; the same right of free speech rubric used by wealth owners to talk politically and to sell their wares has been laid claim to by workers when they picket to protect their jobs, but the Supreme Court of Canada has told them that, when this exercise of free speech interferes with wealth owners' rights to trade and to profiteer, their acknowledged *Charter* right is negated; when the same way to speak—picketing—is used by progressive, but non-workers', causes, however, the Supreme Court of Canada has protected it, etc.

The point here is that, while lawyers lovingly massage these results to try and make legal methodological sense out of them, these kinds of results could have been predicted—and were by some (Glasbeek & Mandel, 1985; Hasson, 1982)—by taking the judiciary's historic role as a guarantor of the legal needs of market capitalism seriously. That is, these results endorse the argument that the base of the legal institutions will, if left to reign free—as instruments like the *Charter* do—turn law into a conserving force. Progressive lawyers, many of whom already accepted this foundation of law as unchallengeable, were hamstrung in their efforts to put constraints on capitalism. When progressive lawyers go further, as so many now have done, and endorse the entrenchment of this judge-made foundation and consciously ground their actions on its logic, their causes are seriously disadvantaged. The *Charter* results bear this out. As Fraser (1997) has argued, whenever a claim taken to court under the aegis of the *Charter*—and, I would add, under a rubric of common law—requires a political and/or economic restructuring, such as a demand for redistribution of property or for putting the investment of property under more democratic control, the claimants are very likely to lose, regardless of the plausibility of their strictly legal argument. Attempts to use the judiciary to reverse the power

relations which underlie the class divisions of our political economy are non-starters. Why, then, do progressive legal academics and lawyers turn to the *Charter* and the courts so much more often than they do to the legislatures today?

The answer is to be found in the fact that the State-bound route no longer offers them a role. More, regretful as I am to say it, most may have bought into the argument that totalizing political economic theories are to be discarded because no one theoretical approach can deal respectfully with everyone's needs and desires. Economic radicalism will not lead to the proper respect for all peoples. The best that can be done is to reform the system from within to give substance to the identity and cultural needs of all members of society. This tendency to give up on finding a total alternative to capitalist relations of production is reinforced by the postmodernist schools which concentrate on the multiplicity of identities, rather than on class conflicts. And, relatedly, it is when they act in accordance with those postmodernist understandings that the forces of would-be progressivity have had considerable success under the *Charter* and in the courts.

When class is not an obvious issue, legal politics centred on claims to redress cultural, moral and symbolic injustices have found willing listeners in the courts, especially when the claims can be made under the *Charter* which, it must be remembered, gives the judges wide discretion and a new legitimacy as policy-makers. Claims on behalf of people whose sexuality, gender, race or identity has been represented and treated discriminatorily or with disrespect by law, have been given sympathetic treatment. To be treated as equals in a polity which characterizes itself as a liberal one is a demand which resonates with the courts aware of their newly-crafted roles as protectors of some of the vulnerable in society. They have been prepared to do their bit. That progressive academics find this worthwhile is not surprising; indeed, they are right to celebrate these successes: they add to the citizenship rights of all of us, no mean accomplishment. But, there are limits.

Fraser (1997) and also Fudge & Glasbeek (1992) have shown that, if the cultural and symbolic claim calls into question existing wealth and economic distribution, the likelihood of success is diminished. A great deal of the success is explained by the fact that judges are most sympathetic to a representational claim when it does not involve a demand that there should be any expenditure to make the remedy effective. This is supported by the findings of Lajoie, Gelineau and Janda (1999), who find that courts are more willing to recognize the rights of lesbians and gay men when there are no public funds to be expended. This was even expressly emphasised by the Supreme Court of Canada in its widely hailed decision in *M. v. H.* (for a similar observation in a different setting, see Laura Cram (1993), and also Fudge (2000) and Fudge & Glasbeek (1997), on the European Commission's issue of directives where the bulk of would-be progressive directives are those which do not demand that the member States have to spend any monies). And, in the area where the progressives have had most success under the *Charter*, the legal rights' provisions, it ought to be noted that the procedural protections extended to suspects and accused persons—a

term which bizarrely qualifies corporations for many, but not all, of the legal rights' protections—in no way changes the class bias of the criminal justice system. No more corporations and their owners are treated as criminals, regardless of the harms they do or of the frequency of their deviant behaviour (Glasbeek, 1989(b)). Despite all the upgrading of *Charter*-supported protection against coercive police and prosecution practices, the same kinds of people, those without property to invest, the unemployed and the poor, are going to jail. Indeed, there are more of those people in prisons and under State surveillance in Canada per capita than at any other time in its history. Criminal law, the quintessential guarantor of private wealth, continues to be class-based law. No amount of success on the cultural, symbolic, identity front, has changed this in any way. Surely all this ought to be food for thought.

While progressive academics and lawyers argue that participation in representational, cultural, symbolic and identity politics in the courts in no way negates their efforts to get real change, this neglects the impact of their willing participation in a political setting where history, numbers and class take a back seat to a “rationality” bounded by the premisses developed to support capitalist relations of production, materially and ideologically. I have elaborated this argument in the pages of this periodical before, (1989(a); 1990), and will not rehearse the reasoning then offered. It is my view that the progressive lawyers' use of judicial law has forgotten or ignored President Roosevelt's rationale for his promise of a new Bill of Rights in 1944. He justified his constitutionalization of material entitlements, that is, of the kinds of gains a class-based politics would fight for as a prelude to fundamental change, by arguing that the political rights found in the Bill of Rights—the sort of abstract rights embedded in our *Charter*—had “proved inadequate to assure us equality in the pursuit of happiness. We have come to a clear realization of the fact that *true individual freedom cannot exist without economic security and independence. 'Necessitous men are not freemen.'* ...*In our days these economic truths have become accepted as self-evident.*” [Emphasis added]

While President Roosevelt was trying to safeguard capitalism, he knew that equality and democracy would be better advanced by an abandonment of the pristine features of capitalism and a movement toward a socialist regime or, at least one in which there had been a dramatic redistribution of wealth and, thereby, political power. He acknowledged that judicially developed, inspired and interpreted legal rights, as imported into a Bill of Rights of the kind that is now found in many advanced industrialized nations, were an impediment to autonomy and democracy. In our fervour, largely sustained by the successes of the early post-war years and, more recently, by the successes in our courts in respect of certain kinds of issues, progressive academic lawyers have tended to forget this truth. Many have lost sight of the fact that law in a liberal capitalist democracy will, when push comes to shove, deny democracy its place, and support liberalism only to the extent that this is consonant with capital's needs.

This pessimistic perspective on the potential of law as a tool for progress has led me to the belief that the best an academic can do is to point out the

limitations of law. Again and again. At the same time, a would-be progressive lawyer should support extra-parliamentary and extra-legal protests, from OCAP's to those which try to expose the workings of capitalism's acronyms, the WTO, World Bank, IMF, BIS, NAFTA, APEC, from Vancouver to Seattle to Windsor to Washington to Prague to Melbourne to Quebec. This does not place lawyers at the centre of meaningful politics. So be it.

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