Toward 'New Property' and 'New Scholarship': An Assessment of Canadian Property Scholarship

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Abstract
While the particular nature of property law makes both the undertaking of property scholarship and its assessment difficult Professor Mossman finds that the general question essential to any assessment of legal scholarship remains the same that is, the underlying methodological inquiry. An analysis of three topics in property law - the doctrine of estates in land, landlord and tenant, and matrimonial property - reveals a lack of contextual awareness in the legal writing. If the principles of property law are to be sufficiently dynamic to provide protection for 'new property' claims, legal scholars must develop a critical awareness of the values and choices that underlie the scholarly inquiry.
TOWARD ‘NEW PROPERTY’ AND ‘NEW SCHOLARSHIP’: AN ASSESSMENT OF CANADIAN PROPERTY SCHOLARSHIP

By Mary Jane Mossman*

While the particular nature of property law makes both the undertaking of property scholarship and its assessment difficult, Professor Mossman finds that the general question essential to any assessment of legal scholarship remains the same, that is, the underlying methodological inquiry. An analysis of three topics in property law — the doctrine of estates in land, landlord and tenant, and matrimonial property — reveals a lack of contextual awareness in the legal writing. If the principles of property law are to be sufficiently dynamic to provide protection for ‘new property’ claims, legal scholars must develop a critical awareness of the values and choices that underlie the scholarly inquiry.

I. APPROACHING THE TASK: PROBLEMS AND PITFALLS

Twenty years ago, in the preface to his casebook, Cases and Notes on Land Law,1 Professor Laskin (as he then was) quoted and agreed with a statement of Professor Hargreaves, written in 1956;2 assessing the state of property scholarship; Hargreaves had asserted:

Not since Littleton has there been a serious attempt to isolate [the principles of English land law] from their historic origin, to examine them as living contributions to contemporary thought, and to apply them in the construction of a systematic analysis of the whole field which would satisfy the demands of scientific jurisprudence and prove worthy of the greatest system of property law that the world has ever known.3

Hargreaves’ assertion was an assessment of property scholarship in England, and Laskin was even less enthusiastic about the state of property scholarship in Canada at that time:

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2 A. Hargreaves, Book Review (1956) 19 Mod. L. Rev. 14; Professor Hargreaves was reviewing Cheshire’s Real Property, 7th ed., lamenting “the present position of land law studies and ... the neglect into which its basic principles have fallen.” Ibid. at 25.

3 Ibid. quoted in supra, note 1 at v.

4 Supra, note 1 at v-vi.
There has been nothing in Canada comparable to the English texts, let alone those in the United States (where there is a proliferation of general casebooks and specialized treatises as well). We have to go back to Armour's second edition of Real Property, 1916, to find any general treatment of the subject, and this is a work which, basically, is founded on Blackstone. We will get no farther than Armour unless it be by the efforts of the law teachers, to whom Professor Hargreaves feels England too will have to look for any systematic study of basic land law problems.

Twenty years after Laskin so stated the challenge to the law teachers, the question is whether the state of property scholarship in Canada has fundamentally changed, or even changed at all.

The answer to this question requires an assessment of property scholarship in Canada. This task is a daunting one for a number of reasons. First, “property and civil rights” are a matter within provincial jurisdiction under the Canadian Constitution; any assessment of property scholarship should therefore take account of published work in several different provincial jurisdictions. Moreover, unlike some other areas of law that also fall within provincial legislative jurisdiction, property laws, especially those in relation to land law, often differ greatly from one province to another depending on the time of reception of English law; the Torrens registration systems of the four western provinces make land law and procedure very different from those in the east, while the civil law system in Quebec is based on concepts very different in theory from those of the common law provinces. The provincial nature of property law thus complicates an assessment of property scholarship, to a greater extent perhaps than some other areas of law.

A second difficulty in the task of assessing property scholarship is that property law is more dependent upon statutes than upon common law principles. However, unlike some other areas of law that are essentially statute-based, the framework of property law depends upon statutes often enacted several centuries ago; the task of interpreting and applying statutes may thus depend upon both an understanding of the context

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4 Supra, note 1 at v-vi.
6 The Torrens system of land registration was introduced in the four western provinces from its origins in Australia. For an excellent review of its origins and significant principles, see T. Mapp, Torrens' Elusive Title (1978).
7 The civil law system is based on allodial ownership while the common law system is based on tenure. See J.G. Castel, The Civil Law System of the Province of Quebec (1962).
8 For example, the law of taxation and labour law are both substantially statute-based.
9 The most (in)famous may be the Statute of Uses, 1535, 27 Hen. 8, c. 10, although there are others with long antecedents like the Statute of Frauds, 1677, 29 Car. 2, c. 3. Even statutes like the Wills Act, 1540, 32 Hen. 8, c. 1, present difficulties because they have been frequently amended.
in which the legislation was originally enacted, as well as creativity in its use in a modern context. This process is further complicated by the need to take account of common law principles that have developed interstitially when outdated legislation has not been repealed, despite wholly failing to meet modern needs.10

This difficulty is compounded by the absence, at least until recently, of any constitutional principles overtly protecting property interests. Unlike the United States,11 Canada has had no constitutionally entrenched rights to property that override enacted legislation. The advent of constitutionally entrenched rights and freedoms in the Charter12 created demands for extending such protection to property.13 Although property protection has been expressly omitted to date from the Charter,14 it has been suggested that this does not prevent full protection, either pursuant to section 7 of the Charter or by reason of a “common law” right.15

Thus property scholarship must take account of statutes, both ancient and modern, which are interwoven with common-law principles; as well, it must accommodate a background of ideas, often only implicit, about the constitutional protection of property interests. The tasks of enunciating the law and demonstrating the efficacy of its application in a particular context may be overwhelming in themselves; and these difficulties may provide at least a partial explanation for the absence of property scholarship that advances beyond explication of this sort. Moreover, the combination of provincial jurisdiction over property and the nature of property law analysis — an amalgam of statutes, common law, and constitutional principles — makes the task a daunting one indeed.

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10 There are a number of examples that could be used to illustrate this problem. Perhaps the best is the Limitations Act, R.S.O. 1980, c. 240 and the doctrine of adverse possession.
11 The Fifth amendment of the U.S. Constitution prevents any “taking” of “property” without due process. See B. Ackerman, Private Property and the Constitution (1977).
14 There have been a number of suggestions that an amendment may be appropriate.
15 See Re Fisherman's Wharf Ltd. (1982), 44 N.B.R. (2d) 201 aff'ing (1982), 40 N.B.R. (2d) 42 (Q.B.). In the Court of Appeal, Mr. Justice La Forest reviewed the general principles of constitutional history and stated at 211:

Those who struggled to wrest power from the Stuart Kings and placed it in the hands of the elected representatives of the people were not of a mind to replace one despot with another. Rather they were guided by a philosophy that placed a high premium on individual liberty and private property and that philosophy continues to inform our fundamental political arrangements — our Constitution. [Emphasis added.]
However, there is also a third and even more telling reason why the task of assessing property scholarship is so difficult. This reason is the scope of 'property analysis'. From the perspective of legal philosophy, 'property' is a concept, not a thing, and moreover it is a concept that evolves and changes according to the societal context:

The meaning of property is not constant. The actual institution, and the way people see it, and hence the meaning they give to the word, all change over time. . . . The changes are related to changes in the purposes which society or the dominant classes in society expect the institution of property to serve.17

Using this approach, the scope of property analysis includes not only the traditional categories of property interests — land, chattels, non-possessory interests, leaseholds, and so forth — but also other categories of "new property," including government benefits and jobs; such an approach might also include an assessment of categories of interests in which proprietary interests are no longer recognized, such as slaves, children, or wives. Clearly, the adoption of the concept of property used in legal philosophy makes any assessment of property scholarship a difficult if not impossible task.

An alternative and more pragmatic approach to defining the scope of property analysis may be the use of 'property' subject headings in the Index to Canadian Legal Periodical Literature. However, even this approach evidences the great breadth of scope for property analysis. Although the subject headings have changed to some extent over the period 1960-1984, a very large number have remained generally in use throughout the period: adverse possession; chattel mortgages; city planning; community property, condominium, and cooperative housing;

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19 See also M. MacNeil, "Property in the Welfare State" (1983) 7 Dal. L.J. 343.


21 The Index to Canadian Legal Periodical Literature was reviewed for the period 1960-1984 under the listed headings.

22 For further details of these changes, see text at 638-39.
conveyancing; copyright; dower; easements; estate planning; expropriation; family law; forfeiture; fraudulent conveyances; future interests; homesteads; housing; husband and wife; immovables; implied trusts; inheritance and succession; inheritance, estate and gift taxes; intellectual property; joint tenancy; landlord and tenant; leases; marriage; property; mortgages; movables; perpetuities; personal property; lost goods; pledges; possessions; property (civil law); property taxes; public lands; pollution; natural resources; real estate agents; real property covenants; regional planning; restraints on alienation; secured transactions; title to land; Torrens system; trusts and trustees; vendors and purchasers; water pollution; wills; and zoning.

The breadth of 'property' topics, even using the more pragmatic approach of the Index, is still overwhelming and makes any attempt to assess 'property' scholarship a challenging one indeed.

These same problems, which make an assessment of property scholarship so difficult, also operate to make it difficult to undertake property scholarship per se in Canada. A legal scholar who works in the property area is much more likely to be a specialist in municipal zoning, or charitable trusts, or matrimonial property; he or she is much less likely to be interested in drawing connections and pointing out similar themes among these categories, assuming such connections and similar themes even exist any longer. Indeed, the startling conclusion may be that what is property is now so diverse that the concept is no longer useful, except as a starting point for analyses that are completely divergent depending on the special context. If this is so, the usefulness of the property concept as a means of extending legal protection to 'new property' interests may also be in doubt. For both these reasons, it seems important to assess the potential for property scholarship more generally.

Bearing in mind the difficulties that have been identified, and particularly the breadth of scope, which defies complete mastery by any single scholar, it seems nonetheless important to try to identify some of the trends in Canadian legal scholarship in property since Laskin's casebook was published in 1964. In doing so, it may be possible to identify some of the strengths as well as the weaknesses of the work to date, and to suggest directions for scholarly inquiry for the future.

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23 Lists of entries for these headings are on file with the author.

24 Names of authors generally associated with property scholarship usually appear in only one category; for example, the names of McClean, Waters, and Sheard appear frequently in relation to charitable trusts, but not in relation to municipal zoning or matrimonial property.

25 See Bucknall and Youdan, supra, note 16.
II. PROPERTY SCHOLARSHIP: A PRELIMINARY APPRAISAL

A. Overview

The task of appraising legal scholarship in the property context seems to require, first, an overview of the scholarly work produced by lawyers and legal academics and then, some comparison of this work to that produced by scholars of property in Canada, or by legal and other scholars elsewhere. In drawing comparisons, it may be useful to consider whether the work is essentially doctrinal (explaining the law and its application in the legal context); normative (assessing implicit or underlying values according to expressly stated policy or criteria); comparative (comparing the law and its functions in different contexts or jurisdictions); or interdisciplinary (examining the law in its social, political, or economic context). It may also be of use to consider whether the intended audience for scholarly work on property includes persons other than law students, academic colleagues, practicing lawyers, or judges.

In this framework, the legal scholarly work on property topics listed in the Index to Canadian Legal Periodical Literature for the years 1960-1984 might be assessed as follows. First, the total number of entries is very substantial due to the scope of the property concept; however, the number of entries for any single subject heading is usually not excessive. Second, the entries are specialized by topic rather than general in focus, and authors' names seem to recur in relation to specialized topic headings rather than appearing in relation to more than one property topic. Third, the entries seem to be essentially doctrinal; they explain a particular legal development in terms of earlier cases or statutory provisions, and sometimes present a new decision in the context of overall doctrinal development. Finally, the intended audience for most of the writing seems to be lawyers, whether students, academics, practitioners, or judges; there is no pervasive sense of a framework for analysis outside the legal system itself.

At the same time, the list of entries in the Index discloses some interesting developments. Beginning in the early 1970s, the Index included two new titles: 'environmental control' and 'industrial property'. At this time, there was also a noticeable increase in the number of entries for

26 In the property field, the published work includes treatises and articles, Law Reform Commission Reports, Law Society Lectures, and CBA Continuing Education Programs. It also seems useful to include (at least published) teaching materials.
27 Supra, note 24.
28 The titles of many articles suggest a precise focus on a very specific topic.
29 See Index 1971-74.
some topic headings including 'copyright', 'landlord and tenant', 'marriage: property', 'pollution', and 'regional planning'; at the same time, there was, for example, a decrease in the number of entries for 'personal property'.30 Although it would be inappropriate to form any significant conclusions from such a quantitative analysis alone, it is perhaps noteworthy that the legal periodical literature seems to reflect, at least in quantitative terms, attentiveness by legal scholars to some of the controversial property issues of the past two decades.

Beyond quantitative analysis, however, how should property scholarship be appraised? What are the critical elements and how should we determine when the standard has been met? This question is both necessary and interesting, driving us to the heart of scholarly inquiry: how to ask the right question. Inevitably, the act of assessing scholarly writing requires a determination of criteria for assessment. Yet the process of defining appropriate criteria itself provokes critical questions about how all the possible factors can be assembled, how a selection of factors can be identified, and how these factors can be applied fairly to the literature in order to reach a conclusion about the state of property scholarship in Canada. Indeed, the really significant point about a Symposium on Canadian Scholarship is not the debate about the relative merits of different kinds of scholarly writing in Canada, but the underlying methodological inquiry: how do we decide the relative merits?

This question is a provocative one in the context of legal writing. It is generally accepted that legal writing as a form of writing is reasoned, logical, and precise. Notwithstanding this perception however, many lawyers both in practice and in academe recognize that judicial decisions are usually affected by judges' values, beliefs, and assumptions; thus, the reasoned argument of judges' decisions is best understood in light of such unstated factors in their legal writing. What is then surprising is the apparent lack of awareness in scholarly legal writing of the significance of the writers' perspectives. If asking the right question is important to the scholarly method, then it must be important as well to know why a legal writer has concluded that the question posed is the right one.

The point of this discussion is to suggest that most Canadian legal writing in property law reflects little interest in the methodology of its inquiry; it is a 'closed' system in which persons with legal training first read the reasoned arguments of other persons who are legally trained and then critique the reasoning or the logic or the precision of the writing:

30 Ibid.
Legal scholarship is in fact a sophisticated and elaborated form of legal brief. Doctrinal analysis, the chief method for legal scholarship, is undertaken to establish a particular interpretation of case law on the basis of arguments and authority which would be acceptable to an appellate judge. As a method of inquiry, conventional legal scholarship serves the narrow professional function of supporting lawyers' advocacy.31

Of course, such writing may be defended on the basis that it is useful and that legal writers may provide assistance through such efforts. The question here, however, is whether such writing can be regarded as scholarly in terms of its method of inquiry.

This question is fuelled by the critiques of legal method expressed most recently both by the critical legal studies movement32 and by feminists.33 In both cases, the critiques have centred on the liberal bias inherent in the law's rationality and logic. Moreover, feminism has focused very systematically on methodology and has developed a compelling critique of the law's "point-of-view-lessness"34 and, arguably, also of its use by legal scholars. In this context, it seems desirable to face up to the question of method in scholarly inquiry: "How can one do critical scholarship without questioning conventional methods? How can one do critical scholarship without considering one's role as a scholar engaged in a social enterprise?"35 And we can add: How can one assess scholarship on property without addressing these same questions?

These questions do not have easy answers. At the very least, they seem to require a statement about perspective from an assessor of legal scholarship. Since I am interested in law as a central element in social relations among people, I am primarily interested in whether scholarly writing about law addresses such process questions as follow about the creation, interpretation, and application of the law:

— How were legal principles adopted, or why are they appropriate, having regard to the 'outside world' as well as the 'closed system' of the law?

31 F. Munger & Seron, "Critical Legal Studies versus Critical Legal Theory: A Comment on Method" [1984] Law and Policy 257 at 260. Perhaps a good example is A.H. Oosterhoff & W.B. Rayner, *Anger and Honsberger Real Property*, 2d ed. (1985), in which the authors express the hope in their preface that they have made the intricacies of the law of real property "more accessible to the profession."


34 The phrase is C. MacKinnon's. See Munger & Seron, *supra*, note 31, for a critique of methodology in the critical legal studies movement.

35 Munger & Seron, *supra*, note 31 at 258.
— How can we explain the cases 'at the margin' as well as those in the mainstream; are legal decisions useful as legitimating forces for the mainstream?

— Why are some problems beyond law or outside the boundaries of legal decision making and what factors make them so?

In choosing to adopt these kinds of questions for an assessment, I will find doctrinal explication less meritorious than legal writing that pursues these broader issues. The critical issue remains: what is fundamental to scholarly inquiry is the how and why for the choice of questions, and not the answers.

B. The Development of Property Analysis

As a starting point for my inquiry, I have chosen to examine three topics in property law:

1. The doctrine of estates in land;
2. Landlord and tenant; and
3. Matrimonial property.

These three areas represent different stages in the development of property analysis. The first is a topic with ancient origins and few modern developments; the second is a topic with medieval beginnings but dramatic changes in the twentieth century, and the last is a topic that has emerged in its modern form within the last decade or so. What follows is a preliminary assessment of some of the scholarship in light of the questions posed.

1. The doctrine of estates in land

This topic has not been one of significant controversy in the past two decades, even though it is obviously what both Hargreaves and Laskin had in mind when, in the quotations at the beginning of this essay, they directed the attention of law reformers and legal scholars to further efforts. In fact, most of the legal scholarship about the doctrine of estates in land appears in casebooks or texts for use by law students. For example, Laskin's casebook of 1964 includes a brief introduction to the nature of feudalism and the doctrine of estates, as well as legal and

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36 See Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council, Law and Learning (Chair: H.W. Arthurs) (1983), for an analysis of types of research in law (esp. ch. 5).
37 Supra, notes 3 & 4.
38 See for example, supra, note 1 and D. Mendes da Costa & R. Balfour, Property Law (1982).
39 See for example, A. Sinclair, Introduction to Real Property Law (1982); and Oosterhoff & Rayner, supra, note 31.
equitable interests in land. The material includes excerpts from treatises,\textsuperscript{40} statutory provisions, and cases. Some of the material\textsuperscript{41} places the legal concepts in a broader socio-political context, but the main focus is the enunciation of legal doctrine. By comparison, a more recent student casebook, \textit{Property Law},\textsuperscript{42} contains a greater amount of descriptive material, along with statutory and case excerpts; however, it is not much more successful than Laskin's casebook was in placing the legal concepts in a socio-political context.\textsuperscript{43}

There are three criticisms that can be directed at these casebooks and texts. The first is that they misrepresent the variety of legal ideas that flourished in the medieval period, when the basic concepts of modern land law were being established. The history is usually presented as an inexorable drive to universal fee simple estates held in free and common socage tenure.\textsuperscript{44} The work of medievalists is ignored in this process, even though some of them have clearly demonstrated the diversity and creativity within feudalism and its legal concepts;\textsuperscript{45} for example, widows, who were systematically excluded from land ownership by the doctrines of tenure and primogeniture, nonetheless, often succeeded in their objectives of keeping the family and the land intact.\textsuperscript{46} The legal scholarship, by contrast, analyses the history of developing legal concepts in terms of modern ideas, particularly those that have been successful or become dominant, and ignores the variety of concepts or ideas, some of which were quite flourishing at the relevant time.

\textsuperscript{40} For example, R. Powell, \textit{Real Property} (1949); and H. Bigelow, \textit{Introduction to the Law of Real Property}, 3d ed. (1945).

\textsuperscript{41} The excerpts from Powell, \textit{ibid.}, attempt to assess the pervasive political, social, and economic organization of feudalism. Yet the accuracy of the historical scholarship may be criticized for its efforts to equate the perspective of William the Conqueror in 1066 with that of men [sic] today. Powell asserts that the "ambitious, somewhat ruthless seeker of power" in the eleventh century became William the Conqueror, whereas in our century, such a person becomes John D. Rockefeller or George Eastman; Powell further suggests that other "close analogies are obviously found in the activities of Germany during the first two or three years of World War II." See \textit{supra}, note 1 at 7.

\textsuperscript{42} \textit{Supra}, note 38.

\textsuperscript{43} The material is fully descriptive but does not really address the issues of why developments occurred, why certain actions were brought, and so forth.

\textsuperscript{44} Both Laskin's casebook and that of Mendes da Costa & Balfour assign relatively little weight to copyhold tenure, for example. See \textit{supra}, note 1 at 25; Mendes da Costa & Balfour, \textit{supra}, note 38 at 315-16. By contrast, see J. Baker, \textit{An Introduction to English Legal History}, 2d ed. (1979) at 259 ff.


If the only result were inaccuracy in legal history, that might alone prompt a reassessment of the scholarship. In addition, however, the approach of the casebooks generally presents five centuries of development of land law concepts as if change occurred in a legal vacuum. Although there are usually references to the problems created for Henry VIII by the widespread existence of conveyances to uses, there is usually little acknowledgment of the impact of the power struggle between King and Parliament, or the efforts of Sir Thomas More and others to establish the Lord Chancellor’s role as subject to the rule of law. In the result, the vision of legal change, and especially its relation to political, economic, and social factors, is incomplete and often misleading.

Finally, given the treatment of legal reform during the late medieval period, when basic legal concepts about land were being developed, it is hardly surprising that this legal writing virtually ignores the possibility of land law reform. With a few exceptions, the legal writing evidences no interest in modern reform of the principles developed under feudalism in England. Since other possible concepts exist, and since conditions of modern society in Canada differ markedly from those in England under feudalism, a conscious perception of change and reform in the legal scholarship of the medieval period would likely result in a conscious re-examination of the need for legal change in the principles of land law in modern Canada. However, since such legal changes would affect not just those holding interests in land, but also those who ‘manage’

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48 See for example, Mendes da Costa & Balfour, supra, note 38 at 764-65.

49 See supra, note 45. An American scholar writing about future interests has commented: “... the infusion of political and historical paradigms of analysis into the study of law ... is much more realistic and productive of useful results than is the aridity of idealism, formalism and wordplay. In short, future interests rules fit together imperfectly not because of the inability of judges, scholars, or ourselves to be logical, but because different rules arose at different times due to differing matrices of social and political needs.” See W. Holt, “The Testator Who Gave Away Less Than All He or She Had: Perversions in the Law of Future Interests” (1980) 32 Ala. L. Rev. 69 at 86.

50 A confidential report was prepared for the Ontario Law Reform Commission by Professor Mendes da Costa (as he then was) on the Basic Principles of Land Law (1970) recommending the adoption of allodial land ownership. It was followed by a Second Report (1975) and a Second Report (Supplemental) in 1976. At about the same time the Commission investigated the possibility of reforming land registration systems. See Ontario Law Reform Commission, Report on Land Registration (1971).


the existing system of land law — the lawyers — it has been suggested that:

A change that made the law simpler or less ambiguous . . . could have an adverse effect on their [lawyers'] income. In addition, the stock-in-trade of a practicing attorney is his or her knowledge of the existing law. A drastic change could reduce the most experienced practitioner almost to the level of a beginner.\textsuperscript{53}

Is Laskin's challenge, therefore, to go unheeded, even by law teachers?

2. Landlord and tenant

In contrast to the problem of estates in land, the legal concepts of landlord and tenant have been under careful scrutiny during much of the past two decades. Laskin stated the essential question in his casebook in 1964:

The pertinent question is to what extent is the transaction regarded as the transfer of an interest in land (and hence governed by rules and doctrines developed as part of the law of estates) and to what extent is it regarded as a business dealing (and hence governed by rules and doctrines developed later as part of the law of contracts).\textsuperscript{54}

Shortly after stating the issue in this way, Laskin noted without further comment that “the effect of the domination of property conceptions was to subordinate the tenant to the landlord.”\textsuperscript{55} Virtually nothing in Laskin's 1964 treatment of the subject departed from a basic doctrinal approach to the subject matter.

By the end of the 1960s, however, law reform proposals\textsuperscript{56} regarding residential leases were significantly altering the legal rights and obligations of tenants.\textsuperscript{57} Nonetheless, except for the law reform documents, there is little in the scholarly legal writing of the period that examines the impetus for the law reform initiatives.\textsuperscript{58} Nor is there much in the legal writing after 1970 that assesses the effect or significance of the legal

\textsuperscript{53} See Watson, supra, note 47 at 1153.

\textsuperscript{54} Laskin, supra, note 1 at 180.

\textsuperscript{55} Ibid. at 181.


\textsuperscript{57} See for example, the Commission's Report in Ontario, ibid. and the provisions of the Landlord and Tenant Act, Part IV, now R.S.O. 1980, c. 232.

\textsuperscript{58} By way of comparison, in the English context, there is an excellent analysis of the process and impact of law reform initiatives in the landlord-tenant area in D. Nelken, The Limits of the Legal Process (1983).
changes introduced by amendments to residential leasehold law across Canada.⁵⁹ As the authors of Property Law⁶⁰ laconically state:

The legal system’s treatment of the lease as a conveyance was no doubt sensible and adequate in a largely agrarian society. . . . Subsequent economic and social developments, however, have rendered inadequate the conception of the lease as solely a conveyance. . . .⁶¹

There is no real exploration of the nature of the “economic and social developments” that formed the basis for so fundamental a shift in legal doctrine.

By contrast, much of the analysis conducted by Ontario’s recent Commission of Inquiry into Residential Tenancies⁶² was not legal but economic. It included assessments of the legislative and political background to the Residential Tenancies Act, a statistical description of the Ontario housing market, a survey of other jurisdictions and of alternative systems of rent regulation, and computerized simulation models of financial performance of hypothetical buildings.⁶³ The thrust of the Commission’s inquiry is in stark contrast to most of the legal scholarship in the landlord-tenant context.

Is the lack of attention in scholarly legal writing to the underlying economic issues of landlord and tenant law significant? Arguably, the legal principles may operate without regard to economic consequences, but it is unlikely that they do so.⁶⁴ Ignoring the underlying economic principles is likely to distort the analysis of the law of landlord and tenant, just as ignoring medieval history is likely to result in a distorted understanding of basic doctrines of land law.

Yet once again, it is not only accuracy that is at stake. The broader perspective is also needed here to understand the legal change that has occurred within a few decades in the landlord-tenant context and to appreciate the possible relationship between legal and social change.⁶⁵ Landlord and tenant law is, perhaps, a microcosm of the usefulness of law in the twentieth century as a means of economic regulation, on the

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⁵⁹ Again by way of comparison, in the English context, see M. Partington, Landlord and Tenant (1975).

⁶⁰ Supra, note 38.

⁶¹ Ibid. at 1145.


⁶⁴ At the same time, it is unlikely that there is a single explanation for the choices and results of the application of principles. See Nelken, supra, note 58.

⁶⁵ See Watson, supra, note 47.
one hand, and redistributive justice on the other. An English study of the criminalization of landlord harassment of tenants has been said to:

... sow further doubts as to the capacity of law to correct the effects of inequalities in economic resources to the extent which 'progressive' lawyers had hoped. There is increasing recognition that law is not a neutral tool that can be employed at will in the service of Fabian projects of piecemeal social engineering but that it partakes of and is subject to internal and external constraint in its ability to achieve social change.

The challenge for Canadian legal scholarship in landlord-tenant law is to assess, in the broader context, the neutrality of the law and its inherent limits.

3. Matrimonial property

If the legal scholarship on land tenures generally ignores the socio-political context, and the legal scholarship on landlord and tenant law seems to discount the impact of economic forces, the legal scholarship on matrimonial property appears imprisoned in both outmoded historical conceptions and larger economic forces. In some respects, the principles of matrimonial property present an illustration of property law at the brink: do the principles really have enough inherent dynamism to be useful in a radically different context, and if the principles are apt, can they be applied systematically notwithstanding a hostile economic context?

The tension is evident once again in the casebooks. Professor Laskin considered property relations in marriage in the context of life estates, which were often created by operation of law through the doctrines of dower or curtesy for a surviving widow or widower. At the time he was writing, there was a prevailing sense that legal equality had been substantially achieved for husbands and wives:

The 'property' relations of husband and wife at common law exhibited the disabilities of the married woman found in other branches of the law, most of which have now been remedied by legislation and to some extent also by judicial decision.
Two comments can be made. First, there is a sense in Laskin's treatment that there are no problems remaining in the law's treatment of married women in relation to property;\textsuperscript{71} with all the benefit of hindsight, of course, it is easy to suggest how inadequate this assessment would prove in the Murdoch case,\textsuperscript{72} in the Rathwell case,\textsuperscript{73} and in the drive to reform 'family property' regimes in every province of Canada by the late 1970s.\textsuperscript{74} Second, matrimonial property seems to sit somewhat uncomfortably in the midst of life estates; it is as if matrimonial property does not deserve treatment on its own, but must be 'fitted in' somewhere in the traditional scheme of things.\textsuperscript{75}

The treatment of matrimonial property by Mendes da Costa and Balfour twenty years later demonstrates an awareness of all the intervening legal developments that have occurred.\textsuperscript{76} Yet, despite the existence of a unique statutory framework in Ontario after 1978,\textsuperscript{77} the subject of matrimonial property still receives no separate treatment; instead, it is 'fitted in' interstitially under the subject of co-ownership. Even though many husbands and wives are co-owners prior to marriage breakdown, it is the statutory framework of the Family Law Reform Act, and not the common law principles, that governs property distribution. In this sense, the Family Law Reform Act probably offers the main principles for division of property between co-owners, with the common-law principles applying only in relatively less frequent circumstances. However, the material is presented in the casebook with the new statutory framework being 'fitted in' among older legal principles.\textsuperscript{78}

Perhaps because of this choice about the method of presentation, the underlying values of the reform legislation and the microcosm of its social and economic context are scarcely addressed. These issues were,

\textsuperscript{71} There was a sense also among nineteenth-century reformers of married women's property that legal changes would result in equality for husbands and wives. See L. Holcombe, Wives and Property (1983); and Lucie, supra, note 20.


\textsuperscript{74} Between 1978 and 1980, virtually every province except Quebec enacted special family property legislation; Quebec also considered new legislation in Bill 89. See A. Bissett-Johnston & W. Holland, Matrimonial Property Law in Canada (1980).

\textsuperscript{75} This idea is, of course, consistent with the notion, also urged by those advocating matrimonial property reform, that the reform sought would not create any major change but merely extend to women the rights already enjoyed by men. For an early example, see the Declaration of the Rights of Women (1848).

\textsuperscript{76} Supra, note 38 at 856 ff.

\textsuperscript{77} The Family Law Reform Act, R.S.O. 1980, c. 152.

\textsuperscript{78} This arrangement is traditional when common-law principles are altered by statute; however, what is suggested here is that the statutory framework is too radical and too comprehensive a legislative scheme to be 'fitted in' successfully.
however, generally evident in the reports of federal and provincial law reform commissions throughout the decade of the seventies. Additionally, a number of articles in the periodical literature, particularly in recent years, have focused on the inadequacies of the law in achieving equity in the division of property upon marriage breakdown. Yet there has been no substantial and fundamental re-thinking in Canadian property scholarship of the role of law in allocating wealth between husbands and wives when marriage ends in divorce. The economic analysis of the male-breadwinner and female-housewife model of marriage has only infrequently been considered in terms of the legal system’s goals and values. It is interesting to speculate whether the creation of entitlement to family property under the reform legislation has failed to attract the legal deference usually granted to ‘property’ (and the legal scholarly inquiries it deserves) because the idea of family property has made it available to the many rather than the preserve of the lucky few. If everyone is ‘a man [sic] of property’, the value of such property diminishes accordingly:

In a time of transition, both in family behaviour and in the nature and forms of wealth, the law is reflecting and interacting with social trends which affect the majority of persons, primarily those who are at neither the highest nor the lowest economic levels.

Is scholarly inquiry less appropriate when the ‘property’ is ‘family property’?

III. TOWARD BLACKACRE’S NEW HORIZONS . . .

This review of three areas of scholarly interest within property law demonstrates a range of different types of analytical problems. In the context of title to land, the scholarship evidences a lack of contextual

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82 See Gintis, *ibid.* It is noteworthy that such investigations are also being undertaken in the context of legal history; see for example, E. Spring, “The Family, Strict Settlements and Historians” in G. Rubin & D. Sugarman, *Law Economy and Society, 1750-1914: Essays in the History of English Law* (1984) at 168; and in the context of anthropology, see for example, R. Hirshon, *Women and Property/Women as Property* (1984).

83 Glendon, *supra*, note 18 at 1.
understanding; this results in a rigidity of thinking about basic concepts in modern property analysis and an institutional disinterestedness in legal reform. The legal scholarship too often seems to view law in a vacuum, a practice that results in masking the underlying forces and values that shape the development of legal principles. This approach is, however, consistent with the interests of the legal profession in maintaining a system, which because of its intricacy, reinforces dependence upon lawyers’ services in property transactions.

In the landlord-tenant context, the scholarship evidences an institutional will to continue to regard law and the legal process as essentially neutral and impartial in the resolution of disputes; there is also a desire to eschew the underlying economic forces within which legal rules have been negotiated or adopted, and according to which disputes are resolved. There seems little awareness in the legal scholarship of the extraordinary rise in the numbers of Canadians who look to residential leaseholds as their life-long shelter and the impact of this branch of law upon the actual relations between landlords and tenants. The possibility that the law of landlord and tenant needs to be examined, taking account of governmental housing policies generally and the private investment market, seems as obvious as is the absence of such examination from legal scholarship.

Finally, the matrimonial property context confronts the limits of traditional property analysis. In implementing a statutory scheme for dividing property upon marriage breakdown, judges truly perform the role of redistributive justice when they transfer title on the basis of equity arising out of the marriage relationship. In this respect, the legal principles declare that the traditional principles of property, which presumably are rationally based, are to be superseded by principles based on equity between a husband and a wife. The major effect of such statutes is to confer property rights on those with the status of wives, a status that barely one hundred years ago deprived its holder of any property interest whatsoever. To the extent that the scholarship generally fails to take account of the radical nature of matrimonial property principles, it is not difficult to understand why it is not confronted more successfully.

Thus, it seems that much of the scholarship on property is essentially doctrinal rather than normative, comparative; or interdisciplinary. It is also fragmented and specialized rather than synthesized and theoretical. And it is mainly directed to those who are legally trained rather than to others. What conclusions should we draw from these observations?

The conclusions should not necessarily be negative. In terms of the training and experience of most legal writers, their writing reflects what they are best able to do: analyse and explicate abstract and rational
principles about a process for decision making that is insulated from social, economic, and political forces, and in which disputes are resolved by neutral rules applied with fairness and objectivity. That this process is mythical does not necessarily detract from its internal coherence. And its internal coherence must offer some solace to even the most jaded philosopher.

Yet there is a crisis: a demand that property law demonstrate coherence to the external (non-legal) world and that principles of property law be adapted to provide protection for new interests, including those of tenants; and wives on marriage breakdown. On one hand, a rational, logical analysis leads inevitably to the conclusion that 'new property' claims can be sustained just as easily as more traditional ones. Because 'property' is simply a conceptual construct of law, there is no logical reason to deny 'new property' claims. However, the structure of our society cannot admit new claims without (inevitably) modifying older ones because the concept of property is essentially a distributive mechanism for society's benefits. The extension of the property concept to benefit all individuals stretches classic J.S. Mill liberalism to an Orwellian egalitarian checkmate:

... the crisis is a crisis in the individualistic view of society, in a legal model attuned to the needs of the individual house- or property-holder, the entrepreneur, the settled citizen living on terms of equality with those around him, secure and confident as an individual in his bearing vis-à-vis the state and the rest of society. Against this, the new demands elevate the interests or 'requirements' of the comparatively poor and/or underprivileged as contrasted with those who are 'at home' with law; they pit the interests of 'society' or of 'humanity' against 'excessive' respect for abstract individual rights and powers, especially proprietorial rights and powers....

Yet any suggestion that the 'new property' claims should be rejected in order to preserve the integrity of the concept sounds suspiciously like

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84 This view has been subjected to critical assessment most recently by feminists: see Olsen, supra, note 68 and MacKinnon, supra, note 33.

85 The idea of "myth" is derived from the analysis of "the myth of judicial neutrality" in A. Sachs & J. Hoff Wilson, Sexism and the Law (1978).

86 See C.B. MacPherson, supra, note 17 at 201: "... property, although it must always be an individual right, need not be confined, as liberal theory has confined it, to a right to exclude others from the use or benefit of some thing, but may equally be an individual right not to be excluded by others from the use or benefit of some thing. When property is so understood, the problem of liberal-democratic theory is no longer a problem of putting limits on the property right, but of supplementing the individual right not to be excluded by others .... The right not to be excluded by others may provisionally be stated as the individual right to equal access to the means of labour and/or the means of life.

an argument in favour of the status quo, in other words, the protection of existing property interests.

What does seem necessary, however, is a recognition that societal changes external to the legal system now make the property concept less and less a matter of only 'private law':

There is . . . a shift of attention from the property whose paradigm is the household, the walled-in or marked-off piece of land . . . to the corporation, the hospital, the defence establishment . . . whose ‘property’ spreads throughout the society and whose existence is dependent upon subsidies, state protection, public provision of facilities, etc. . . . Property becomes social in the sense that its base and its effects can no longer be contained within the framework of the traditional picture.88

Thus, property has become public rather than private and so pervasive that the fragmentation and specialization of scholarship are not only inevitable but perhaps a necessity. Yet the need to take the measure of the individual parts to the whole remains. The task is unenviable, since it must by nature be concerned not just with internal consistency but also must meet the demands of ideas external to the law itself.

The complexity of the demands means that it is unlikely that any one scholar, or type of scholar, can perform the whole task. Both those who are legally trained and those trained in other disciplines may participate; scholars with experience of ‘law in action’ and those without it may all offer useful insights. What also seems essential is that legal scholars develop self-awareness of the perspective from which they write, of the underlying values and assumptions they bring to the task, and of the limits of rational argument in legal discourse. To argue that the law’s internal coherence is alone sufficient no longer seems persuasive; yet to prefer other frameworks for analysis, without critical inquiry into their underlying rationales, seems equally inappropriate to scholarly inquiry. The real task is the critical assessment of why choices among ideas are made and advanced by scholars.

In the context of this assessment of property scholarship in Canada, it is clearly evident that my experience and understanding of law as it impacts on those at the margins of society inform my critique of the scholarly writing and my assessment of appropriate directions for future change. What is interesting to me is that perceptions of law differ so greatly among legal scholars, nearly all of whom were trained in a country where legal education has been remarkably homogeneous for several decades;89 does this not itself suggest the mythical nature of the idea of the law’s neutrality? My experience is that law is seldom neutral and

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88 Ibid. at 133.
89 See supra, note 36 at ch. 2.
that it may even be humane rather than objective on occasion. Surely legal scholarship, as well as law, should be informed by experience as well as logic.90

What seems most critical for the future of property scholarship is to focus attention on these issues in the classroom, and to help students to appreciate the experiential nature of legal ideas and not just their content. On this basis, it still seems necessary to 'look to the law teachers', not to codify the traditional principles, as Professor Laskin suggested twenty years ago, but rather to construct Blackacre's new horizons for the twenty-first century.

90 See O.W. Holmes: "The life of the law has not been logic: it has been experience" in *The Common Law* (1881). Feminist legal theorists agree that experience and not just logic should inform the law, but assert that women's experience should also be central to legal interpretation and decision making. Other writers deny the importance of experience; see for example, Sir Edward Coke: "Reason is the life of the law; nay, the common law itself is nothing else but reason. . . . The law, which is perfection of reason", in *First Institute* (16th century).