REVIEW ARTICLE

TAKING A STAND: THEORY IN THE CANADIAN LEGAL ACADEMY

A REVIEW OF

CANADIAN PERSPECTIVES ON LEGAL THEORY edited by Richard F. Devlin (Edmond Montgomery Publications, 1991)

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I. INTRODUCTION

For much of its history, Canada's legal academy has been easy prey to the allegation that its scholarship is immature because uninformed and uninforming theoretically.[1] This state of affairs has had everything to do with the academy's traditional self-conception.[2] Until quite recently,[3] the Canadian academy thought itself the handmaid of the practising

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* Assistant Professor, Faculty of Law, University of Alberta. In this review, I begin by situating the text in the overall legal theoretical debate — here and elsewhere — in order later both to assess its success and to offer some general reflections on the future of theory in Canada's legal academy. The purchase price for meeting the latter two objectives was extensive footnoting in the foundations part — for which I ask indulgence.

I have had the benefit of the critical readership of Professor Richard Bauman and Professor R.J. Zuk. The errors, as always, are mine.

1. See for instance Mark MacGuigan's 1966 lament — noted by Professor Devlin in his "Introduction": *Canadian Perspectives on Legal Theory* (1991) 1 (hereinafter, *Perspectives*) — that "Canada has been noted neither for its jurisprudence nor its jurisprudents": M. MacGuigan, *Jurisprudence: Cases and Materials* (1966) at 652. For more recent and sophisticated views along the same lines, see *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (1983, H.W. Arthurs, chair) esp. c. 5, 6, 7 and 10; and "Symposium on Canadian Legal Scholarship" (1985) 23 Osgoode H.L.J. 395-695. For earlier views — again along the same lines! — see: Cohen, "The Condition of Legal Education in Canada" (1950) 28 Can. Bar Rev. 267; and Committee on Legal Research, (F.R. Scott, chair), "Report" (1956) 34 Can. Bar. Rev. 999.

   The *Ottawa Law Review* has tracked the generally troubled state of jurisprudence in Canada in its intermittent Annual Surveys of Canadian Law, which it began in 1968. See: Swan, "Annual Survey of Canadian Law: Jurisprudence" (1968-69) 3 Ott. L. Rev. 591; Swan, "Annual Survey of Canadian Law: Jurisprudence" (1970-71) 4 Ott. L. Rev. 540; Lewis, "Annual Survey of Canadian Law: Jurisprudence" (1976) 8 Ott. L. Rev. 427; Lewis, "Annual Survey of Canadian Law: Jurisprudence" (1979) 11 Ott. L. Rev. 733; Lewis, "Survey of Canadian Law: Jurisprudence" (1984) 16 Ott. L. Rev. 172; and, Lewis, "Survey of Canadian Law: Jurisprudence" (1988) 20 Ott. L. Rev. 671. The state of legal academic affairs in this regard is spoken as much as anything by the fact that the author of four of the six surveys is a professional philosopher, and not a lawyer.

2. In addition to *Law and Learning* and "Symposium on Canadian Legal Scholarship," *ibid.*, see Glasbeek & Hasson, "Some Reflections on Canadian Legal Education" (1987) 50 Mod. L. Rev. 777.

3. Professor Devlin, for instance, associates the "sea-change" he sees the legal academy undergoing with the *Charter* which, in his view, "has been a major catalyst in the development of an indigenous Canadian legal philosophy": see *Perspectives* at 367. As will become apparent, I disagree with him on all counts. I shall later argue that whatever changes the academy has undergone, they in no measure approximate a "sea-change" (see: *infra*, Part IV, "Conclusion"); that whatever the scholarly

profession.[4] Its educational practices were consciously designed to groom the generations of lawyers required to replenish professional ranks,[5] and its scholarship, to provide modest doctrinal monographs, and case commentaries and collections, for use by the profession.[6] The academy's agenda was one with the profession's. And since the profession's exclusive interest was supply and support, the legal academy became the solipsistic prodigal of university faculties, its scholarship a soliloquy with neither interest nor currency in the community of ideas.

This cozy symmetry in interest and aspiration between legal academy and profession has, however, begun to dissolve. Professor Devlin, for one[7], thinks that Canada's legal academy "has undergone a sea-change"[8]
occasioned by a very untypically Canadian "theoretical turn"[9]; and it is his aim, in this

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consequences of those changes, they fail to qualify as indigenously Canadian (see: *infra*, Part III, "Measuring Up"); and that whatever changes have in fact occurred have very much more to do with the demography of the academy than with the *Charter* (see: *infra*, Part IV).

4. See for instance: Arthurs, "To Know Ourselves: Exploring the Life of Canadian Legal Scholarship" (1985) 23 Osgoode H.L.J. 403 (arguing that the Canadian legal academy is "too preoccupied with an agenda of issues defined by professional priorities...too firmly implicated in the value structures and mind-set of the practising bar); and, more recently, Glasbeek & Hasson, *supra*, note 2 at 778 (arguing that "Canadian law schools have remained wedded to the notion that it is their primary task to advance the needs of the profession and the judiciary").

5. See for instance: *Law and Learning*, *supra*, note 1 at 54-56; and Glasbeek & Hasson, *ibid.* at 778.

6. In addition to *Law and Learning* and "Symposium on Canadian Legal Scholarship," *supra*, note 1, see Baker, "The Reconstruction of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law & Hist. Rev. 219 at 276-77 which associates the poverty of Canadian legal academic production with "the enigmatic and unparalleled longevity" of positivism in Canada.

7. As I have already indicated, I remain much less certain and optimistic than is Professor Devlin concerning the significance of the changes which the legal academy has, without question, undergone. See: *supra*, note 3, and *infra*, Part IV, Conclusion.

8. *Perspectives* at 367.

9. *Ibid.* at 4.

The turn to theory is not, of course, at all unique to Canada's academy. See for instance: (1987) 50 Mod. L. Rev. (which, in addition to the piece by Glasbeek & Hasson — *supra*, note 2 — contains reports on the condition of the American, British and Australian academies); Barnhizer, "The Revolution in American Law Schools" (1989) 37 Cleveland State L. Rev. 227 (describing the changes in the American academy as "a continuing revolution...that is transforming legal scholarship, teaching, and the structure of the curriculum" and "altering the law schools' relationships with the legal profession and judiciary"); and (1988-89) 5 Aust. J. of Law & Soc'y 1-152 (for essays and comments providing a recent view of the status of the Australian academy).

Nor is the response to the turn to theory any different here than elsewhere: commentators are either much too grand in their condemnation or much too easy in their praise. For a sample of the responses, see: Posner, "The Present Situation in Legal Scholarship" (1981) 90 Yale L. J. 1113 (claiming that "doctrinal analysis...is currently endangered at leading law schools"); Carrington, "Of Law and the River" (1984) 34 J. of Leg. Educ. 222 (calling for the banning of "radical" and "subversive" scholars from the academy); Fiss, "The Death of Law?" (1986) 72 Cornell L. Rev. 1 at 16 (arguing that critical legal studies and law and economics are dangerous because they may "mean the death of law, as we have known it throughout history, and as we have come to admire it"); Hagan, "The New Legal Scholarship: Problems and Prospects" (1986) 1 Can. J. of Law & Soc'y 35 at 48 (arguing that "the new legal scholarship is broadening our understanding of law"); Posner, "The Decline of Law as an Autonomous Discipline" (1987) 100 Harv. L. Rev. 761 at 778 (arguing that "law schools need to encourage...Legal Theory"); Langille, "Revolution Without Foundation: The Grammar of Scepticism and Law" (1987-88) 33 McGill L. J. 451 at 486 (arguing — as is common:

welcome collection of twenty-four essays,[10] to illustrate both the maturity and sophistication, and the uniqueness and utility, of this turn to theory.[11]

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see the particularly rancorous piece by Donald Galloway in *Perspectives*, 255 — that critical scholars misrepresent the work of mainstream scholars); and — last and least — Watson, "Is Legal Scholarship Failing?" (1991) 15(1) *Canadian Lawyer* 17 at 26 (lamenting the disappearance of scholarship "that is immediately useful to the profession"). For an overview of matters as they pertain to critical legal studies, see: Lewis, "The Unbalance Critical Legal Scholars and Their Unbalanced Critics" (1989) 40 Mercer L. Rev. 913.

Nor is the cause for the condemnation any different: here, as elsewhere, a critique of traditional scholarship and education has been part and parcel of the turn to theory. See for instance: "Symposium on Legal Scholarship: Its Nature and Purposes" (1981) 90 Yale L. J. 955-1296; *Law and Learning*, *supra*, note 1; "Legal Scholarship: Present Status and Future Prospects" (1983) 33 J. of Leg. Educ. 403-58; Kelman, "Trashing" (1984) 36 Stan. L. Rev. 293; "Symposium on Canadian Legal Scholarship," *supra*, note 1; Glasbeek & Hasson, *supra*, note 2; and "Colloquium on Legal Scholarship" (1988) 13 Nova L. Rev. 1-105.

Two final matters: here, as elsewhere, the origin of the changes has, in my view, much to do with the demographic changes which the academy has undergone in the last two decades; and here, as elsewhere, not only the academy, but the profession too, is under stress. I deal with the former elsewhere (see: *supra*, note 3; and *infra*, Part IV, "Conclusion"). For recent views concerning the latter, see: "Symposium: New Visions of Professionalism in Law and Legal Education" (1990) 26 Gonzaga L. Rev. 267-473; McKay, "The Rise of the Justice Industry and the Decline of Legal Ethics," (1990) 68 Wash. U. L. Q. 829 at 855 (arguing that "the ethics of the marketplace [have] increasingly weaken[ed] or even supplant[ed] the professional responsibility concerns of lawyers"); Glasser, "The Legal Profession in the 1990's — Images of Change" (1990) 10 Legal Stud. 1 (analyzing the disintegration of the "ideology of professionalism" which previously underpinned the practice of law); Johnson & Coyle, "On the Transformation of the Legal Profession: The Advent of Temporary Lawyering," (1990) 66 Notre Dame L. Rev. 359 (proffering temporary lawyering as a solution to the demographic changes in the profession); Richard W. Moll, *The Lure of the Law* (1990) at 215 (concluding that "those who have stepped out of the law are more buoyant and optimistic than those who are now practicing law"); and "The Growth of Large Law Firms and Its Effects on the Legal Profession and Legal Education" (1989) 64 Jud. L. J. 423-600.

Although this is not the place to pursue the matter, I take three views on stress in the profession: firstly, that it has its origin in the same demographics that have changed the academy; secondly, that unlike the academy —which has responded to the ideological stresses caused by these changes by turning to theory — the profession has failed to articulate a response; and thirdly, that the consequences of the changes are significantly different in the academy (where, at least for the present, the results have tended towards diversity and tolerance) than in the profession (where, increasingly I think, the move is towards even greater homogeneity and intolerance). See further *infra*, Part IV, "Conclusion".

10. In addition to the essays, which are segregated into seven chapters — representing five schools of jurisprudence (about which more shortly), and two jurisprudential themes — the text contains an overall introduction (Chapter 1), chapter introductions, and questions which follow each essay, all of the latter delivered by Professor Devlin. I should add that it is a matter of praise that only three of the essays — those by Hogg, Monahan and Petter, and Turpel — were previously available. Far too often this is not the case; and what parades as a new contribution, in fact consists of a mere collection of materials already available. For a particularly egregious example, see: *At the Boundaries of Law: Feminism and Legal Theory* (1991, M. Fineman & N. Sweet, eds.), the whole of which consists of essays previously available, at least one, several times, and many from a single issue of the same periodical. Incidentally, since the publication of Professor Devlin's collection, one of the essays — the one by Joel Bakan — has already reappeared in another forum. See: Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 Can. Bar Rev.307.

11. See *Perspectives* at 368 — ("the Canadian jurisprudential conversation is mature, sophisticated, subtle, and sensitive to the peculiarities of the Canadian cultural context"). See also iii, 1, 5-6.

More specifically, his collection has two purposes: to document that "there is a vibrant, polyvocal and diversified *indigenous* Canadian jurisprudential conversation"[12]; and to provide "a reasonably comprehensive introduction to the primary issues and competing perspectives that currently capture the Canadian legal theoretical imagination."[13] The first I take to be a scholarly purpose, and the second, an educational one; and in this review, I want to test the collection against both. Because the purposes are so clearly interrelated — one can only provide a comprehensive introduction to an indigenously Canadian jurisprudence, if indeed there is one — I will have first to provide a sketch of the contemporary agenda of Euro-American legal theory against which the collection's indigenousness and comprehensiveness must, in final measure, be assessed. I shall then proceed to take that measure, before concluding with reflections about the future of legal theory in Canada's reluctantly changing legal academy.

II. CONTEMPORARY LEGAL THEORY: STANDS, STRANDS, AND LOCATIONS

Traditionally, jurisprudence has been approached on what may be termed a "schools" basis.[14] That is, jurisprudence was taught, and collections prepared, on the understanding that legal theory consists of a series of chronologically ordered and discrete systems of belief, each addressing a set, time-honoured agenda, and each displaying a roughly uniform intellectual methodology.[15] If this was ever a useful attitude to take — and for reasons which will become apparent, in my view, it was not — it is no longer, simply because modern legal theory is not at all disciplined in that sense.

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12. *Ibid.* at 1 (emphasis added). I will consider later what possibly can be meant by indigenously Canadian: *infra*, Part III.

13. *Ibid.* at iii. Professor Devlin offers a number of more expansive versions of this claim: See: *ibid.* at 2 (that the collection will "enable newcomers to jurisprudence to understand...more readily"); 2 (that it will "encourage the reader to reflect critically upon his or her taken-for-granted assumptions about law"); 5 (that its "primary target market" are "those who are approaching jurisprudence in any systematic way for the first time",); 5 (that new-comers will find "very tidy, cogently argued, and nicely pitched analyses...that articulate and exemplify legal theoretical reflection"); 5 (that the collection "should prove to be an invaluable text for introduction to legal theory courses, and perhaps useful for graduate seminars"); 6 (that "students in other disciplines...may find it an excellent core text through which to approach the Canadian legal system"); and 6 (that practitioners and judges "will also find it a useful starting point").

14. The exemplar of the "schools" approach is *Lloyd's Introduction to Jurisprudence* (5th ed., 1985, Lord Lloyd of Hampstead and M.B.A. Freeman, eds.) which segregates extracts from the works of legal theorists into the familiar jurisprudential canon — natural law, positivism, realism, marxism, and so on.

So entrenched was this typology in the jurisprudential mind, that in the "Preface" to his *The Concept of Law* (1961), H.L.A. Hart declared his as "pedagogic aim," the discouragement of "the belief that a book on legal theory is primarily a book from which one learns what other books have said."

15. The "Preface to the First Edition" of *Lloyd's* (*ibid.*) exemplifies this.

A few examples. One of the tropes of contemporary legal theory is law *as* interpretation[16]; but — and this is the point — there is no school of law as interpretation, because legal theorists use literary theory for dramatically different purposes, and with significantly different results. Ronald Dworkin, for instance, deploys law as interpretation as a means to legitimize law's coercive power and to defend adjudicative integrity,[17] while others — Sanford Levinson is a good example[18] — wish the hermeneutic horse to carry them to just the opposite destination.[19] And the case is no different in any other area of jurisprudential debate, including that most traditional of jurisprudential themes, law as rights.[20] Scholars deploy rights discourse for opposed purposes — mainstream scholars to defend law's integrity, most left scholars to disclose it as a site of class or gender or

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16. This is the claim — begun in its contemporary form, I believe, by Hart: see, *The Concept of Law*, *supra*, note 14, c. 7 and p. 200 — that since what judges and lawyers do is interpret texts, law is an interpretive enterprise which must be informed by literary theory. See generally: "Symposium on Interpretation" (1985) 58 S. Calif. L. Rev. 1 - 725.

If pushed logically, the law as interpretation claim will produce the view that legislation is not law until sourced and interpreted by the legal community. John Chipman Gray's is the classic declaration of this view: "statutes", he says, are "merely...a source of the law" until "their meaning is declared by the courts, and it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as law." See: J.C. Gray, *The Nature and Sources of the Law* (1916) at 162.

For more recent pronouncements in the same vein, see: R. Means, *Underdevelopment and the Development of Law: Corporations and Corporation Law in Nineteenth Century Columbia* (1980) at xii (arguing that "the legal system is the domain of the legal specialist" and that "the legislature is in general not part of the legal system but a source of the goals that system is to carry out"); Posner, "The Jurisprudence of Skepticism" (1988) 86 Mich. L. Rev. 827 at 891 (submitting that "law is not a set of concepts, but simply the activity of judges"); and especially, Allan, "Pragmatism and Theory in Public Law" (1988) 104 L.Q. Rev. 422 at 446 pronouncing the following:

> Both legislative and executive will are always subject in the last analysis to the dictates of legal reason, which lies in the custody of the judges, since reason is always ultimate over will: an act of will is a fact to be acted upon, or not, in accordance with reason.

Law as interpretation has been soundly criticized for failing to account for, and indeed, for mystifying, law's coercive power. For excellent statements of this view, see: Cover, "Violence and the Word" (1986) 95 Yale L. J. 1601; and, more generally, Devlin, "Law's Centaurs: An Inquiry Into The Nature and Relations of Law, State and Violence" (1989) 27 Osgoode H.L.J. 219.

17. See for example: Ronald Dworkin, "Law as Interpretation" in *The Politics of Interpretation* (1982, W.J. Mitchell, ed.) at 249; and, for his fullest account to date, *Law's Empire* (1986).

18. See: Levinson, "Law as Literature" (1982) 60 Tex. L. Rev. 373; and, more generally, the collection of essays in *Interpreting Law and Literature: A Hermeneutic Reader* (1988, Sanford Levinson & Steven Mailloux, eds.).

19. The case is no different in law as interpretation's relation, the law and literature movement — see generally: "Symposium on Law and Literature" (1985) 60 Tex. L. Rev. 373; and, more recently, Thomas, "Reflections on the Law and Literature Renewal" (1991) 17 *Critical Inquiry* 510, and Dunlop, "Literature Studies in Law Schools," (1991) 3 Cardozo Studies in Law & Lit. (forthcoming) — which is deployed by scholars having very diverse agendas. Notable in this regard is the debate between Robin West and Richard Posner. See: West, "Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner" (1985) 99 Harv. L. Rev. 384. Posner's reply and West's rejoinder are in the same volume at 1431 and 1449 respectively. Posner has continued the debate in his *Law and Literature: A Misunderstood Relation* (1988) at 176-205.

20. For an excellent summary of the contemporary rights debate, see: Bartholomew & Hunt, "What's Wrong With Rights?" (1990) 9 Law & Ineq. 1.

race struggle, and still other left scholars, those who are pro-rights, to enlist liberal rights in the struggle for transformation[21] — but the deployment in itself signals nothing.

If this is so — if contemporary legal theory consists of a variety of terrains occupied for a variety of divergent purposes — the question becomes how to make any sense of the legal theoretical matter. In my view, sense is made by distinguishing the *stands* legal theorists can take from both the *locations* on which they can take them, and the *strands* of theory they are likely, given their stand, to be involved in, regardless of their location. Let me explain. What legal theory is finally about — and what makes it something worth doing — is the relationship between law and life.[22] Whichever inquiries legal theorists make, and however specialized their questions may appear — is there an obligation to obey the law? are judges constrained by law? is law an knowledge enterprise? do lawyers have ethical responsibilities? — their interest in, and the substance of, their inquiries, arise from, and ultimately turn on, some version of how law both relates, and ought relate, to the conditions of human association. Because this is so, legal theory is always utopian[23]: in order to encounter inquiries, the legal theorist *must*, with a necessity that is cruel, take a *stand* on the relationship between law and life. Otherwise, questions will not appear, or if they do — particularly if as borrowings from some other theorist's stand — they will have no meaning beyond mimic. Although this is not the place to pursue the matter fully, I take the view that there are two, and only two, positions possible with respect to the relationship between law and life — a liberationist/transformative position, and a non-liberationist/reformative position. The former is represented (exhaustively I think) by marxism, anarchism, and feminism, and proclaims that the relationship between law and

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21. See: Bartholomew & Hunt, *ibid.*; Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17 J. of Law & Soc'y 309; Fudge, "What Do We Mean By Law and Social Transformation?" (1990) 5 Can. J. of Law & Soc'y 47; and Brickey & Comack, "The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?" (1987) 2 Can. J. of Law & Soc'y 97.

22. See for instance: Catharine MacKinnon, *Towards a Feminist Theory of the State* (1989) at 237 (arguing that "a jurisprudence is a theory of the relation between law and life"); and, more generally, Eagleton, "The Significance of Theory" in Terry Eagleton, *The Significance of Theory and Other Essays* (1990) 1 (arguing that the "polarity between 'theory' and 'life' is surely misleading" because "all social life is in some sense theoretical").

Legion are the jurisprudence classes where this — the pith and purpose and passion of theory — is not as much as mentioned. Little wonder, then, that the legal community, academic and practising, has, until quite recently, thought theory the lard of the law. And this notwithstanding that legal theorists have, time and again, proclaimed law's significance precisely in terms of the theoretical underpinnings of social life. See for instance: Ronald Dworkin, *Taking Rights Seriously* (1977) at 67 (arguing that legal practice "must carry the lawyer very deep into political and moral theory").

23. I use utopian in the same sense as does Michael Ignatieff: "Utopian thought is a dream of the redemption of human tragedy through politics." See: M. Ignatieff, *The Needs of Strangers: An Essay on Privacy, Solidarity, and the Politics of Being Human* (1984) at 19. Viewed in this fashion, legal theories are dreams, dreams which express our longing for, and our understanding of, salvation through human association in history.

Robin West, too, takes this view:

> Jurisprudence — like law — is persistently utopian and conceptual as well as apologist and political: jurisprudence represents a constant and, at least at times, a sincere attempt to articulate a guiding utopian vision of human association.

See: West, "Jurisprudence and Gender" (1988) 55 U. Chi. L. Rev. 1 at 71-72.

life is, and has forever been, morally corrupt, and that the task is transformation, however variously interpreted. The second is represented (exclusively I propose) by liberalism, and proclaims that the relationship between law and life is a morally defensible one, subject only to a caveat of continuing vigilance and reform.[24]

What I take to be the three major *strands* of contemporary legal theory arise from the two stands from which legal theorists have unavoidably to choose. If a legal theorist's stand on the relationship between law and life is what I've termed non-liberationist/reformist, her occupation will be the first and predominant strand of theory, namely, the defence of the coercive force of law.[25] This strand, however expressed — theory of adjudication, theory of obligation, theory of punishment, and so endlessly on — will make hers a practice of legitimation: whatever the context of her practice, her objective always will be to convince that law is authoritative, and not merely authoritarian.

If, however, a theorist adopts the alternative attitude to law — if, that is, her stand is that the relationship between law and life is corrupt — then her practice will instance one or both of the other two strands in contemporary legal theory. The first — and until quite recently the pre-eminent[26] — strand of alternative theory informs a practice of de-

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24. How we take up these views has everything, I think, to do with a prior understanding of what we ought to be. This is to claim that legal and political theory turn ultimately on a founding understanding of human personhood. If this claim is correct, then the separation I've been suggesting between liberationist/transformative theories such as marxism and feminism, and the non-liberationist/reformative theory of liberalism ought to be defensible in terms of the understanding of human nature from which each arises. Such an argument is, I think, available in terms of the description of history to which each subscribes. Liberationist theories take as their description domination and subordination precisely because they subscribe — as did Marx —to an inessential view of human personality as limited transcendence. Liberals, on the other hand, take as their description a thickly essential view of human personhood itself; I am thinking here of what MacPherson termed the possessive individual (C.B. Macpherson, *The Political Theory of Possessive Individualism* (1962)). Liberationist dread, and its dream of transformation, arise from the sense of alterity that its view of personhood makes possible. Likewise, liberal complacence, and its dream of reformation, arise from the foreclosure its view of personhood makes ineluctable.

25. Ronald Dworkin — in my view the leading proponent of the liberal/reformist stand — expressly makes this strand the entire point of law and of legal theory:

> [T]he most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.
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> The law of a community on this account is the scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from past decisions of the right sort.

(*Law's Empire*, *supra*, note 17 at 93).

26. This caveat applies primarily to legal theorists in the legal academy, and not to left scholars situated elsewhere in the university — departments of political science, theology, and women's studies come to mind — who have had a longer engagement with the third strand.

When, in these rare periods, the Anglo-American academy has not been the enthralled captive of legal positivism's simple story about law — I'm thinking of American Realism of the 1920's and 1930's, and of the Critical Legal Studies Movement of 1970's and 1980's — legal scholars have tended to be obsessed with disclosing the lie of legal formalism, and with exception (perhaps Karl Llewellyn, and certainly Roberto Unger), never moved on to the much more troubling and engaging

legitimation. Theorists engaged here will seek to convince, generally by deconstructing the work of theorists in the dominant strand, that law, instead of being authoritative, is mere coercion, an irredeemable barbarity all the way down.[27] The second strand of alternative theory engages the theorist in the difficult task of theorizing the reconstruction of human association; and included here is the perplexing issue of law's potential for reconstructive practice.[28]

Now except at the very centre of matters — a reformist won't locate herself in marxism or feminism or anarchism, nor a transformist in liberalism[29] — the *locations* available for inquiries concerning these strands are completely open: any theorists, regardless of stand, can occupy any of them,[30] and the locations which can be occupied are expanding

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questions of reconstruction and of law's purchase on progressive practice. For accounts of realism and critical legal studies, see: Wilfred E. Rumble, *American Legal Realism: Skepticism, Reform and the Judicial Process* (1968); and Mark Kelman, *A Guide to Critical Legal Studies* (1987).

27. Much left rights discourse is undertaken with just this purpose in mind. See Bartholomew & Hunt, *supra*, note 20.

28. To sample some recent ruminations on law as a site for progressive politics, see: works cited, *supra*, note 21; Radin & Michelman, "Pragmatist and Poststructuralist Critical Legal Practice" (1991) 139 U. Penn. L. Rev. 1019; West, "The Role of Law in Progressive Politics" (1990) 43 Vanderbilt L. Rev. 1797; Glasbeek, "Some Strategies For An Unlikely Task: The Progressive Use of Law" (1989) 21 Ott. L. Rev. 387; and Hutchinson, "Talking the Good Life: From Free Speech to Democratic Dialogue" (1989) 1 Yale J. Law & Liberation 17. For a good summary of the difficulties left scholars have with law, see: Hugh Collins, *Marxism and Law* (1982) c. 6; and Walsh, "Redefining Radicalism: A Historical Perspective" (1991) 59 Geo. Wash. L. Rev. 636, 658-81.

29. The reasons for this are deep and perplexing, and have everything to do with the genealogy of taking a stand in moral and political theory. I indicated earlier (*supra*, note 24) that, in my view, whether one looks at the past of human association with dread or with complacence is a consequence of one's view of human personhood. How one comes to this view, however, is unclear and requires theorizing. It is possible that one comes to the view, and then adopts marxism or feminism or anarchism to provide flesh and direction to the view. On the other hand, it is also possible that one can only come to a view through a reflection on theory. In whichever case, the results are certain: the theory of the person makes the stand by prohibiting, in broad brush, certain positions. An interesting example of this is Dworkin's attitude to Marx in *Law's Empire* (*supra*, note 17 at 408, 425 n. 21): his taking the view that Marx's theory of justice is no theory at all, makes sense because given Dworkin's stand, Marx's view is unintelligible.

Incidentally, there is a caveat to my excluding reformists from feminism: if what is called liberal feminism is feminism properly so called, then that genre at least (and, in fact, only) is available to the reformer. For a strong declaration to the contrary, see: Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987), esp. c. 2; and, more generally, *The Sexual Liberals and the Attack on Feminism* (1990, D. Leidholdt & J. Raymond, eds.).

30. This is particularly so for feminist and critical legal scholars, and with good reason. Neither critical legal studies nor feminism is a school in the traditional sense, because what feminists share with one another, and what critical scholars share, is *not* a discipline, but an attitude — an attitude of dread towards the terms and conditions of the standing social formation. In consequence, neither are system builders, and are, instead, system users; and, quite properly, each will use whatever intellectual tools — marxist, psychoanalytic, literary, and so on — are available. See: Tushnet, "Critical Legal Studies: A Political History" (1991) 100 Yale L. J. 1515 (arguing that CLS "is less an intellectual movement in law...than it is a political location"); and Bender, "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 J. Legal Educ. 3 at 5 n. 5 (submitting that "feminism is not a monolithic concept but an ongoing conversation about women's subordination").

rapidly, and apparently endlessly.[31] Feminists can both defend,[32] and decry,[33] rights discourse. Both conservative[34] and reformist[35] liberals, and indeed, some would claim, left scholars,[36] can occupy law and economics; moreover, liberals can disagree fundamentally, among themselves, over the propriety of economic analysis in law.[37] Progressive scholars can disagree not only about the reconstructive potential of liberal discourse,[38] but much more profoundly about what founds the domination and subordination which they claim inheres in the present social arrangement; and this disagreement leads to divisions concerning the proper context of progressive scholarship

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31. In addition to the traditional canon of political, moral, and social theory, a tentative list of locations could be:

    law and literature
    law and economics
    critical theory
    hermeneutics
    psychoanalytic theory
    political theology
    existentialism
    history
    race theory
    linguistics
    post modernism
    deconstruction
    myth
    narratology
    sociology
    phenomenology

    This expansion of the terms of legal theoretical discourse alarms some. See for instance: Carrington, *supra*, note 9; and Minow, "Law Turning Outward" (1987) 20 *Telos* 19. These are, I think, unhappy and unhistoric views of the possibilities of discourse in the legal academy. For a description of a period when "the study of law...was an exciting enterprise, a philosophical search for truth and fundamental principles," see: Murray W. Rothbard's description of legal studies in sixteenth century France in his "Introduction" to Etienne de la Boetie, *The Politics of Obedience: The Discourse of Voluntary Servitude* (1975, trans. Harry Kurz) 9 at 10.

32. See for example: Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale L. J. 1860; and Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation" (1988) 136 U. Penn. L. Rev. 1135.

33. See for example: Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale L. J. 1373.

34. See for example: Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication" (1980) 8 Hofstra L. Rev. 487 (arguing that efficiency and wealth maximization should drive common law adjudication).

35. See for example: Rose-Ackerman, "Law and Economics: Paradigm, Politics, or Philosophy" in *Law and Economics* (1989, N. Mercuro, ed.) 233 at 241-44 (arguing that law and economics can support a rather Dworkinian conception of law as public morality).

36. See: Schlag, "An Appreciative Comment on Coase's *The Problem of Social Cost*: A View From The Left" [1986] Wis. L. Rev. 919 (arguing that law and economics has left implications).

37. Compare, for instance, Richard A. Posner, *Economic Analysis of Law* (1977, 2d ed.), and Dworkin, "Is Wealth A Value?" in R. Dworkin, *A Matter of Principle* (1985) at 237.

38. *Supra*, notes 32 and 17.

— whether race[39], gender[40], or class[41] — and to harsh criticisms of other left scholarship.[42]

Because the sites are open, the permutations of stands, strands, and locations are really quite endless. And not only that: the occupation of sites by different categories of scholars for categorically different purposes continually pushes the boundaries, and new sites and new themes are thereby produced. At the present, for instance, scholarly occupation of contemporary literary and political theory is leading to an engagement with postmodernism[43], and the politics of radical subjectivity.[44] This engagement will provide progressive scholars in particular[45] with entirely new sites for deconstruction[46] and, I think especially, for reconstruction.[47]

This fluidity, as much as anything, signals the temper of Euro-American legal theory because it is bred of a re-engagement which typifies contemporary theoretical discourse. No longer is legal theory an arcane discourse left to the election of scholars after their real labour — the production of doctrinal treatises — is complete. Just the contrary. Theory is now part and parcel of legal discourse, because the Euro-American academy is taking

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39. There is a burgeoning critical race theory. For an excellent summary, see: Peller, "Race Consciousness" [1990] Duke L. J. 758.

40. Perhaps the best analysis of the foundational nature of gender is MacKinnon's *Towards A Feminist Theory of the State*, *supra*, note 22.

41. See for example the articles by Fudge and Glasbeek, *supra*, note 21.

42. Both critical legal studies and feminism have been targets of criticism by race theorists. For the debate regarding feminism, see: Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581 (criticizing the scholarship of Catharine MacKinnon and Robin West); and Kline, "Race, Racism and Feminist Theory" (1989) 12 Harv. Women's L. J. 115 (a white feminist response to race criticism). For race criticisms of critical legal studies, see: Cook, "Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr." (1990) 103 Harv. L. Rev. 985; Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights" (1987) 22 Harv. C.R. — C.L.L. Rev. 401; Delgado, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?" (1987) 22 Harv. C.R. — C.L.L. Rev. 301; and, more generally, Hardwick, "The Schism Between Minorities and The Critical Legal Studies Movement: Requiem For a Heavyweight?" (1991) 11 Boston Coll. Third World L. J. 137.

43. See generally: J.F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (1984, trans. G. Bennington & B. Massumi).

44. See generally: Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill L. J. 507 (for a bibliography of the legal theoretical engagements, see 512 n. 7).

45. In particular, because the liberal commitment to an individualist social ontology will forbid liberal scholars from occupying postmodernism. See further my discussion of liberalism in Part III following.

46. For recent examples, see: Carty, "English Constitutional Law from a Postmodern Perspective" in *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (1991, Peter Fitzpatrick, ed.) 182; and Eskridge & Peller, "The New Public Law Movement: Moderation as a Postmodern Cultural Form" (1991) 89 Mich. L. Rev. 707.

47. I take this view because if we take seriously the proposition that "no dominant political order is likely to survive very long if it does not intensively colonize the space of subjectivity" (Eagleton, *supra*, note 22 at 36), then the postmodern deconstruction of identity can provide both the opportunity and a basis for theorizing about what bell hooks calls the "struggle for subjectivity" (bell hooks, *Yearning: Race, Gender, and Cultural Politics* (1990) at 18). If my guess on this turns out to be correct, it will, I think, occasion a rapprochement of left race, gender, and class scholars, and perhaps even a reformulation of the left project.

seriously the law — seriously as a coercive force, seriously as an intrusive discourse, and seriously as a practice having something significant to do with the present form of human association, and, even possibly, with its transformed future. The academy, that is, is taking a stand on law; and because it is, theory has become not only unavoidable, but necessary and desirable. Otherwise the stands which scholars feel compelled to take reduce to gesture without either direction or location to provide them substance. In this sense — as a reason and a method for taking seriously law and legal scholarship — theory is the very life-blood of the contemporary academy.

One final matter before I proceed to assess Professor Devlin's collection with reference to this state of affairs. An ineluctable feature of fluidity in any discourse is self-reflection. That is, where there is no disciplining canon, a discourse will tend to fold back in on itself by questioning its very substance and direction. This self-criticism puts in contest the nature and, indeed, the value of the discourse. This is now happening in law[48]; and, in my view, it constitutes one of the most engaging elements of legal theoretical debate. Legal theory's discourse on itself constitutes, simultaneously, a search for foundations and an acknowledgement that no such thing is possible. It is out of this dialogue between hubris and humility, I believe, that the future of legal scholarship, and particularly theory concerning alterity, will arise.

III. MEASURING UP

I wish now to test Professor Devlin's claim that his collection constitutes a comprehensive introduction to an indigenously Canadian jurisprudence against the portrait I've just drawn of Euro-American legal theory. Since I take the view that the collection fails in this regard (and happily so), I will quickly dispatch this matter before proceeding to the much more important and engaging question of how the collection measures up as an introduction to contemporary legal theory. This inquiry will provide a basis for the assessment of the state of theory in Canada's legal academy which I'll undertake in my conclusion.

Professor Devlin is never precise about what he means by indigenously Canadian. Sometimes he speaks as if the "Canadian specificity" he's claiming amounts merely to the essays being authored by Canadians.[49] At other times, however, he appears to make a much grander claim, namely, that the collection either constitutes, or is evidence of, a

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48. To sample this self-reflection, see: Hicks, "On the Citizen and the Legal Person: Toward the Common Ground of Jurisprudence, Social Theory, and Comparative Law as the Premise of a Future Community and the Role of the Self Therein" (1991) 59 U. Cinn. L. Rev. 789; "Symposium: Deconstruction and the Possibility of Justice" (1990) 11 Cardoza L. Rev. 919-1726; "Symposium: Law and Social Theory" (1989) 83 Nw. U. L. Rev. 1-472; Berman, "Toward an Integrative Jurisprudence: Politics, Morality, History" (1988) 76 Calif. L. Rev. 779; Gjerdingen, "The Future of Legal Scholarship and the Search for a Modern Theory of Law" (1986) 35 Buff. L. Rev. 381; "Symposium on Canadian Legal Scholarship," *supra*, note 1; *Law and Learning*, *supra*, note 1; and "Symposium on Legal Scholarship: Its Nature and Purposes," *supra*, note 2.

49. See for instance *Perspectives* at iii ("All too often those of us who teach legal theory are forced to draw upon either British or American resources.").

theoretical agenda that is in some pertinent sense distinctively Canadian.[50] Now if his claim is the former — if, that is, by indigenous, he means merely to point to authorship — then I think he fails, at least on any properly Canadian view of the matter. Consider the authorship. Half of the essays are authored by residents of central Canada;[51] the legal academies in New Brunswick and Saskatchewan are not represented;[52] and — sin of cardinal sins in Canada, and rightly so — the collection contains no essays from the Québécois legal academy.[53] But these peculiarly Canadian deficiencies of place and language may be of no great consequence — Professor Devlin admits his collection is "dramatically incomplete and partial"[54] — since his real claim appears instead to have something to do with indigenous in the second, more ambitious sense. And it is in this sense that I wish to explore the matter.

There are really only two senses in which a theoretical discourse may meaningfully be indigenous to a national culture. It may be indigenous in the *strong* sense that the nation in question has produced a distinctively national theoretical framework or agenda;[55] or it may be indigenous in the much *weaker* sense that a standing, extra-national agenda has been addressed to distinctively national phenomena.[56] The manner in which national distinctiveness is achieved varies, I think, according to the sense in which it is achieved. National distinction in the strong sense may be achieved in either of two ways. A national culture may produce what constitutes a self-referencing, free-standing discourse; or it may produce a distinctive contribution to an existing theoretical agenda.[57] Classical English positivism[58] and Scandinavian realism[59] are instances of the former, and the

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50. See *ibid.* at1 (claiming that "we can and do produce legal theory that is of international quality and not a mimic of ether our American or British counterparts"); 2 (implying that "our legal philosophical heritage is... [not] a mimic of happenings in England"); and 3-4 (providing a history of legal theory in Canada — by author — since the 1960s "to identify the traces of what, [he] think[s], is appropriate to describe as an indigenously Canadian jurisprudence").

51. The complete breakdown is as follows: Quebec, 1; Ontario, 12; Western Canada, 7; and Maritimes, 3. One essay has joint B.C. and Ontario authorship.

52. The common law academies not represented are New Brunswick, Ottawa, Western Ontario, and Saskatchewan.

53. One essay — the piece by Colleen Sheppard — is authored by an English language scholar resident at McGill Law School.

54. *Perspectives* at 1.

55. In the case of legal theory, historical examples come easily to mind. The classical positivism of Bentham, Austin, and Hart is peculiarly and identifiably English; similarly, the realism of Axel Hägerström and his heirs is specifically Scandinavian.

56. There are endless examples of this, including, most notably, early American discourse on the English version of liberal legalism. See: Dworkin, *supra*, note 22; and *infra*, note 60.

As will become apparent (*infra*, note 60 and Part IV, "Conclusion"), I take this view of national distinction to be largely empty as a matter of merit, and, along with the stronger claim, as potentially dangerous as a matter of vision.

57. As I indicate later (*infra*, note 62 and accompanying text), contribution in the strong sense often arises from national distinction in the weak sense.

58. See: J. Bentham, *Of Laws in General* (1970, H.L.A. Hart, ed.); J. Austin, *The Province of Jurisprudence Determined* (1954, H.L.A. Hart, ed.); and Hart, *supra*, note 14.

59. See: A. Hägerström, *Inquiries Into the Nature of Law and Morals* (1953, C.D. Broad, trans.).

American rights version of liberal legalism, an excellent contemporary instance of the latter.[60]

National achievement in the weaker sense is less precise a matter. Clearly, if national distinction in this sense is conceived as a matter of some merit, then there must, I think, be something more to it than mere national application. Otherwise, every national culture would have claim to a national theoretical discourse, provided only that some of its nationals write with reference to some standing agenda. What is required to make out the weaker claim, rather, is that the national application be a distinguishable part of the larger, standing agenda. And it will be distinguishable where the national discourse constitutes an identifiable voice in the extra-national conversation. A national discourse of this kind may, if it is lucky,[61] eventually develop into a national discourse in either of the stronger senses. In my view, this is precisely what happened with American liberal discourse: while initially distinctive in a weaker sense, it gradually pushed the boundaries of the standing English discourse so far as to transform itself into a national achievement in the strong sense.[62]

Professor Devlin's collection does not disclose a discourse which is at all distinctive to Canada in either of these senses. Clearly, the collection is not distinctive in the strong sense of demonstrating a distinctive agenda. Note how the essays are segregated: of the twenty-four, fourteen are devoted to various standard liberal locations,[63] four to critical legal studies,[64] three to feminism,[65] one to marxism,[66] and two to race.[67] Now, under

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60. Robin West claims that "in the last ten years, a distinctively American jurisprudence has emerged as the dominant liberal theory of law." West, "Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law" (1986) 134 U. Penn. L. Rev. 817.

She is referring, of course, to the displacement of English positivism by American rights discourse as the ruling vocabulary in liberal legal theory. While this is clearly the case, American discourse, in my view, remains a contribution because it addresses an agenda established previously by English positivism.

Incidentally, these methods of national accomplishment point to the very real dangers involved in conceiving of discourse in nationalist terms. I am referring to solipsism and marginalization. Scandinavian realism may be an object lesson concerning both: as a discourse, it has remained at the periphery because it was not articulated in conversation with discourse elsewhere. I will return to these dangers again (*infra*, Part IV, "Conclusion") when, in my concluding comments, I plea for participation by Canadians in the great conversation concerning law and human association, and dismiss any call for the development of a Canadian jurisprudence.

61. In a wider geo-political sense, of course, it may not be a matter of luck at all. That is, success in developing and exporting theory may have more to do with national stature than with intellectual merit. Certainly, this would explain the unhappy consignment to the periphery of some national achievements. Again, the treatment of Scandinavian theory may be instructive. If this is so, it provides yet another reason for *not* conceiving of theory in nationalist terms. See further *infra*, Part IV, "Conclusion".

62. I have already taken the view that American discourse instantiates the second strong sense. Others take the opposite view. See *supra*, note 60.

63. I'm including here the essays in Chapters 2 ("Liberalism"), 3 ("Law and Economics"), and 8 ("Constitutional Interpretation").

64. *Perspectives*, Chapter 5 ("Critical Legal Studies").

65. *Ibid.* Chapter 6 ("Feminism").

66. *Ibid.* Chapter 4 ("Neo-Marxism").

67. *Ibid.* Chapter 7 ("First Nations").

no measure of the matter, do these segregations in any way evince a distinctively Canadian agenda; on the contrary, they instantiate various of the strands and locations of contemporary Euro-American debate.

Nor does the collection constitute, in either the strong or weak sense, a distinctively Canadian contribution. It fails as a contribution in the strong sense, because instead of providing a peculiarly Canadian message to the Euro-American agenda to which it is directed, it is indistinguishably a part of that agenda. Take, for instance, the five essays which comprise the chapter on liberalism.[68] The first[69] argues that the feminist criticism of the traditional liberal view of pornography is avoidable in an expanded — yet faithful — liberalism; the second[70] uses classic texts of the liberal canon to defend Anglo-Canadian tort law against Yankee pragmatism; the third[71] deploys a traditional liberal analysis to found a model of Canadian constitutionalism which would have Canada's peculiar, history-based group rights trumped by individual rights; the fourth[72] offers a liberal feminist[73] critique of mainstream liberal doctrine on the regulation of hate propaganda and pornography; and the fifth[74] provides a critical disclosure of the ideological origins of corporate law doctrine, and a summary of organizational and interpretive alternatives. None of this, of course, is at all distinctive, either in theme or voice, because each essay, in broad or finer brush, is part and parcel of a standing discourse.[75]

Finally, the collection fails as a distinctive contribution in the weak sense, because even though it is oftentimes directed to Canadian phenomena,[76] it fails to disclose any distinguishably Canadian voice. Just the opposite: the timbre here — as illustrated once again by the chapter divisions and by the chapter on liberalism — is one with the existing voices in the Euro-American conversation.

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68. *Ibid.* Chapter 2, 7-98.
69. Dyzenhaus, "Liberalism, Pornography and the Rule of Law", *ibid.* at 13-28.
70. Weinrib, "Two Conceptions of Tort Law," *ibid.* at 29-38.
71. Schwartz, "Individual, Groups and Canadian Statecraft," *ibid.* at 39-56.
72. Mahoney, "The Limits of Liberalism," *ibid.* 57-74.
73. See *supra*, note 29.
74. Bauman, "Liberalism and Canadian Corporate Law," *ibid.* 75-97.
75. See: regarding the pornography debate, Brown, "Debating Pornography: The Symbolic Dimensions" (1990) 1 Law & Critique 131, and Donnerstein, Champion, Sunstein & MacKinnon, "Pornography: Social Science, Legal, and Clinical Perspectives" (1986) 4 Law & Ineq. 17; regarding non-consequentialist adjudication and the priority of rights, Dworkin, *supra*, notes 25 and 17; and regarding critical demystification of liberal discourse, Gabel & Feinman, "Contract Law as Ideology" in *The Politics of Law* (1982, D. Kairys, ed.) 172, and Stanley, "Corporate Personality and Capitalist Relations: A Critical Analysis of the Artifice of Company Law" (1988) 19 Cambrian L. Rev. 97. This, of course, is no way derogates from the value of the essays; it is merely to situate them.
76. See for instances the many pieces — at least twelve — which concern themselves with the Canadian Constitution.

As I've already indicated, I do not take these deficiencies in proclaimed ends as at all damaging in themselves.[77] So I wish now to put aside Professor Devlin's nationalist claims, and to evaluate the collection on what I will later submit[78] is the only proper basis — namely, as a participation by Canadian scholars in the Euro-American discourse on law and human association. I will take as my angle on this assessment Professor Devlin's educational claim, and will inquire whether the collection provides an adequate introduction to Euro-American theory, especially for his "primary target market ... those who are approaching jurisprudence in any systematic way for the first time."[79]

In my view, the collection fails as an introduction simply because it fails adequately to tell that reader both *what* legal theory is about, and *how* legal theory goes about being whatever it's about. Let me explain. I've been claiming that legal theory is about taking a stand on the relation between law and life, but that's not all it's about, especially in the classrooms of the legal academy. It is also about how — in terms of strands and locations — it is possible to participate in theory by taking a stand.[80] In order for these two defining elements to be captured by an introductory text, it is not enough to leave the reader to her own interpretive devices. It is necessary, rather, to come directly and explicitly to terms with both matters by continually directing the reader's attention both to the purposes and significance of the pieces, and to their location in the overall typology of the legal theoretical conversation. The collection, I think, fails to do either adequately; and this failure is a failure with reason and with considerable — though certainly *not* fatal — cost.

Professor Devlin takes very nearly a schools approach to organizing his collection.[81] Deploying many of the categories which appear in *Lloyd's*,[82] he segregates his essays into seven categories: liberalism (Chapter 2), law and economics (Chapter 3), neo–marxism (Chapter 4), critical legal studies (Chapter 5), feminism (Chapter 6), First Nations (Chapter 7), and constitutional interpretation (Chapter 8). Now, in my view, this organizational strategy leads to the text's difficulties both as an introduction to legal

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77. I shall later argue that the real damage arises from the standard in terms of which they arise — namely, that legal scholarship and theory ought pursue a nationalist vision. See *supra*, notes 56, 60, 61 and *infra*, Part IV, "Conclusion."

78. See *infra*, Part IV, "Conclusion."

79. See *Perspectives* at 5 and 1 ("we can and do produce legal theory that is of international quality").

80. Professor Devlin appears sensitive to this because he adopts as one of his aims an "accessibility" premised upon a "less elitist understanding of legal theory" which, in his view, will "encourage the reader to reflect critically upon his or her taken-for-granted assumptions about law." (*Perspectives* at 2.)

81. See *supra*, note 14 and accompanying text.

I say very nearly because Professor Devlin seems to confuse what may properly be considered schools with what more properly are themes. For example, where Devlin identifies law and economics, critical legal studies, and law and interpretation, as standing discourses, *Lloyd's* more appropriately identifies them as themes — should I say locations? — in standing discourses.

82. *Ibid.* Their organization shares liberalism, marxism, critical legal studies, law and economics, and law and interpretation. Both exclude anarchism; and Devlin alone includes feminism. Unlike the Devlin text, *Lloyd's* includes lengthy chapters on the nature of jurisprudence and on the meaning of law; and again unlike Devlin, many of the shared categories are identified — more appropriately, I think — as themes in standing discourses, rather than as themselves separate discourses.

theory and as a contribution to legal theory, because it so mistakes the substance of theory, its strands and locations, with the point of theory, the taking of stands. In consequence, the text inadequately represents the stands, strands, and locations in scholarly terms, and confuses stands, strands, and locations in pedagogic terms. I will direct my attention briefly to the second matter before engaging the more critical matter of scholarship.

As I've already indicated, what is required of an introductory text is that it inform the beginning reader about the what and how of legal theory. Professor Devlin's approach to his materials prohibits providing this information. Consider what the beginning reader — say a second year law student — comes with to the text, and with what, given its nature, she is likely to depart it. Clearly, I think, she'll come to the text with a rough and ready view of law as a series of discrete categories of rules — property, torts, contracts, and so on — which apply in an arcane, specialized way to an incomplete, faintly alien social world. In all likelihood, she will also come to the text with a largely inarticulate, yet real, disdain for theory as an unavoidable obstacle to the real project of legal education, the accumulation of more rules, more doctrines.

Given this state of reader readiness, our beginning reader is likely, I think, to leave the text with an altogether misbegotten view of theory. She will think, first of all, that seven "competing perspectives"[83] — liberalism, law and economics, marxism, critical legal studies, feminism, First Nations, and constitutional interpretation — comprise the legal theoretical world. She will probably also think — by noting (observant law student that she is) the number of pages devoted to each — that there is a priority of significance among the perspectives.[84] She will think that constitutional interpretation is, by far and away, the single most important item on the jurisprudential agenda; that liberalism and critical theory are of considerably less, but equal importance; that feminism is somewhat less important than either of these; and that marxism and race are, compared to all the rest, of least importance. She will *not* think that liberalism in fact captures many of the chapters (in addition to the chapter so named, I'm thinking of the chapters on law and economics, and on constitutional interpretation), and many of the essays assigned to other categories (for instance, Donald Galloway's piece which appears under critical legal studies, and Sheilah Martin's piece which appears in the chapter on feminism). Nor likely will she come to the view that liberalism is the dominant discourse, and that the rest — all of the rest — is comprised of critical reactions to, or locations for, dominant discourse. Nor, finally, will she leave the text with sufficient sense of the point and passion of legal theory, or of the themes and localities in terms of which alone *she* can possibly play a part.

The scholarly consequences of Professor Devlin's strategy are, however, even more significant. For, in my view, his strategy[85] has led his scholars inadequately to represent

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83. See *Perspectives* at iii.

84. The collection devotes ninety-one pages to liberalism, forty-nine to law and economics, twenty-six to marxism, ninety-one to critical legal studies, sixty-nine to feminism, twenty-eight to First Nations, and a whopping 171 pages to constitutional interpretation.

85. See *infra*, my concluding remarks to this part.

the typology of contemporary legal theory. Let me be clear. At a lexical level, nearly everything is there: the stands (liberalism, marxism, and feminism),[86] the strands (some essays defend, and others criticize, dominant discourse),[87] and an appropriate number of the locations (for instance, psychoanalysis, race, critical theory, law and economics, and literary theory are all present). But beneath the wholesale surface, at the retail level of demand and response, there the absences appear. For reasons of economy, I will not seek to deal with entire collection in exposing these difficulties. Instead, I will focus exclusively on liberalism, as presented in Chapter 2, because it is the dominant stand in legal discourse,[88] and on feminism, as it is presented in Chapter 6, because it, in my view, constitutes the major locality of emerging alternative theory.

What, then, of the essays on liberalism: do they adequately represent that stand in legal theory?[89] I think not. And this is not just a matter of the chapter's lacking coherence and integration, though this it surely does.[90] While this may be a part of the

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86. Absent is anarchism.

87. Missing is any discussion of law's purchase on progressive practice.

88. Indeed, Professor Devlin appropriately calls it his "anchor chapter": see *Perspectives* at 5.

89. Anyone literate in recent theoretical debate will approach this question with caution simply because one of the features of that debate has been a hide-and-seek attitude by mainstream scholars concerning the nature of liberalism. See for example: Dworkin in *Law's Empire*, *supra*, note 17 at 274–75 (criticizing critical legal scholars for having "a defective account of what liberalism is, an account supported by no plausible reading of the philosophers they count as liberal"). See also: Galloway, "Critical Mistakes" in *Perspectives*, 255 (which takes the same tact, this time using Dworkin); Ewald, "Unger's Philosophy: A Critical Legal Study" (1987-88) 97 Yale L.J. 665 at 665, 691, 702, and 754 (arguing that the version of liberalism which Unger criticizes is a "straw–person" because "it is dubious that [it was] ever held by anybody at all" and attributing Unger's mistake to his being "in control neither of the literature he cites, nor of his own arguments"); Langille, "Revolution Without Foundation: The Grammar of Scepticism and Law," *supra*, note 9 at 486 n.162 (submitting that "the legal theorists under attack as 'mainstream' or 'liberal' all hold more sophisticated theories about legal reasoning, the requirements of legal certainty or determinacy, and the ideal of the rule of law than those ascribed to them"); Stick, "Can Nihilism Be Pragmatic?" (1986–87) 100 Harvard L. Rev. 332 (commenting that "many observers have noted that strong critics in assembling the target of 'liberal' law for destruction engage in the exercise of constructing a 'straw-man'"); Krygier, "Critical Legal Studies and Social Theory – A Response to Alan Hunt" (1987) 7 Oxford J. Leg. Studies 26 at 28 (arguing that in critical characterizations of liberalism, "the arguments of individuals are rarely analyzed singly or at length but are briefly and abstractly characterized and dissolved into the one, antinomy-ridden portrait" and that the "claims attributed to them ... are at times the opposite of what [they] believed"); and Finnis, "On the Critical Legal Studies Movement" (1984–85) 30 American J. Jurisprudence 21 at 42 (arguing that Unger "distorts our human situation as that situation is understood in the social theory of Aristotle and ... Aquinas").

I take two views on this scholarly hocus-pocus: first, that critical scholars have indeed often been guilty of not taking sufficiently seriously the texts they read (see my comments in "Radical Discourse in Legal Theory: Hart and Dworkin" (1989) 21 Ott. L. Rev. 679 at 681); and second, that liberalism is not nearly as mysterious a matter as mainstream theorists would have us believe, and is, instead, easily deducible as a system of belief from the major premises of liberal legalism itself. For these reasons, I also take the view that the mainstream attitude has more to do with an easy debunking of critical scholarship than with the illusiveness of liberalism. In consequence, I won't permit caution to stall me here.

90. The essays, in my view, are just too eclectic to be other than disjointed as a whole. Consider the contents: two essays – those by Dyzenhaus and Mahoney – which so repeat one another that Professor Devlin (*Perspectives* at 69) is moved to ask whether the authors "reach essentially the same conclusion, except perhaps using different labels" (answer: they do – for each, it's all a matter of

problem, its crux appears, instead, to be that the scholars in Chapter 2 failed to address themselves adequately to the matter of the meaning of liberalism.[91] Remember that liberalism as a political philosophical claim[92] arises, and only arises, from specific, prior ontological, epistemological, and moral commitments.[93] One can properly require scholarly work at least to reference both parts of the liberal project. This, I think, the authors in Chapter 2 fail to do. Let me illustrate briefly.

In "Liberalism, Pornography and the Rule of Law," David Dyzenhaus seeks to accommodate liberalism with feminist concerns about liberal law's apparent inability to come to terms — through regulation — with pornography as harm to women.[94] He works this rapprochement through the claim that "the liberal refusal to censor pornography does not, in fact, serve a commitment to autonomy"; and he attempts to make out the claim by arguing that the traditional liberal conception of harm, which alone justifies regulation, and of the rule of law are both too narrow, and may be revised without abandoning liberal principles.[95] Now, I have no particular contest with these arguments; indeed, I think them attractive in liberal terms. My concern, rather, is that the vocabulary of the debate the author joins is neither defined nor defended. At no point does Professor Dyzenhaus explain the origin and significance of liberal autonomy, harm, and rule of law, and they, after all, are constitutive elements in liberalism's politico-legal claim. Just the contrary: the origin and significance of the debate — its very substance and purchase — is assumed.

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the liberal definition of harm); a very specialized essay — that by Weinrib — arguing for the self-referencing integrity of the common law of torts; another essay — that by Schwartz — which presents what is essentially an interpretive proposal for the Canadian Constitution; and a final essay — that by Bauman — which offers a CLS disclosure of the ideological origins of corporate law.

91. I'll come shortly to my view of why this is so.

92. It is this claim — best represented, I think, in Lockean liberalism — which contains the liberal legal claim. Briefly: from its ontological, epistemological, and moral predicates — of which more, *infra*, note 93 — liberalism ineluctably frames its theory of civil society (namely, that it antedates political organization), and its theory of government (namely, that it is necessary to solve the co-ordination problems which inhere naturally in civil society, and that it is necessarily itself a problem because it threatens always, through paternalism, to contradict the protection of autonomy which is its intended purchase); and from these claims regarding the inherent tension between civil society and political organization, liberalism just as ineluctably frames its theory of law (namely, that law is always merely a strategy directed towards a prior natural social ontology, and never a constitutive cultural practice), and its theory of the (proper) state (namely, that because political organization threatens always paternalism through law, the proper state is a minimal state, and a properly minimal state is one limited by constitutional provision which pledges the state to neutrality and, thereby, prohibits it from intruding on individual autonomy — which, finally, is the ontological predicate from which the entire politico-legal claim arises).

93. It is these ontological, epistemological, and moral claims which alone provide either occasion for, or substance to, the liberal politico-legal claim. The ontological claim provides that the horizon of human experience is forever the same — namely, an individuality comprised of transactionability and alienability. The epistemological claim is twofold. The first concerns reason, and provides that individuals may know both the world and themselves. The second concerns morals, and provides that in knowing themselves, individuals are disclosing their preferences, not discovering truth. It is a matter of contest whether this moral claim need give rise to scepticism about the good. See for instance: Dworkin in *Law's Empire*, *supra*, note 17 at 441 n. 19 (arguing that it needn't).

94. *Perspectives*, 13-24.

95. *Ibid.* at 13.

Matters do not change in the rest of the essays. Professor Weinrib argues in favour of a non-consequentialist view of common law adjudication.[96] Now, this is fine and good (and, in fact, quite creatively done, considering the parts of the canon he deploys); but — and this is the point — he does not explain why the question of law's adjudicative integrity comes to liberal view. What, after all, is it about liberalism that would make this question centrally a part of the liberal legal project?[97] We are not told because the essay is silent on this critical matter. So too Professor Schwartz's "Individuals, Groups and Canadian Statecraft," which argues for a working compromise between individual and group rights, along with a principled proviso in favour of the former when there is an unworkable conflict between the two.[98] Once again my complaint is not necessarily with the message,[99] but with the philosophical medium, about which, incidentally, the author is both disarmingly candid and undisclosing.[100] Simply, the medium doesn't tell us enough. What, for instance, is it about liberalism that makes "the tension between the 'individual' and 'society'... the standard characterization of the problem of political ordering,"[101] or that makes "the individual... the basic unit of human existence"[102] and "the only coherent basis for political philosophy"?[103] Again the reader is not told: there are assertions, but no explanations.

The same holds for the essays by Professors Mahoney and Bauman. In "The Limits of Liberalism,"[104] Professor Mahoney argues that "the centrality of the autonomous and undifferentiated individual to liberal thought shows how its abstract principles fail to address the historically specific oppression actually experienced by dominated groups."[105] On this basis, she then calls for state regulation of pornography and hate propaganda.[106] But what are these "abstract principles" to which the reader is being introduced, and on which the essay's entire argument depends? Professor Mahoney provides a list — the principles, we are told, are "abstract individualism, individual liberty, political freedom, the public/private distinction, and the preference ... for theoretical definitions and principles rather than social reality"[107] — but she provides no explanation

96. *Ibid.* 29-38.
97. And it is indeed central as Dworkin's project admirably discloses: *supra*, notes 17 and 22.
98. *Perspectives*, 39-56.
99. Although the argument for the message is, in my view, curious, because Professor Schwartz preferences individualism against a rather consequentialist measure: *ibid.* at 41-42.
100. See *ibid.* at 42 ("No elaborate attempt will be made in this essay to justify, as a general and philosophical basis, the liberal (as opposed to the individualist) aspect of the approach being recommended").
101. *Ibid.* at 39.
102. *Ibid.* at 41.
103. *Ibid.* at 46.
104. *Ibid.* 57-73.
105. *Ibid.* at 68. More particularly stated, her thesis is that "the harms that pornography causes to women" can "only [be] made visible through a contextualized approach that contradicts the value of abstract individualism": *ibid.* at 62.
106. *Ibid.* at 106. Professor Mahoney, incidentally, calls for state regulation by downplaying — but not by relinquishing — a very liberal view of the problem of political organization: "although some threat of tyrannical tendencies of governments to turn against democracy may exist, the argument is overplayed and out of proportion to twentieth century reality." *Ibid.* at 64.
107. *Ibid.* at 60.

concerning why holding these values would make one a liberal, or why a liberal would wish, as a matter of political philosophy, to hold these views.

The final essay, "Liberalism and Canadian Corporate Law"[108] by Professor Bauman seeks to — and does — convince that despite its rationalist veneer, corporate law is contestable, because it is an expression of liberal ideology, and because, of course, that ideology is avoidable.[109] So far so good. But what of that liberal ideology on which the essay turns? We are told that the "liberal view of the goals, structure, and status of the corporate form of business organization"[110] involves a commitment to the free market as a natural form,[111] to private regulation through self-interest,[112] and to a minimal state.[113] But notwithstanding that Professor Bauman's is the most detailed and precise of the essays devoted to liberalism,[114] we are not told why commitments of this sort are liberal, or why liberals would have commitments of this sort.

Though greatly improved — and possibly with the exception of the excellent essay by Professor Lahey — the case is finally no different in the chapter on feminism.[115] Scholarly expectations here are somewhat different from those proper regarding the essays on liberalism,[116] but expectations there are nonetheless. Because the feminist stand on law is denunciatory, because feminism, in consequence, is necessarily committed to the delegitimation and reconstruction strands of theory, and because feminism, concerned as it is with alterity, displays locality adventurism, one can properly expect introductory essays, especially, to illustrate all three characteristics, by providing a sense of the rage that informs feminism,[117] an indication of the nature of its delegitimation and reconstructive practice, and a sense of the multitude of locations which its scholarship occupies.[118] In my view, the essays have mixed success regarding the first, only partial success regarding the second, and virtually no success regarding the third.

In "A Feminist Approach to Criminal Defences,"[119] Professor Boyle, appropriately enough,[120] aims "to provide an introduction to feminist ways of thinking for the person

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108. *Ibid.* 75-97.
109. *Ibid.* at 76.
110. *Ibid.* at 77.
111. *Ibid.*
112. *Ibid.* at 78.
113. *Ibid.*
114. As is most proper for an introductory piece in an introductory text, Professor Bauman has footnoted his essay extensively, and, thereby, provides the beginner reader with an easy access to a rich literature.
115. *Perspectives*, 269-338.
116. And this simply because, unlike liberalism, feminism is not a discipline, but a political location: see, *supra*, note 30. For a useful introduction to feminist scholarship, see: Ellen Carol DuBois *et. al.*, *Feminist Scholarship: Kindling in the Groves of Academe* (1987).
117. My use of the word 'rage' is not at all idiosyncratic. See for instance: West, "Love, Rage and Legal Theory" (1989) 1 Yale J. of Law & Feminism 101.
118. For a useful introduction, see: R. Tong, *Feminist Thought: A Comprehensive Introduction* (1989).
119. *Perspectives*, 273-89.
120. The essays in the chapter on feminism, alone among the essays in the collection, expressly declare themselves as introductions.

to whom they are new," and then to illustrate "these ways of thinking" by applying them to "a practical issue — namely, the scope of the doctrine of self-defence as it relates to women."[121] So far then so good: the author is going to speak both to meaning and to practice. And with a passing nod to feminist diversity[122] and to reconstruction,[123] this she proceeds to do. Professor Boyle's version of the feminist message is very timid — "in [her] experience," she says, "the term 'feminism' is often used to refer to the doctrine of equality between the sexes"[124] — because it absents any sense of the dread from which feminism arises, or the rage which it expresses. On the matter of feminist scholarly practice, Professor Boyle indicates in her general discussion[125] that feminists seek to delegitimate existing discourse by disclosing both its maleness and contingency.[126] When, however, it comes to her illustration of feminist practice in law — Professor Boyle discusses the law of self-defence — the delegitimation focus of practice becomes obscured by an interest in the utility of a contextualized approach to legal argument.[127] This is unfortunate, because it needlessly leaves the beginning reader in the ambivalence at which Professor Boyle herself arrives, namely, whether feminist legal practice is at all possible.[128]

Similar absences are discernible in the essay by Professor Martin, and, in a very engaging way, in Professor Lahey's wonderful essay of introduction. In "The Control of Women through Gender-Based Laws on Human Reproduction,"[129] Professor Martin seeks to explore "the complex relationship between laws on human reproduction and

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121. *Perspectives* at 274.

122. *Ibid.* at 273 ("it would be a mistake to assume that there is one and only one feminist perspective").

123. *Ibid.* ("while not neglecting long-term concerns about what a criminal justice system would look like, if such a thing existed at all, in a feminist state, many feminists have focused on the need for immediate and practical reforms of the present criminal law"). Incidentally, like Professor Bauman, Professor Boyle has extensively footnoted her piece, providing significant aid to the beginner reader.

124. *Ibid.* at 274. She goes on to indicate — quoting from a work by Jaggar and Struhl — that feminism has "a dual aspect" — "a description of women's oppression and a prescription for eliminating it": *ibid.* at 275.

In my view, Professor Boyle's lack of temerity is both strategic (so as not to estrange the beginning reader) and strategically unfortunate (because it hides the dread which feminism expresses).

125. *Ibid.* at 275-76.

126. *Ibid.* She does, however, confine herself largely to "the feminist emphasis on contextualization." She shares this cultural feminist attitude (about which, see: Josephine Donovan, *Feminist Theory: The Intellectual Traditions of American Feminism* (1988) c. 2 and 7) with a number of other women scholars in this volume (it appears, for instance, in Professor Mahoney's piece in chapter 2); and if its prevalence here is any indication, feminism in its American cultural form has very much captured the Canadian legal academy.

127. *Ibid.* at 278-81. In my view, this has much to do with Professor Boyle's cultural feminist perspective which always informs an ambivalent practice because it tends both to condemn and to celebrate the history of women.

128. *Ibid.* at 282. In my view, it is not, if the measure of success is success as measured by law's patriarchic past. Professor Boyle's discussion of cultural feminist contextualization in criminal law is, I think, an acquiescence to just that measure, because it looks to feminism to inform a practice of winning. This, I think, won't do. What is required of feminist and other progressive scholars is theory about reconstruction and about law as a site for progressive struggle. This matter is nowhere adequately addressed in the collection.

129. *Ibid.* at 291-317.

women's subordination."[130] Despite declaring early in her essay that "we are much closer to Atwood's dystopia than is either commonly credited or morally comfortable,"[131] and notwithstanding her discussion of gender domination in terms of "the appropriation of women's sexual and reproductive labour,"[132] her piece is robbed of much of the sense of rage that it might otherwise have imparted by both its nuance and its perspective. Professor Martin's perspective is cultural feminism, which leads her to assess the dystopia she situates us in with reference to a "society based on sex equality."[133] And her nuance is conciliatory: she describes the subordination through appropriation which occupies her in a distant, past voice[134]; and law is presented as "both part of the problem and part of the solution,"[135] and in the end, indeed, rather optimistically as a solution.[136] Professor Martin then goes on to illustrate the gendered nature of Canadian law on reproduction,[137] and it is there that she discloses, at least by implication,[138] her view of feminist scholarly practice. She appears to think that feminist practice is essentially one of delegitimation, because throughout her discussion of what she terms "gender bias in legal norms,"[139] she seeks to disclose that law, rather than being neutral and rational, is "androcentric" in the sense that "male experience [is] accepted as the universal experience."[140] Professor Martin only very indirectly refers to reconstructive practice[141] (and then to offer standing law as a partial strategy for women "to combat their inequality");[142] and her essay provides no sense at all of the many locations which feminists occupy.[143]

I come finally to Professor Lahey's "On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory."[144] Unlike the other essays, those on liberalism as well as those on feminism, this essay is a direct and explicit and comprehensive engagement with each of the issues critical to an introduction; and even where it is, in my

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130. *Ibid.* at 292.

131. *Ibid.* at 292. Her reference, of course, is to Margaret Atwood's novel *The Handmaid's Tale* (1985).

132. *Ibid.* at 292-93.

133. *Ibid.* at 291. For cultural feminism, see *supra*, note 126.

134. See for instance *ibid.* at 292 ("The person 'woman' was treated as an object of sex and for reproduction, defined and valued according to which of her body parts were desired by men") and 293 ("Women were expected to live in the private sphere and tend to home, hearth, and family").

135. *Ibid.* at 292.

136. See her discussion of the *Charter* (*ibid.* at 307) tempered with an immediate realism (*ibid.* at 308: "Women have good reason to distrust a purely law-based strategy to combat their inequality").

137. *Ibid.* at 295-305, which includes a useful summary of the forms gender bias takes in law.

138. I say by implication because her analysis asserts directly no position on feminist practice.

139. *Perspectives* at 295.

140. *Ibid.* at 297.

141. *Ibid.* at 306-07.

142. *Ibid.* at 308.

143. Although with the rest of the feminist essays and Professor Bauman's, her essay is extensively footnoted.

144. *Perspectives*, 319-38. I should add that among those essays having directly to do with taking (and introducing) a stand in legal theory — among which I count those on liberalism in chapter 2, the essay by Professor Fudge on marxism in chapter 4, those on critical legal studies in chapter 5, and those on law and economics and on feminism — I take this essay and the essays by Professors Fudge and Smith to be the most successful. In my view, each is scholarship of introduction as it should be — engaging, directing, and directed.

view, wanting, it is wanting in a provocative and productive fashion. Professor Lahey, first of all, provides an evocative sense of the dread and rage of feminism. And this is not just a matter of her express statements — though evocative they most often are[145]; it is also a matter of her polemical nuance[146] which is uncompromising and direct, and so unlike the mahoganied veneer of mainstream discourse.[147] No beginning reader reading Professor Lahey will fail to notice that feminism is, minimally at least, a politics and scholarship of dread, because her evocations are declarative, never mysterious.

When Professor Lahey proceeds to describe the practice of feminist scholarship, she is no less successful. She explicitly directs the reader to its critical and reconstructive moments, and not only does she describe each,[148] she expressly relates one to the other in terms of the overall feminist project.[149] Indeed, my only hesitation with the essay is its failure adequately to advise on the practice of reconstruction.[150] Professor Lahey does address the matter; and thinks "the language of specificities... important to the long-term reconstruction of legal theory."[151] This she then proceeds to demonstrate through case analysis.[152] But this won't do, not alone at least; and it tends to lead Professor Lahey to a rather optimistic, incrementalist view of legal possibilities.[153] What is required rather — and particularly so in an introductory essay — is an indication of the myriad of reconstructive practices available. And such an indication, in my view, depends on providing an overview of the myriad locations, especially theoretical, which feminist legal scholars occupy.[154] By choosing instead to confine herself to gender specificities

145. For instance, in summoning the origins of feminist legal theory, she comments that "the distance between silence as a strategy of survival and screaming as a strategy of liberation is vast." *Ibid.* at 321.

146. See for instance *ibid.* at 323 (where she recounts by name the reactions of male scholars to an early conference piece by Professor Lorenne Clark claiming that mainstream legal theory was in fact male-stream) and 329 (where she comments directly on a prosecutor's racism and political ambition).

147. Though I'm not certain Professor Lahey would approve, in tone her piece reminds me of Peter Gabel's review of Ronald Dworkin's *Taking Rights Seriously*. See Gabel, "Book Review" (1977) 91 Harv. L. Rev. 302.

148. She describes feminist scholarship generally as "purposive and liberatory," its critical moment as the "undercutting of the 'grand' aspirations of traditional legal theory," and the progressive moment as "work...[which] has...been reconstructive of the current legal order." *Perspectives* at 328, 325, 324.

149. *Ibid.* at 324. There is, she claims, a "dialetic between critique and reconstruction in feminist legal work [which] has made it possible for Canadian feminist legal theorists to get a particularly clear view of just how entrenched male supremacy remains."

150. This hesitation is bred of experience. For the past two years, Professor Lillian MacPherson and I have conducted a seminar in feminist legal theory at the Faculty of Law, University of Alberta. We have found that participants do not dissent from the feminist critique of standing legal arrangements; their common concern, rather, is a sense of being left with a critique alone, and with no advice on what they can possibly do about it.

151. *Perspectives* at 326.

152. *Ibid.* at 326-30.

153. In concluding her discussion of specificities in the criminal law of self-defence, for instance, Professor Lahey notes that two decisions "seem to close the gap between the realities of women's lives and mainstream law, by adopting a feminist perspectives." *Ibid.* at 327-328.

154. In her introduction, Professor Lahey indicates that "feminist jurisprudence...covers the major genres of mainstream legal theory" and "includes critiques of existing male legal theory, detailed analysis of laws relating to women, Marxist feminist work on the material implications of present laws, surveys of feminist legal scholarship, and deconstructionist and psychoanalytic contributions to legal

in legal analysis, Professor Lahey has provided the beginning reader with too limited a view of feminist possibilities. Even here, however, her essay is instructive. Not only does it direct one to the relationship between locations available and the possibilities of practice, through its discussion of specificities, it surfaces what I take to be the major site for critical and reconstructive practice, namely, the politics of subjectivity.[155]

To conclude, then, in my view the collection fails its scholarly purpose, because it fails to convince that the scholarship it offers is in any significant sense indigenously Canadian; and while it hasn't failed completely its pedagogic purpose, neither has it been fully successful, because some of the key chapters provide an incomplete introduction to the legal theory to which they are directed.[156] Before proceeding to a conclusion in which I will provide an analysis of the origin, extent, and future of change in Canada's legal academy, I wish now to deal with what I take to be the origin of the collection's difficulties. This is important because I do not take the collection to be entirely representative of the state of theory in the legal academy, and it is just that which will occupy me in my conclusion.

The origin of the failure of the nationalist claim need cause no delay: the collection fails in this regard because there is no national theoretical agenda which it could possibly reflect or evince. The origin of the difficulties in meeting the pedagogic claim are more instructive. What, after all, would lead scholars invited to contribute to an introductory collection to fail adequately to introduce the areas of their contribution? The answer to this question provides the sense in which I believe the collection *not* to be representative of legal theory in Canada. And the answer, I propose, is this: the difficulties which the contributions exhibit as introductions arise from their — and the collection as a whole — having inconsistent objectives. I am referring, of course, to the scholarly/nationalist objective and to the pedagogic/introductory objective. In attempting to serve both these masters — in aiming, that is, both to display scholarly sophistication and to provide accessible simplicity — Professor Devlin's scholars were in a virtually impossible intellectual position, and their contributions, and the collection as a whole, suffered in the result.

But, as I've already indicated, the collection has many merits despite these difficulties. First of all, it signals a *significant* achievement in the intellectual history of Canada's legal academy, namely, that the academy has this many denizens (and as Professor Devlin indicates,[157] many more) who are taking law seriously as an intellectual project. Secondly, and by its very breadth, it serves notice that Canada's legal academy has come out of the intellectual cold, and, indeed, that it is a participant, with other university

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discourse." *Ibid.* at 319-20.

155. *Ibid.* at 329.

156. Although for the purposes of this review essay, I have canvassed the essays in two chpaters only, I think my conclusion regarding the collection's pedagogic purpose applies very nearly to the entire collection. I add the caveat because I think the two essays on law and economics, and the single essay on Marxism are fine introductions.

157. *Perspectives* at 1 ("Today, there is a vibrant, polyvocal and diversified, indigenous Canadian jurisprudential conversation and the participants number in the hundreds").

faculties and departments, in the exciting de-disciplining of intellectual life which is currently occurring in the Euro-American academy. Finally, the collection is useful. Once one puts aside Professor Devlin's more ambitious claims for the collection, it can be viewed for what it happily is: a collection of papers by Canadian legal scholars — most unavailable elsewhere — addressed to topics occupying contemporary Euro-American debate. And that's achievement enough.

IV. CONCLUSION[158]

Professor Devlin expresses two views with respect to the status of theory in Canada's legal academy — namely, that its recent turn to theory constitutes an intellectual and institutional "sea-change", and that the *Charter of Rights and Freedoms* "has been a major catalyst" in that development.[159] As I indicated earlier, I dissent from both these views;[160] and I wish by way of conclusion to argue to that dissent. More particularly, I want to explore the origin and nature of the changes which Canada's legal academy has in recent years undergone, so as to provide a foundation for some concluding speculations regarding the future of theory in the academy.

For reasons that will become apparent, I take the future of theory to have everything to do with the future of the academy. And I do mean everything. The status and stature of theory will determine how the legal academy relates to the university community in which it resides, to the community of ideas at large, to the profession and the judiciary, and through the profession and judiciary, to the citizenry. It is just because so much turns on the legal academy's self-understanding, which theory *alone* mediates, that a precise understanding of the present state of affairs is so critical.

Whatever the extent of the change the legal academy has undergo — and it has yet, I will argue shortly, to undergo any structural change — those changes have their origin in the demographic changes which the academy has been progressively experiencing over the last twenty years or so. Let me explain. There can be no doubt that the Critical Legal Studies and Law and Economics movements, and feminism and marxism and literary theory, have been the intellectual venues of much of the change experienced by the legal academy here and elsewhere. In my view, however, these movements and strands of activity are consequent to demographic changes, and are not, therefore, themselves first causes.[161] For this to be so, I must convince that the demographics of the legal academy have indeed changed, and that changes of this sort would produce consequences of the sort described and, particularly, the turn to theory.

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158. I have had the benefit of discussing the matters canvassed in this conclusion with my colleagues Professor Richard Bauman and Professor Lillian MacPherson. The views expressed are, of course, mine alone.

159. *Perspectives* at 367.

160. *Supra*, note 3.

161. I would apply the same analysis to a myriad of other causes, including, in particular, the increasingly precise expectation that law faculty, like other members of the university community, will engage in scholarship throughout their careers.

Two things, I think, are beyond contest regarding the demographics of the legal academy, namely, that the numbers of students and faculty have increased rapidly during the recent past,[162] as have the numbers of women students and faculty.[163] What is less certain, however, are the substance and effect of these changes. Glasbeek and Hasson, for instance, argue that despite changes in demography, the ideology of Canada's law schools has remained unqualifiedly the same: now as before, they claim, the legal academy seeks the advancement of "the needs of the profession and judiciary" and, therefore, of "dominant elite" interests.[164] While it is impossible without data to contest conclusively such a view, I want to suggest that they have seriously both misappraised and underappraised the significance of the change. By misappraisal, I mean simply that they looked for the wrong things and, more particularly, for indications of purposive shifts in direction and philosophy. Formal institutions seldom change that way, yet change they do when faced — as Canada's law schools have been — with dramatic changes in both the size and quality of their population.[165] These changes, however, are not changes of grand design. Just the contrary. Because what drives the changes are diffuse ideological pressures occasioned by the shifts in population, the changes that do occur occur in a similarly diffuse fashion, and consist of piecemeal and strategic responses which operate in institutional interstices.

I want to propose that the legal academy's turn to theory is a change of just this sort. It does not at all, therefore, represent some epochal purpose or some utopian plan. Rather, like all changes of this sort, it is a change by increment, and in response, and for survival. It is as a change in this sense, that Glasbeek and Hasson so underappraise the changes the academy has been experiencing: by searching for a large significance, they missed the significance of the small. And the Canadian academy's turn to theory is indeed significant, because it is a strategic response to diffuse ideological pressures caused by profound demographic changes, and because it is through that turn to theory that the academy is mediating its self-understanding and, thereby, its future.

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162. The Report on *Law and Learning* (see: *supra*, note 1 at 25-31) provides data for the years between 1950 and 1980, the last period for which systematic data are available. As at 1980, Canada's twenty-one university law schools had 9,500 full-time students, and nearly 700 full-time faculty. The Report also records dramatic changes in the size and content of curricula, a vast increase in the number of scholarly publications, and significant improvements in physical plant and library holdings.

163. Remarkably, neither the Report on *Law or Learning* (*ibid.*) nor the Glasbeek and Hasson commentary (*supra*, note 2) canvasses demography in terms of gender. For an excellent summary of international sources and data on women in the profession, see: Menkel-Meadow, "The Comparative Sociology of Women Lawyers: The 'Feminization' of the Legal Profession" (1986) 24 Osgoode H. L. J. 897. In Canada, the article reports, "the number of male students doubled between 1962 and 1981, while the number of female students increased twenty-four times."

164. See: Glasbeek and Hasson, *ibid.* at 778-79. They make their argument by re-interpreting Report on *Law and Learning* (*ibid.*) statistics concerning law students ("the background of the bulk of the students is such that they have a stake in maintaining the status quo, materially and politically") and law professors ("a vast number of faculty are not truly committed to teaching and researching in law"). *Ibid.* at 785, 790.

165. The most easily documented change is the change in gender representation (*supra*, note 163), a change which Glasbeek and Hasson fail even to mention. In my view, however, there have been other changes — changes of class and race representation — though these are much more difficult to document.

Clearly, this change has not resulted in profound structural changes. Yet the changes that have occurred — and I'll come to these shortly — are, nonetheless, profound because, however matters eventually turn out, they have led to a contest of profound proportion, namely, the very future and purpose of the legal academy. The turn to theory has bred contestation of this basic sort with a certain inevitability. By taking different stands on law — feminist stands, marxist stands, anarchist stands, informed liberal stands — stands which take law and legal scholarship seriously, Canadian scholars have diversified the vocabulary of the academy. But not only that. Because their languages are theoretical, their taking stands has produced different sites within the academy from which the academy can be criticized and re-envisioned — from which, in short, it can be contested.

Though this contest continues — and, hopefully, forever will — a report on progress is possible. Besides, of course, hostility,[166] the legal academy had perhaps three attitudes available to it regarding the new voices and spaces *its* history has produced. It could adopt an attitude of welcoming civility,[167] or an attitude of minimalist toleration, or an attitude exceeding toleration in either of these senses, the purposive incorporation of the different views and their constituents. It was apparently a response in the last sense that Glasbeek and Hasson sought, and report that they failed to find.[168] I think their report in this respect correct, because Canada's legal academy has *not* undertaken anything nearing such an attitude. It is for this reason, of course, that the demographically induced turn to theory has not resulted in structural change: structural change would require taking seriously the new voices in a fashion which far exceeds toleration. Nor has the academy, by and large, been tolerant in the first sense. For it has not welcomed the dissident voices of scholars pursuing their critical stands on law and life, and on the academy itself. The academy's tolerance, rather, has been minimal at best. It has made room for difference only in the meanest sense of not subjecting those voices to discipline.[169]

On basis of this description of the current state of affairs, I will now offer some brief concluding comments on the future of theory in the academy. Everything turns, it seems to me, on whether the present attitude of barest toleration continues. If, of course, it doesn't, and if hostility replaces live and let live, then the fate of theory and of the academy is sealed, and any discussion of progress from bare toleration through civility to incorporation becomes pointless. I wish then to direct my comments to how legal scholars who dread this happening can work towards ensuring that it doesn't. Above all, it is the responsibility of these progressive scholars to nurture *difference* in the academy; and this they can best do, I think, by more directly taking a stand on the academy — in

166. Of which, of course, there has been some in some quarters. See for instance Carrington, *supra*, note 9.

167. For a discussion of which, see Fraser, "Turbulence in the Law School: Civility vs. Patrician Deference" (1988-89) 5 Aust. J. of Law & Soc'y 44.

168. See *supra*, note 164 and accompanying text.

169. But, of course, this is not always the case. See for instance: Adams, "A Battle for Yale Law School's Soul? Offer to Feminist Draws Fury" (1988) 10 Nat'l L. J. 3 (describing the events which followed Yale's offer of a tenure position to Catharine MacKinnon); and Gordon, "Law and Ideology" (1988) 3 *Tikkun* 14 (recounting the tenure difficulties experienced by critical and feminist scholars).

terms of its demographics, in terms of their scholarship, and in terms of the academy's relation to the profession and the judiciary.

Institutional demography is critical to difference in being both the origin of different theory and the cause for theory about difference. The demographics of the academy will, therefore, be a central concern to progressive scholars who will take stands on matters — faculty hiring, student admissions, and so on — having to do with pluralizing the academy. Scholarship, of course, is where the stands taken elsewhere are first articulated, because it alone provides them their meaning and motivation. Two matters, I think, are currently of critical importance here. As I indicated earlier, Professor Devlin's failure in his nationalist ambitions is, in my view, a happy result. Perhaps now my reasons may be clear. It is important to dismiss any call to a nationalist scholarship, because a nationalist scholarly practice, in matters of legal theory at least, makes vulnerable theoretical practice by isolating and insulating it. By instead joining the great conversation[170] on law and human association, Canadian scholars will both enrich and nurture theory, and through theory, difference and debate in the legal academy. This leads to the second matter. To be at all significant the Canadian engagement in the great conversation cannot be apocalyptic. By this I mean, it mustn't be an engagement by fiat, and must, instead, be an engagement in the details of the whole of the scholar's practice — teaching and administration, as well as scholarship. Such a practice alone will nurture theory, and the difference it supports, by fighting marginalization and promoting the integration of both.

We come finally full circle to the academy and the profession. Sites for progressive practice in the academy will endure only if progressive scholars take a stand on the reality of the relationship between the academy which they occupy, and the profession which they unavoidably supply. But not only that: in as much as scholars occupy progressive sites, they will be drawn ineluctably to declaring a position of the academy's relationship to the profession. Both propositions are so, because the profession has so defined what the legal academy has been, and is so very much a barrier to what, in progressive terms, it may become. With courage and consistency in practice at this critical juncture, progressive scholars have the opportunity to redeem not only their place in the academy, but a place for difference in the profession as well.[171] For the profession and the academy are unavoidably bound; but the texture of the binding needn't be what Professor J.C. Smith some years ago declared it to be — "a theory without a profession and a

170. I owe this phrase to my colleague Professor Richard Bauman.

171. For my present views on the state of the profession, see *supra*, note 9.

profession without a purpose."[172] By taking stands in the academy, progressive scholars can create a conversation between a theory of difference and a different practice.

Above all, Professor Devlin's collection is welcome for just these reasons: because it so signals that there are men and women in Canada's legal academy who are willing to take these stands, stands which will make a difference.

172. J.C. Smith & D.N. Weisstub, *The Western Idea of Law* (1983) x. The entire passage reads as follows:

> [W]e have [in common law jurisdictions] a theory without a profession and a profession without purpose. Despite the fact that law may be viewed as a secularized theology with the lawyer as secularized high priest, many lawyers participate in legal institutions, without the remotest sense of their own or the institution's social purpose...The classical image of the lawyer in Western literature is a central figure in society, a giver of order. We now have a fraternity of lawyers who do not know what the law is. They know how to lobby on behalf of a client but they lack a coherent theory about their work. Law, in this crippled state, is a pale imitation of an ordering principle of society.