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Every Whichway: New Directions for Canadian Socio-Legal Research

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Barely three years ago, as chairman of the SSHRC's Consultative Group on Research and Education in Law, I released a report entitled *Law and Learning*. This report — in its diagnosis hardly more than a systematic compilation and empirical verification of "what we knew but could not tell" — contained a series of recommendations for the invigoration of Canadian legal scholarship. Several of these recommendations related to the need to diversify the types of legal research being conducted, to strengthen the research community by the development of networks and centres of activity, and to communicate the results of new research endeavours to relevant professional audiences, as well as to the public.

For me, therefore, the establishment of the Canadian Law and Society Association and the publication of the *Canadian Journal of Law and Society* are events of special significance. I am pleased — indeed flattered — to be involved in these new and important enterprises, albeit in a largely symbolic way. My pleasure is only enhanced by being afforded both a platform for pontification (the Editor has absolved me from the obligation to provide footnotes), and a collective script to which I can add what amounts to a postscript to our report.

Law and Learning sought to launch a modest revolution in legal research. Although all types of legal research in Canada must be reinforced, non-traditional research (we argued) deserves special attention. We labelled such research as "basic" — an unfortunate choice of terminology insofar as it seemed to disparage the major fraction of legal research which has traditionally addressed doctrinal materials by means of familiar lawyerly techniques of analysis and synthesis. Disparagement was not our objective. Nonetheless, we certainly did aim to draw attention to the need to break out of the intellectual boundaries imposed by a limited range of theories, themes, data, methodologies and participants. And we certainly did contemplate that the revision of intellectual boundaries would be

"basic" in the sense that it would radically alter the dynamic of debate within law schools, legal institutions and policy forums, and in society more generally.

If such a project can be considered "revolutionary," and if the events culminating in the appearance of this *Journal* suggest that the new era has actually dawned, a brief reflection upon the natural history of revolutions may be in order.

The most obvious characteristic of revolutions is their evanescence — here today, suppressed tomorrow — by the reassertion of the powerful and entrenched forces they sought to displace. In the case of Canadian socio-legal scholarship, there is every reason to be concerned about survival. While there are some modest signs of change in Canadian law faculties, for the most part these bastions of the old learning have yet to fall to the forces of the new. Until they do, or at least until the two forces reach a genuine balance of power, the new learning will always exist by let and sufferance, unable to make a deep impact upon professional culture, ideology or behaviour. In such a precarious position, it will not attract the material or human resources necessary to sustain it, especially at a moment when such resources appear to be growing scarcer and scarcer.

Nor can it be said, at this point, that socio-legal research has established an impregnable beachhead in such well-defined disciplines as economics or psychology, philosophy or anthropology, linguistics or sociology. The strength of socio-legal studies is its ability to generate "basic" insights about law by mobilizing the diverse methods and insights of these disciplines in a new attempt to understand legal assumptions and events. But the centripetal force within the socio-legal field — a focus on law — operates centrifugally with relation to these disciplines themselves, because of their focus on their own distinctive theories and methods. In how many of the social sciences, for example, are those who focus on law regarded as central contributors to the discipline? And how many of those involved in socio-legal studies are recognized as producers rather than consumers of theoretical or methodological "goods"?

A second characteristic of revolutions is their tendency to sectarianism and schismatic dispute. At first, unity and discipline are achieved among disparate "revolutionary" elements by identification of a common goal: the achievement of an often ill-defined new regime. When this goal is achieved, the basis of unity disappears, and discipline is replaced by dispute.

So, too, with socio-legal studies. What its adherents have in common is a commitment to broadening and deepening the understanding of law in its fullest sense. But they are profoundly divided by ideological orientation, methodological style and degrees of involvement in the legal system.

Adherents of the Critical Legal Studies movement, for example, share few assumptions about the nature of either law or society with followers of the Law and Economics school. The implacable quantifications of some sociologists of law must often seem irritating or irrelevant to hermeneuticists. The research agenda of law professors — even of the sub-species *socio-legalis* — tends to reflect their professional culture to the extent that it frequently fails to excite the interest of socio-legal researchers whose offices are elsewhere on campus. And exacerbating these many differences is the intrinsic difficulty of interdisciplinary research, even

for those most disposed to pursue it, and most committed to a reconciliation of opposites in the interest of the greater good.

From the perspective of intellectual excitement, of course, the presence of a full spectrum of contending views among socio-legal "revolutionaries" can only be viewed as desirable. But there is at least one danger which must be addressed. As suggested, it is characteristic of those engaged in the socio-legal project that they already exist at the margins of their professional disciplines. Given this marginality, and given the intrinsic difficulty of their task, the added burden of internecine strife has serious potential for demoralization. This is particularly true in Canada (unlike, say, the United States or England) because the project as a whole is so new and so small.

It is particularly important, therefore, that the editors of this *Journal* should regard it as a common resource for all of the many manifestations of socio-legal scholarship, rather than as the exclusive preserve of any one. This would be, I am sure, the natural instinct of any editor who is concerned to preserve the largest possible supply of both potential authors and potential readers. However, to maintain this broad-church approach will be increasingly difficult as Canadian socio-legal research grows in quality and quantity. With enhanced methodological and theoretical sophistication may come a tendency to be dismissive of more speculative and polemical works. With a larger pool of potential contributors may come a temptation to focus on some types of work to the exclusion of others, such decisions being articulated in terms of "merit" but in reality expressing current intellectual fashions. It would hardly be worth expressing such concerns — which must now seem remote and improbable — were it not for the fact that elsewhere socio-legal scholarship has been the forum for such schismatic strife. Forewarned is forearmed.

There is a final characteristic of revolutions which must be recalled and resisted: their atavistic urge for respectability, for the normalcy and conventionalism of the very regimes which they displace. In the case of socio-legal scholarship, the spectre of respectability already looms large.

Socio-legal research (as I myself have just urged) must seek to penetrate traditional professional enclaves if it genuinely aspires to transform legal discourse. This it can most rapidly do by being "useful." And usefulness is easy enough to demonstrate: the Federal Government has for some time been the major purchaser of socio-legal research; the development of social data for Charter litigation is today no mere cottage industry; and even "disinterested" academic research is often generated with the explicit intention of influencing the outcome of policy debates.

To none of these phenomena can one take objection, nor do I argue that what is "useful" is necessarily un-scholarly, much less poor either technically or theoretically. But I do suggest that from usefulness one may progress rapidly to respectability. When research is designed to inform decision making or policy formation, it generally proceeds within relatively non-controversial assumptions. It would be an unusual Supreme Court of Canada brief, for example, which began with an explicit confession of behavioural assumptions about the nature of adjudication. It

would be a rare piece of research commissioned, for say the Solicitor General, which began with a disquisition on the nature of the criminal justice system in advanced capitalist societies. And one infrequently finds a major theoretical breakthrough in a learned journal article whose focus is a current controversy over proposed legislation. In short, the task at hand is persuasion, and persuasion is usually facilitated by the development of common ground rather than the proliferation of differences. Common ground, I would argue, is the native habitat of conventional wisdom.

This tendency to respectability is likely to be exaggerated in the current context of constrained funding for research, funding which more and more is being linked to the willingness of the private sector to support it. Support for new work will in any event be hard to come by. And it will be hardest for researchers who have no established track record, no safe disciplinary base, no sympathetic referees, no apparent aspiration to "relevance" or concern with ultimate practical applications. Yet what I have described as the least promising work in terms of its ability to attract funding may well be the most important in terms of its contribution to our understanding of the law and the legal system. Faced with the necessity of becoming respectable, or not doing their research at all, it is at least possible that many serious and able scholars will choose the apparently lesser evil.

I suggest, then, that the *Canadian Journal of Law and Society*, and the entire project of socio-legal research, may conceivably find that at some point it has shifted from the margins to the centre of legal research. As remote and enticing as that possibility may seem today, it ought to be regarded as a mixed blessing. This suspicion of the respectable is neither a steely-eyed assertion of revolutionary resolve, nor a romanticization of the joys of being poor and unknown. It is, rather, a reminder that it has always been the business of serious scholars to ask hard questions and explore the implications of hard answers. The revision of paradigms and the transformation of theory and practice are not likely to result from a mere extrapolation of what is known and agreed. Without at least attempting such revision and transformation, we will not be testing ourselves to the full, or making our finest contribution to our discipline or our society.

This *Journal* will therefore contribute most if it remains a forum for free-wheeling ideological debate and daring theoretical conjecture, as well as for the display of methodological virtuosity. And it will in the end have the broadest impact if it functions as an infinitely expandible mechanism for linking legal and social scholarship. I detect in this first volume the signs and portents of an editorial policy which fully meets these prescriptions, and extend to Professor Knopff and his colleagues my congratulations for taking an initiative that — from the point of view of Canadian intellectual and social development — is years overdue.