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Rod Northey*

Conflicting Principles of Canadian
Environmental Reform: Trubeck
and Habermas v. Law
and Economics and the
Law Reform Commission

I. *Introduction*

Early in the 1970s, the American legal scholar, David Trubeck, made a far-reaching observation:

Law is a practical science. It does not ordinarily dwell on fundamental questions about the social, political and economic functions of the legal order. Satisfied with implicit working assumptions about these matters, legal thought moves rapidly to more tractable questions. But when law's solutions to social problems fail to satisfy, it becomes necessary to examine the basic theory from which they derive¹.

Trubeck expounded this thesis in connection with legal developments in the Third World. Using an idea he termed the "core conception" of law, Trubeck argued that "this conception has misdirected the study of law and development by asserting that one type of law — that found in the West — is essential for economic, political, and social development in the Third World."²

This paper applies Trubeck's observation to Canadian environmental law reform. It emphasizes two points. First, environmental law is not centered in the environment or in the law; it is centered in a particular society's social, political and economic outlook. Trubeck suggests that law is best considered as only an effect of progressive society, not a cause. As such, law is confined to an instrumental status³: it is the means of reform, but not itself the impetus. For this reason, legal reform is not simply a matter of looking elsewhere for interesting approaches and then legislating them into a particular society. Instead, law reform is dependent on appreciating a society's particular composition.

Second, the paper emphasizes that Canadian society has a distinct social, political and economic perspective, demanding distinct environmental reforms. It suggests that Canadian institutional theory

* LL.B. Dalhousie, 1987. The author wishes to thank Professors Stephen Mills and David Fraser, of the Dalhousie Law School (1985-86) for their help in preparing this paper.

1. "Toward a Social Theory of Law: An Essay on the Study of Law and Development" (1982), 82 Yale L.J. 1.

2. *Id.*, at 2.

3. *Id.*, at 5.

contains a peculiar dichotomy. On the one hand, Canadian legal theorists assume a progressive society, one amenable to American reforms. Our British tradition is deprecated as colonial, the American tradition is exalted as independent and dynamic. Our *Charter of Rights and Freedoms* is the most significant of such reforms.

On the other hand, Canadian economic and political theorists recognize clear differences between Canadian and American positions. Economic theory takes account of our small population, our regional differences, and our decentered markets. Economically, we have not displayed the capacity to move as dynamically as American society. In turn, political theory recognizes that the Canadian tradition is unlike the strongly adversarial balance of powers of the American tradition, without being strongly hierarchical like the British political tradition. Canadian democracy tows a middle line. Legal reform must reconcile this divergence between legal theory and economic or political theory.

From this position, two current legal perspectives on environmental reform are problematic. First, there is the perspective provided by the Law Reform Commission of Canada's current project, the Protection of Life series. This paper compares the project's three initial reports: *Crimes Against the Environment*⁴, *Sentencing in Environmental Law*⁵, and *Political Economy of Environmental Hazard*⁶.

The reports are problematic for two reasons. As part of general environmental reform, none provide reform that takes specific account of the Canadian context. *Crimes* discusses environmental law from a larger philosophical perspective, but only provides the limited reform of a new *Criminal Code* offence. It fails to surmount the limitations that inhibit the use of present *Code* offences against the environment. *Sentencing* explores the many sentencing options available to reformers, but the most pressing problems — corporate liability, for example — and the most promising solutions — compensation, for example — are given only cursory discussion. Finally, *Political Economy* deals with the problems arising from governmental action with respect to the environment, but it fails to propose any solutions.

As part of specific legal reform, the reports are inconsistent. *Crimes* and *Sentencing* focus on enforcement issues. *Crimes* deals with an aspect of environmental liability while *Sentencing* examines environmental remedies. Both recommend further means for government to crack down on industry. *Political Economy*, on the other hand, addresses both the

4. Keyserlink, E.W., Law Reform Commission of Canada, 1985.

5. Swaigen, J., Bunt, G., Law Reform Commission of Canada, 1985.

6. Schrecker, T.F., Law Reform Commission of Canada, 1984.

enforcement and the establishment of government standards; it argues that the present regulatory approach involves the close cooperation of industry and government, but the exclusion of public interests. The three reports are thus ill-fitting pieces in the environmental jig-saw: the specific reports propound government's role as enforcer; the general report criticizes government's role as regulator. How can government provide effective enforcement where it is an ineffective regulator?

The second problematic perspective on environmental law is that of legal instrumentalism. Instrumentalism misjudges the nature of human interaction. Instrumental interests contrast with communicative interests. The work of the German theorist, Jurgen Habermas, limits instrumental interests to our relation to nature, where we pursue an ethic of control^{6a}. He argues that social relations demand higher, communicative values, values that follow the egalitarian ethic of recognition⁷. This conclusion undermines recent work of Law and Economics theorists. In particular, Habermas' perspective highlights the conflict economic efficiency has with democracy. Efficiency demands large-scale operations; democracy demands individual representation. Clearly, efficiency criteria settle disputes differently than do democratic criteria.

From these criticisms of contemporary trends in environmental reform, the paper concludes with an examination of a Canadian environmental reform that follows Trubeck's extra-legal considerations and Habermas' communicative concerns. These different recommendations are put to practical use in the example of the "Manitoba experiment"⁸. The Manitoba experiment provides an example of government working cooperatively, both internally within its bureaucracy and externally toward the general public. Such cooperation involved gathering information and constructing a comprehensive land use development strategy, involving economic, social, and environmental values. The experiment was thus an effective demonstration of government tying together instrumental interests with citizenship values.

This discussion of Canadian environmental reform has three parts:

- (1) The Law Reform Commission Reports on environmental reform;
- (2) Habermas and the critique of instrumentalism;
- (3) The Manitoba experiment.

6a. Habermas, J. "A Reply to My Critics", from Thompson, J.B., Held, D., *Habermas: Critical Debates* (M.I.T. Press: Cambridge, 1982) at 243-4.

7. *Id.*, at 248.

8. Page, J.E., Carvalho, M.E., "Southern Manitoba: An Experiment in Regional Action", from Leiss, W., *Ecology Versus Politics in Canada* (University of Toronto Press, 1979) at 202-32.

The first part begins with an examination of *Crimes Against the Environment* and *Sentencing in Environmental Law*. It argues that a similar criticism applies to both reports. This criticism is developed through an examination of *The Political Economy of Environmental Hazards*. The second part begins with Habermas' critique of instrumentalism, and then uses this critique against Law and Economics theory. The third part provides an example of Canadian reform that overcomes these criticisms. It presents the Manitoba experiment as a model process of environmental reform.

II. *The Law Reform Commission of Canada and Environmental Reform*

The two Law Reform Commission reports involving environmental enforcement can be neatly divided: *Crimes Against the Environment* examines liability in environmental law, dealing specifically with criminal liability for environmental injury; *Sentencing in Environmental Law*, on the other hand, examines legal remedies, dealing specifically with their application to environmental harm.

Crimes has a specific agenda: the creation of a new *Criminal Code* offence. Its creation is symbolic as much as substantive⁹; environmental harm is given a recognition equal to that given traditional harms to the body or property¹⁰. Protection of the environment is deemed a basic right, not merely a public convenience¹¹.

Placing this offence in the *Code* is valuable symbolically since it gives a new legitimacy to environmental harm. The report argues that environmental harm is suitable for inclusion in the *Criminal Code* for three reasons: (1) environmental harm can be seriously harmful or endangering to society¹²; (2) it is harm that may be effectively deterred by criminal prosecution, sentencing, and enforcement¹³; (3) it is harm that meets the *Criminal Code's mens rea* requirements for criminal negligence¹⁴.

Though this proposed reform has many strengths, these strengths are outweighed by its shortcomings. The most immediate problem is that it is not that different from offences that already exist in the *Criminal Code*. While there are many places where the report discusses alternatives, in its final product it has stuck close to traditional ground. To give two

9. Keyserlink, E.W. Lecture at Dalhousie Law School, Spring term, 1986.

10. *Supra*, note 4, at 8, 65.

11. *Id.*, at 8.

12. *Id.*, at 16-29.

13. *Id.*, at 2 for the test of criminal liability; at 46 for the conclusion.

14. *Id.*, at 33. The report calls for prosecution of gross negligence only.

examples, the report suggests that the new offence might adopt an ethic valuing nature in itself, yet it is satisfied in the end to restrict itself to the present ethic of strictly human interests¹⁵. Secondly, while the report discusses the many reasons for changing the onus for environmental crimes, it returns to the traditional stance of full onus on the prosecution¹⁶. Both resolutions leave the proposal similar to the present *Criminal Code* offence of common nuisance¹⁷.

Nuisance's concern with both health and aesthetic issues gives it many obvious virtues when dealing with environmental harm. Case reports reveal, however, that it has not received much attention. The precise reasons for this inattention would seem relevant to the *Crimes* report but they are not addressed. Moreover, when one compares this "new crime" with the existing nuisance provisions, one finds little substantive¹⁸ difference¹⁹.

Like the report *Crimes Against the Environment, Sentencing in Environmental Law* is focussed on criminal law²⁰, specifically the present statutory remedies within federal and provincial environmental laws.

15. *Id.*, at 67

16. *Id.*, at 40.

17. *Criminal Code*, R.S.C. 1970, c.C-34, s.176:

Certainly a first restriction on nuisance is that the offence is for public, not private nuisance; the harm must affect the general public not one or two individuals. Moreover, its inclusion in the *Criminal Code* has meant that the prosecution is brought not by a member of the public but through the authority of the Attorney-General of the federal or provincial governments (*Criminal Code*, s. 2). There is, however, some reason to doubt this conclusion. The article, "Private Prosecutions in Canada" (from Mills, Stephen *Supplement to Environmental Law*, (in-house casebook), Dalhousie University, Spring term, 1986) suggests that there are no statutory restrictions on the general common law privilege to lay information, and it is up to judicial discretion whether a summons will be issued. This privilege applies to both summary conviction and indictable offences. The problem with this procedure is that appeals lie only as of statutory right; one can bring the action, but not an appeal.

A second limitation on nuisance is the *mens rea* requirement. Nuisance may require the full standard of intentional harm, not the lesser negligence standard. While there are no Canadian cases deciding this point, some early English cases in public nuisance come down on both sides. (*R. v. Medley* (1834), 172 E.R.1246; *R. v. Stephens* (1866) L.R. 1 Q.B.702).

The third and more serious limitation on nuisance is its standard of proof — beyond a reasonable doubt. This standard particularly cripples prosecutorial success on causation questions, where plaintiffs have struggled to prove definite harm even on the lesser standard of the balance of probabilities. *Crimes* addresses this point by arguing that it will be employed only where the danger is clear (p. 46). All that is clear using this policy is that the offence will not be used frequently. See also: Jeffrey, M.C. "R. v. Sault Ste Marie Revisited" (1984), 10 Queen's L.J. 41 at 52-3.

18. Although the report adds little substantively to the nuisance provision already in the *Criminal Code*, the new crime does serve a symbolic purpose of suggesting that harm to the environment is a serious public matter.

19. The report fails to deal with causation issues. It fails to overcome the mental element problems associated with nuisance in preferring full *mens rea* or gross negligence, not a lesser standard (at 33).

20. Both reports' point of departure is criminal law since that is what the Protection of Life

Sentencing addresses two points: the kinds of remedies available to a court and the factors that “trigger” the various remedies. The report takes issue with the common perception that statutory fines need to be amended to increase their upper limits²¹; it argues that effective deterrence depends more on the application of measures beyond fines.

The report considers measures such as fines, imprisonment, forfeiture of property and licence suspension. It concludes by recommending greater attention be focussed on restitution and compensation²².

Unfortunately, while the report has extensive coverage of the remedies field, it may be criticized for its emphasis. It is not clear, for example, why remedies in environmental law should be guided by the objectives of criminal law. While the report spends a great deal of time presenting these aims and their relation to various remedies, it would seem more in line with environmental harm to restrict discussion to the following three objectives: restoration of the environment, compensation for environmental harm, and deterrence of future environmental damage²³.

Moreover, in spite of the report’s support for restitution and compensation, it spends little time discussing either²⁴. Though the question of attaching civil remedies to federal criminal offences does not have clear constitutional support²⁵, *Sentencing* never states that this is the reason for its restricted discussion. Similarly, the report recognizes the problems corporate liability and “white collar” crime pose to fair sentencing practices; yet, again, it does not provide more than a summary of the problem²⁶. A discussion restricted to any of these topics would have been of considerably greater use to reformers.

Finally, *Sentencing* can be criticized for raising, but not adequately addressing, the problem of government’s role in sentencing. This involves two issues, unreasonable standards and government enforcement²⁷. Concerning unreasonable standards, for example, the federal *Fisheries Act*^{27a} deems pollution to be any emission of toxic substances into water “frequented” by fish. The impossibility of holding industry to such

series was funded to explore. Here, criminal law is meant in its non-technical sense. The present *Constitution Act*, s. 91 gives jurisdiction to create criminal law exclusively to the federal government. Criminal law in its non-technical sense encompasses both federal and provincial statutes that create offences enforced by fine or imprisonment.

21. *Supra*, note 5 at 45.

22. *Id.*, at 69.

23. Instead of these aims, the report discussed protection of the public, retribution, rehabilitation and reform, and deterrence.

24. *Supra*, note 5 at 68-9.

25. *Id.*, at 68.

26. *Id.*, at 38-40.

27. *Id.*, at 36.

27a. R.S.C. 1970, c.F-14, s.33(2).

standards leads government to loose enforcement. Indeed, government agencies are forced to waive the standard every time they come to agreement with any particular industry on licensing standards. In such circumstances, enforcement then involves one government body penalizing an industry for what another government body has sanctioned²⁸. *Sentencing* also acknowledges that even reasonable standards have not been properly enforced²⁹. Government seems to judge other interests more important than environmental enforcement.

The problems associated with government's different interests in the environment are addressed more thoroughly in the third Law Reform Commission report, Schrecker's *The Political Economy of Environmental Hazard*. Schrecker's report moves away from emphasis on enforcement and towards the establishment of government standards. The report raises the problem of bias. There is bias at two important levels: in knowledge and in politics.

In knowledge, there is bias with respect to uncertainty. One part of this bias lies in cost-benefit analysis, the other part in the distinction between false positives and false negatives.

The distinction between false positives and false negatives is a simple point with far-reaching consequences³⁰. The distinction is employed with respect to toxic substances, especially with regard to carcinogenicity (whether the substance is cancer causing). A false positive is a finding that a substance is toxic when it really isn't; conversely, a false negative is a finding that a substance isn't toxic when it really is. It is a question of broad policy which concept is preferred when determining the admissibility of new substances into the market for public use. Prudence suggests a more restrictive test standard so that false negatives occur more frequently than false positives, and public health wins out over quick economic gain. However, the general political-economic pursuit of growth has resulted in a Canadian regulatory system that favours risking more false negatives³¹.

28. Courts have been necessarily cautious in dealing with these situations. In *R. v. United Keno Hill Mines Ltd.* (1980), 10 C.E.L.R. 43 at 47, the court stated: "It is nevertheless relevant to consider corporate evidence of the excessive nature of environmental regulations. In the absence of evidence suggesting that reasonable environmental management is fostered by the imposed standards, some mitigation in sentencing is appropriate where the company is striving to meet the standards. In this case the evidence substantially favoured the corporation's view that the standards were excessive and not designed to serve any articulated environmental management scheme."

29. *Supra*, note 5 at 36.

30. *Supra*, note 6 at 26. Taken from Page, T., "A Generic View of Toxic Chemicals and Similar Risks" (1979), 7 *Ecology Law Quarterly* 207.

31. *Supra*, note 6 at 26.

The second aspect of environmental uncertainty concerns the use of cost-benefit analysis. Like the principle behind false negatives and false positives, the basic principle of cost-benefit analysis (CBA) is quite simple: in making decisions about environmental impact one should determine whether the total costs of a particular action outweigh the benefits³². CBA also has widespread usage in both industry and government³³. In the environmental field in particular, CBA is one aspect of the environmental impact assessments required by most governments in deciding upon the feasibility of public (and private) projects³⁴.

The principle of CBA would be practical were the world easily quantifiable, but thus far it hasn't been. The problem is often expressed as the "externalities" problem — the fact that the normal pricing mechanisms of the market do not apply to certain public goods. But the problem of pricing is more deep-seated than this. It is often forgotten how much government policy — expressed through vehicles like regulation — structures and affects market prices.

The fundamental problem is not the lack of markets, it is the lack of any consistent or rational valuation technique. This failing has two direct implications for cost-benefit tallies; first, they are at best confined to the current day's concerns, and second, they are biased in favour of private interests.

Both of these implications prejudice environmental concerns. The cost side of CBA will be calculable since controls usually have a direct short-term effect on particular private industries, and profit concerns give them an obvious reason to calculate these effects. However, the benefits accruing from pollution controls will usually be both long-term and public, and thus extremely difficult to calculate. (For example, what is the tally of Canadian public welfare from the reduction of water pollution?)³⁵

These arguments make it clear that in two major issues involving government regulation of uncertainty, industry is favoured. Both issues undermine the idea that environmental reform depends simply on tougher enforcement.

Political Economy has a second part to its story, however. The problem of knowledge may be placed within a larger problem: politics. Concepts

32. *Id.*, at 46.

33. Schrecker mentions its application to personal injury cases. Generally, a notorious example of its use was the Ford Motor Company's CBA for the Pinto and its exploding gas tank.

34. See Emond, P., Cotton, R. "Environmental Impact Assessment" in Swaigen J. (ed.) *Environmental Rights in Canada* (Butterworths: Toronto, 1981)

35. See Ackerman, B.A. *The Uncertain Search for Environmental Quality* (Free Press: New York, 1974) at 342. Interestingly, Ackerman considers this quantification process to have overestimated certain benefits.

and procedures may promote bias, but their bias is only important when individuals make the decision to use them.

The real issue of *Political Economy* is the activity of government. It has not acted neutrally to balance public interests:

Existing statutes and distributions of political resources provide powerful advantages to one set of interested parties: the firms and industries which generate such hazards, rather than the individuals who are the recipients of them³⁶.

This bias has been particularly evident in the Canadian regulatory and licensing processes. Both federally and provincially³⁷, government makes regulations and grants licenses on the basis of consultations with business only. Business is judged the only major interest. Not simply is the public not given information regarding such negotiations, government does its best to keep the public out: the negotiations are usually conducted in secret³⁸.

Such bias has extended as far as the legislative process. For example, the pre-legislative process of the federal government's *Environmental Contaminants Act*³⁹ involved the public only after industry negotiations produced two drafts of the law⁴⁰. While the final draft was acceptable to the chemical industry, it was, even at its proclamation, less restrictive than comparable U.S. legislation. Moreover, the Act's regulatory contribution has been minimal, listing only a half dozen substances as toxic while the United States' list involves almost two hundred substances. This fact still stands⁴¹. Clearly, the Canadian approach of excluding the public leaves the public poorly represented.

Moreover, the negotiation model of regulation-making is problematic for another reason: it allows delay. Objectives on pollution levels may be agreed upon, but they are frequently subject to timetables for compliance. Such timetables are "characterized by slippage as industry compliance is repeatedly delayed and deadlines repeatedly extended."⁴²

Even where negotiation results in substantial agreement, government has enforced its position selectively. Schrecker cites some surprising statistics: (1) between 1970 and 1977, 12 federal prosecutions of pulp and paper companies resulted in only \$18,500 in fines; (2) between 1968

36. *Supra*, note 6 at 4.

37. *Id.*, at 8.

38. *Id.*, at 7.

39. S.C. 1974-75-76, c. 72.

40. *Supra*, note 6 at 7.

41. Revisions to the Act have been proposed under Part II of Bill C-74, "The Canadian Environmental Protection Act". But these revisions have only received First Reading.

42. *Supra*, note 6 at 9

and 1976, 17 Ontario prosecutions resulted in only \$18,600 in fines⁴³. Given such meagre penalties for pollution violations, it is not surprising that Schrecker finds a "persistent and nationwide noncompliance with the relevant government objectives."⁴⁴

Against any suspicion that this is not a fair report, merely some ungrounded polemic, one should note the views expressed by the noted environmental lawyer, David Estrin, in 1975:

The procedures for approval of new pollution sources . . . are also the subject of criticisms. Again the general rule is that such applications are handled in a secret process between the applicant and the agency. No notice of the application is given to other industries or residents in the area, nor are they given, even if they are aware of it, any legal right to meaningfully make their views known⁴⁵:

To conclude this part, the analysis of the two Law Reform Commission reports dealing with enforcement measures imply a certain view of government. Within the big picture, both reports advocate stronger enforcement measures. Both imply that government's present approach falls short because the government lacks sufficient measures to properly enforce environmental harm. This applies just as clearly to the federal government as it does to the ten provincial governments. Both the new crime and new sentencing policy are therefore meant to aid government in a serious crackdown on industry.

When one places these perceptions of government's role in enforcement within Schrecker's perspective, a clear problem arises. If government has not been tough in creating its initial legislation, if it has not been tough in drawing up regulation standards, if it has not been tough in negotiating particular agreements, why is it to be expected that tough penal measures are a suitable response? If government hasn't towed a tough line all along, why are tough options at the level of enforcement likely to be used? Surely the only use of such reforms would be within a context where strict enforcement of present provisions was proving inadequate to cope with violations. According to Schrecker, nothing could be further from the truth.

Schrecker's position reveals government's commitment outside the litigation sphere. When one acknowledges the disproportionality between actions involving litigation and day-to-day governmental actions, one realizes that Schrecker has raised the real problem. In its day-to-day operations, government has committed itself to industry, not the

43. *Id.*

44. *Id.*

45. Estrin, D. "Annual Survey of Canadian Law Part 2: Environmental Law" (1975), 7 Ottawa Law Journal 385 at 408.

environment. Within such a picture, enforcement reforms are only a pittance. Environmentalists need reforms that overcome government's present bias towards business interests.

III. *Habermas and the Critique of Instrumentalism*

Schrecker suggests that government bias is not so much an environmental issue as a political issue, beginning his report with Schattschneider's comment that:

All forms of political organization have a bias in favour of the exploitation of certain kinds of conflict and the suppression of others because organization is the mobilization of bias. Some issues are organized into politics while others are organized out⁴⁶.

The German theorist, Jurgen Habermas, provides a sophisticated analysis of this politicization. He concentrates on the distinction between public and private interests, arguing that government has reduced the public sphere to private interests. Habermas grounds this criticism historically in the origin of modernity. Modernity's origin is the 18th century alliance between capitalism and democracy⁴⁷.

Capitalism was essentially private. It demanded self-interest in the individual and encouraged such self-interest in the goal of efficient production. Efficient production was expected to come from the increasing perfection of humanity's domination of nature. As our control improved, so would efficiency.

Democracy, on the other hand, was essentially public. Here, the individual was encouraged to be a citizen. Citizenship was modelled on the ancient Athenian model of public discussion⁴⁸. Each citizen had an equal say in public decision-making. The democratic ideal involved every citizen of the modern state having one vote so that public discussion tended towards accommodation and recognition. Every person was important.

The success of each sphere depended on the success of the other. Capitalist interests would succeed in controlling nature efficiently only by democratically promoting both an equal access to markets and the free flow of information. Democratic interests would succeed in instilling citizenship when they encouraged capitalist interests to increase the available supply of basic material needs.

46. Schrecker, *supra*, note 6 at 1.

47. Habermas, J. "The Public Sphere: An Encyclopedia Article" (1974), *New German Critique* at 52-3.

48. Habermas, J. *Theory and Practice* (Beacon Press: Boston, 1974) at 48: "The order of the polis was actualized in the participation of the citizens in administration, legislation, justice and consultation."

At first glance, this understanding seems anything but environmentalist. Indeed, Habermas' perspective on modernity's origin seems anti-environmentalist for its support of human domination of nature. The appreciation of this perspective's relevance for environmental reform depends on two steps.

The first step is the acknowledgement that any concern expressed about nature is a human concern, not a concern for nature itself. This acknowledgement in no way reduces the number of perspectives that may be held with respect to nature. It merely reminds us of their human origin. The claim that nature has rights — for example, Stone's question, "Should trees have standing?"⁴⁹ — itself depends on human appreciation of natural values. Such values hardly seem intuitive. The Banff-Jasper national parks region, for example, has regulated its forests to such an extent that the ecosystem is imbalanced: there has been insufficient natural regeneration. Our lack of perfect information⁵⁰ about the environment means that "environmental values" are only human hypotheses on such values.

The second step is the acknowledgement that the concern to protect the environment is reducible to the concern to give interested parties a chance to control their environment. The Banff-Jasper example shows that protection *per se* is not necessarily good for the environment. Movements like the conservation movement are therefore not valuable for what they claim about nature — conservation does not have universal validity — they are valuable for what they claim about ourselves.

Once these moves are appreciated, environmental concerns show themselves to be directly and inextricably tied to political concerns.

In historical terms, environmental concerns may be expressed as valuing public over private interests and democratic over capitalist interests. Today, however, it is difficult to rely on these distinctions. Democratic values have been overshadowed: the government is now in the marketplace, not just regulating it.

Using familiar legal terms, Habermas emphasizes that the modern political system has moved government into the private sphere and brought capitalism into the public sphere. Yet this "New Deal" economic involvement in the economy has not resulted in democracy controlling

49. (1972), 45 S. Cal. L.R. 450. There is thus considerable irony in environmental law's relation to other law. Most law is centered in the human realm, but is instrumental. Environmental law reaches out into nature and thus involves instrumental interests, yet argues against instrumentalism.

50. This shortcoming is not to suggest that information is irrelevant to environmental disputes — facts do decide the reasonableness of values. See Lemons, J. "Atmospheric Carbon Dioxide: Environmental Ethics and Environmental Facts" (1983), 5 *Environmental Ethics* at 21.

capitalism; rather, government involvement has only extended capitalism. The capitalist criteria for efficiency in the technological control of nature have become government criteria in the technological control of society. Today, efficiency is entrenched in both our relation to nature and our relation to each other.

This perception of contemporary society may be supported by current interest in Law and Economics theory. Law and Economics has received increased political force in the last 20 years. It is primarily an American movement, but it has spilled over into the Canadian legal scene⁵¹.

For two reasons, Law and Economics might appear compatible with Habermas' perspective. First, Law and Economics clearly distinguishes between private and public law. This appears to accord with Habermas' distinction between public and private realms. Second, Law and Economics may remind us of capitalism's traditional relationship to democracy: it was bourgeois interests that grounded the public sphere in the first place, even on Habermas' account.

Economists can argue that while their goal is efficiency, they assume democracy. They may say that economic efficiency depends on both unrestricted access to a market and inability of particular firms to alter the efficient outcome⁵². Both of these assumptions apply democratic criteria to the market model.

Those concerned with Law and Economics may make a similar claim in favour of democracy. This claim may be made even though the Law and Economics perspective moves from strict market concerns to focus on efficient dispute resolution.

The shift involves some intricate footwork. While economics talks about equal status between members of a market in its generation of efficiency, Law and Economics ignores status in dispute resolution. This alteration of a traditional assumption of microeconomic theory is given a just defence by Law and Economics theorists. They point out that for them to posit equality, they would have to ignore the inequality involved in various legal disputes.

Unfortunately, this response only provides a partial answer to the problem facing Law and Economics theory. If legal disputes necessarily involve unequal parties, how does a democratic outcome arise out of efficient law-making? For its answer, Law and Economics goes back to the foundation of the democratic-capitalist alliance: the exchange of information. Parties need not have equal power for disputes to be

51. Trebilcock, M.J., "The Prospects of 'Law and Economics': A Canadian Perspective", (1983), *Journal of Legal Education* at 288.

52. These are axioms of general microeconomic theory.

resolved democratically; instead, they need perfect information⁵³. With perfect information, the judge is able to appreciate the full consequences of his decision on each party and is capable of providing a settlement, effectively balancing each interest.

But is this rationalization of law-making democratic? First, it makes democratic law-making one that preserves the inequality of parties, not law-making that reduces inequality. Second, it depends on perfect information. In environmental disputes, perfect information simply doesn't exist.

Law and Economics does not ever come to grips with the first problem. But their energies have been devoted to the second problem. They frequently use environmental disputes, such as common law nuisance, as a model application of their analysis. Different remedies are proposed for a nuisance dispute depending on the status of the available information. Thus, the problem of information is overcome by making information itself subject to efficiency rules: information has its price. People will pay for what they need as information, and only what they need⁵⁴.

This answer completes a most unsatisfactory circle. Perfect information was supposed to be an assumption of the market in arriving at efficiency, not subject to it. While the former point of view may be consistent with Habermas' perspective, since it gives priority to democratic interests in demanding perfect information as a requirement of instrumental efficiency, the latter is precisely the perspective that Habermas opposes. Efficiency should not determine democratic interests; instrumentalism applies to nature, not society.

The American legal scholar, Horwitz, questioned whether Law and Economics was science or ideology. It would now be clear why he answered that it was ideology⁵⁵.

In contrast to Law and Economics' weak view of social values, Habermas' proposals emphasize them. The earlier discussion of the efficiency orientation of government may now be developed. Government in the economy signals the confusion of public and private spheres and the suppression of democratic values by capitalist values. Everything is geared towards results, with short-term results taking priority over long-term goals.

53. Coase's theorem states: "In a competitive economy with zero transaction costs and perfect information, the allocation of resources will be efficient however the law distributes initial entitlements." From Kupersburg, Mark; Beitz, C. (ed.) *Law, Economics, and Philosophy: A Critical Introduction to the Law of Torts* (Rowman and Allanheld: New Jersey, 1983) at 5.

54. Rhoads, S.C., *The Economist's View of the World* (Cambridge: New York, 1985) at 143.

55. Horwitz, M. "Law and Economics: Science or Politics?" (1981), 8 Hofstra Law Review 905 at 912.

The result of efficiency applied to political control is the destruction of meaningful communication. Both government and industry may be criticized as instrumentalist. Both promote a view that people are better ordered than heard: individuals may be fully satisfied by material gain; society may be fully realized by efficient structuring. There is little need for real participation.

Habermas hopes to show a way beyond this ever-tightening circle by re-emphasizing the role of communication in modernity's origin. Communication has a clear relation to both public interests and democratic interests: language is both public and democratic. It is public because it exists apart from any particular individual's interests; it is democratic because its development is a product of all of society's interests. A flourishing language demands a flourishing, public democracy.

Instrumentalism does have its place for Habermas. But it is a restricted instrumentalism. Habermas resolves the current conflict between communicative and instrumental values by giving each value a distinct application: instrumentalism guides technological efficiency; communication guides social democracy.

Environmental reform therefore depends on communicative interests effectively balancing instrumentalist interests.

Clearly such a policy of reform has widespread application in Canadian environmental law. One application is the reform of the law's present bias with respect to collective interests. Both interest groups and corporations may involve large numbers of individuals. Yet the law has favoured corporate groups over general interest groups. It has favoured private instrumentalism over public discussion and citizenship. The fact that corporations represent the interests of particular citizens or groups of citizens is hidden behind the corporate veil⁵⁶.

There are three specific examples of this favouritism towards corporations: standing, unity of interest, and tax deduction of fees.

The privilege accorded corporations with respect to standing derives from their status as legal individuals⁵⁷. From this status, the pursuit of

56. Andrew Fraser provides a useful exposition of this transition within American society (Fraser, A. "The Corporation as a Body Politic" (1983), 57 *Telos* 5). Fraser traces the evolution of the corporation in American society from an origin requiring service of the public good, to one assuming private economic purpose has an implicit public good. Fraser argues that the movement of corporations away from public service status was not, however, anti-democratic. The liberalization went hand-in-hand with democracy. In Fraser's reasoning, the corporation as a public institution depended on an aristocratic vision of American society. Restrictions on corporate charters served to protect those who had status. Corporate democracy required an opening up of legislative practice.

57. *Eg.*, Companies Act, R.S.N.S. 1967, c. 42, s. 24(5)(c) as am. by S.N.S. 1982, c.17, s.7.

profit then allows corporations to distinguish their interest from that of the general public. Lost profit is always a legitimate interest in a dispute.

These two privileges become a real issue when corporations are involved in environmental disputes. While corporations have such privileges, public interest groups do not. Such groups bear the onus of establishing their legitimacy. Traditionally, private property interests have received standing, but clear public interests have not received the same sympathy. Even with the recent trend towards liberalizing standing rules⁵⁸, public interests still have restricted access to the courts. The common law offence of nuisance, for example, has traditionally restricted public interests from raising a dispute in court without the consent of the Attorney-General. Individuals and groups have also been caught where the defendant is government. Canadian courts have used their discretion on standing to disallow actions demanding government enforcement of its regulations as well as actions demanding government to act *intra vires*⁵⁹.

Corporations are also privileged over public interest groups because of their unity of interest. This unity of interest has two aspects. First, no matter how big the corporation, it is taken for granted that it represents one unified interest. The court will not inquire behind its corporate veil. A policy may have been hotly debated. It may be opposed by shareholders or unions within the corporation. Nevertheless, these differences will not appear before courts of law. The hidden assumption is that profit motivates all groups so that they form one interest. Courts don't examine whether the corporation has pursued different strategies — i.e. growth versus profit — benefitting some of its members but not others⁶⁰. Second, once corporations are before the courts as one interest, the courts have accorded corporations special status: Xerox corporation does not count merely as one individual when the court considers remedies like injunctions. In *Boomer v. Atlantic Cement*⁶¹, for example, the court looked behind the parties to judge that many persons not before the court would be negatively affected by an injunction — parties like unions, *etc.* The court failed to consider, however, the parties not before the court that would *benefit* from the injunction.

58. See the public interest cases decided by the Supreme Court of Canada: *Thorson v. A.G. Can.* (1974), 43 D.L.R.(3d) 1; *McNeil v. N.S. Board of Censors* (1975), 55 D.L.R.(3d) 632; *Borowski v. A.G. Can. and Minister of Finance, Can.* (1981), 130 D.L.R.(3d) 538.

59. See: *Pim v. Ministry of Environment* (1978), 23 O.R.(2d)45; *Rosenberg v. Grand River Conservation Authority* (1976), 96 D.L.R.(3d) 384 (Ont. C.A.).

60. Gower, L.C.B. *Gower's Principles of Modern Company Law*, 4th ed. (Stevens and Sons: London, 1979)

61. (1970) 26 N.Y. 2d 219; cited from Stewart, K.B., Krier, J.E. *Environmental Law and Policy* (Bobbs-Merrill: New York, 1978) at 238.

By contrast, public interest groups must prove unity of interest. This unity is established under class action rules. These rules require groups to satisfy a number of tests⁶². Apart from these tests, class actions still face a number of category problems. They cannot involve contract disputes⁶³, and they cannot seek anything except group damages⁶⁴. Moreover, once such unity is established, special rules on costs through class actions restrict the likelihood of bringing such actions. The liability rules for costs make it necessary to make one party the representative party and to tag that one party with the brunt of the costs should the action fail⁶⁵. Who is tagged with costs when corporations go bankrupt?

The net effect of these restrictions is that it is hard for environmental interests to get before the court in large numbers. This has two effects: it makes it difficult for such interests to satisfy the courts that their interests are equal to that of corporations on a balance of convenience, and it means that the costs of lawsuits are borne by fewer parties.

A final bias accorded corporations in their ability to deduct their litigation cost from their taxes since they are spent in pursuit of profit. Public interest groups may not do this⁶⁶. Nor is there any strong trend towards contingency fees that might allow this tax difference to be of reduced effect⁶⁷.

This favouritism transcends the public-private distinction. Corporations are created by statute and yet count as private interests, while interest groups without any statutory recognition are required to meet the standard of representing a public interest.

Three reforms would remedy a large part of the differences existing between corporations and interest groups. First, the courts could further reduce standing requirements; second, the courts could presume unity of interest for interest groups, requiring the defendant to disprove unity⁶⁸; third, government could level tax breaks consistently by either subsidizing both sides or by eliminating the deduction from the corporate side.

Yet these reforms are only a one-sided response to the bias against communicative interests currently exhibited by Canadian legal

62. See: Chester, S. "Class Actions to Protect the Environment: A Real Weapon or Just Another Lawyer's Word Game?" from Swaigen, J., *Environmental Rights in Canada* (Butterworths: Toronto, 1981).

63. *Id.*, at 93.

64. *Id.*, at 71 citing *Shaw v. Real Estate Bd. of Greater Vancouver* (1972), 29 D.L.R. (3d) 774 (B.C.S.C.)

65. *Id.*, at 72.

66. See: *Income Tax Act*, ss. 9, 18(1)(a).

67. While Nova Scotia Civil Procedure Rules permit contingency fees, other Canadian jurisdictions like Ontario do not.

68. See: Chester, *supra*, note 61.

institutions. Certainly, the advantage of organizing collective interests is that such interests may create a voice that compares with industry's voice, a voice that government may hear. Such reform fails to recognize, however, that the type of interest is not the only problem plaguing environmental concerns. The suggestion that law reform is aided by increasing the numbers of collective interests going before the courts ignores the threat that size itself poses.

Mark Sagoff provides an effective criticism of such reform in arguing that corporations are "ugly because they are anti-democratic"⁶⁹. Competition is not in itself anti-democratic; indeed competition ideally fosters democracy since there are no entrenched positions. However, the corporate model of competition skews this basic model by entrenching performance through corporate status. The corporate model is not like the Indian chief growing older and needing a successor, a model where life is the factor restricting entrenchment. It is a model where there is no re-commencement: Xerox does not go back to nothing after its executive officer steps down. Corporate status has no natural finitude. Corporate size may grow infinitely.

The prejudice of size to democratic interests is not simply a corporate feature: it is also a part of government bureaucracies. Big government is just as anti-democratic as big business. It is anti-democratic at two levels. At a first level, it is anti-democratic because elected officials may no longer fully monitor the behaviour of public officials. The last 20 years have seen criticism upon criticism of the failure of responsible government. Government anti-democratic behaviour at a second level is demonstrated in a recent *Globe and Mail* article,⁷⁰ which describes efforts by the federal environment minister to control public discussion generated by members of his department. Present policy now allows only a few specified individuals to speak directly to the media. Thus, not only is government not responsible to Parliament, it is not accessible to public media.

Such extensive information control contrasts sharply with an essential part of the democratic-capitalist alliance. The public sphere is specifically centered on the free flow of information.

Habermas' communicative reforms demand not only public discussion, but public information. While the present day considers information presumptively instrumentalist, forgetting its public value in the midst of private competition, reform would recognize confidential

69. Sagoff, M. "Is Big Beautiful?" (1984), *Journal of Applied Philosophy*, no.2, October, 269 at 270.

70. *Globe and Mail*, Feb. 22, 1986, at A-4: "Freeze on information muzzles top environmental advocates".

information as a limiting case, not the general rule. Information would be presumptively public, not private. Since all that is legitimately valued in private information is lost profit, information control should not be a prior restraint. Lost profit is always calculable.

In the United States, major freedom of information reform has been attempted. What would succeed in Canada?

IV. *Canadian Environmental Reform and the Manitoba Experiment*

Sagoff again provides a useful starting point to discussion of Canadian efforts to open up the information needed in environmental reform. Sagoff focusses on the question of political legitimacy. Legitimacy is judged the crucial factor in appreciating a respective society's need for public information. Sagoff contrasts the American and British legal traditions⁷¹.

In Sagoff's analysis, British legitimacy arises from a constellation of interests that resemble those criticized by Schrecker. In Britain, the system works through the alliance of business and government⁷². Such an alliance is not regarded as illegitimate. Support for Sagoff's perspective comes from the tradition of parliamentary supremacy. Britain is a unitary state. It is hierarchically focussed. By contrast, the United States is neither unitary nor grounded in parliamentary supremacy. It is federalist and governed by a balance of powers among the executive, Congress and the Supreme Court.

Political decisions made in Britain, have received legitimacy from models of cost-benefit analysis⁷³. The attempt to be objective is deemed legitimate in Britain. By contrast, cost-benefit analysis has been discredited in the United States⁷⁴, where the institutional framework of balance of powers has affected the citizens' view of legitimacy. According to Sagoff, the tradition does not grant legitimacy on the basis of objectivity, it grants it on the basis of interest. Different issues involve different interest groups. Moreover, within the balance of powers structure, the courts are on equal footing with Congress. Both are equal grantors of legitimacy to particular interests. By contrast, British courts remain deferential to parliament. Their legal tradition has remained formal. Legitimacy is thus more broadly based in the United States.

Sagoff's analysis highlights the particular context within which Canada finds itself. Certainly, the United States exerts a wide influence, but our

71. *Supra*, note 67 at 277.

72. *Id.*

73. *Id.*

74. *Id.*, at 278.

legal tradition also has strong ties to Britain⁷⁵. We should not regard our difference from the U.S. as a sign of failure. Our traditions are different.

Such differences should suggest the need for different reforms. Yet Canadian reforms frequently fail to consider these differences. For example, Canadian reform creating environmental impact assessment failed to appreciate the role of government. When the U.S. government first legislated for environmental impact assessment, it was thought to be a progressive step, subjecting all large scale public projects to examination by government. Government was to play the role of enforcer or judge. But on the American adjudicative model, government is not simply an enforcer or judge, but serves three roles: it may judge and it may prosecute; equally importantly, however, government defends. The success of environmental impact assessment was ensured only because it was part of both a public willingness to sue the government when standards weren't adhered to, and a judicial willingness to support these enforcement proceedings⁷⁶.

Contrast this collusion with the Canadian scene in cases like *R. v. Stein*⁷⁷. In *Stein*, the plaintiff sought enforcement of a city by-law requiring an environmental impact assessment be taken before city spraying could begin. The court rejected her application even though it admitted the city's failure to observe the statute. The court found its way beyond this violation by conducting its own version of an environmental impact assessment and concluding that, on a balance of convenience, the city should not be held to the requirement.

Cases like *Stein* suggest that though the American approach should not be entirely dismissed, successful reform in the United States environmental law field may not result in successful reform here.

Trubeck reminds us that the differences are not simply legal. While *Stein* reminds us that our tradition lacks judicial activism, Trubeck forces reformers to consider economic, cultural and political factors. Such considerations could have influenced Quebec's reform of class actions, for example. One goal of this reform was the creation of a public fund to ease the financial burden on particular claimants. When this reform was considered, the Quebec Ministry of Justice extrapolated figures from California⁷⁸. An appreciation of Trubeck's picture would reveal that Quebec had extensive non-legal differences with California, differences

75. It is one shortcoming of this article that it does not explore the influence of the French Civil law tradition on environmental matters.

76. Sax, J.L. "Environmental Law — The U.S. Experience" from Morley, L., *Canada's Environment: The Law on Trial* (University of Manitoba, 1973) at 164.

77. (1974), 5 W.W.R. 484 (Man. C.A.)

78. See Chester, *supra*, note 61.

that would make it extremely unlikely for their figures to match on a person-by-person basis. Quebec has only recently conquered an extremely traditional hierarchical structure. By contrast, California has a tradition of progressive political movements to support progressive legal reforms.

Another application of Trubeck's model of legal thought may be found in Trebilcock's observation that Law and Economics is less likely to influence Canadian society than it has American society because major Canadian development involves closer ties to government than does corresponding American development⁷⁹. Collective intervention in the economy is more of a fact of life here.

On the one hand, we are not a unitary system, but one with checks and balances; on the other hand, we are not adjudicative, but compromising. The British nation state ideal is ineffective in dealing with a conflicting public interest, while the American adjudicative model is ineffective in dealing with a tradition of deference.

In contrast to the American position that political legitimacy comes from tension and resolution — a position that differentiates concerns to encourage conflict — the Manitoba experiment provided results using a cooperative strategy⁸⁰. Unlike the British tradition, the Manitoba results were not objective, nor even imposed. The experiment provides a model integration of citizen and government action.

To return to Habermas, the Manitoba experiment is an example of communicative interests structuring reform. The Manitoba experiment promoted public dialogue in two ways. First, it set a priority of contacting people to establish a community's interest; it did not make assumptions based on economic rationality. Second, it contacted individuals on the basis of residency in the area, not on the basis of commercial interests. People gave views as citizens, not as employers or employees.

An article by J.E. Page and M.E. Carvalho outlines the Manitoba process⁸¹. The first phase was governmental. A series of studies done in the 1960s provided a groundwork for the project done in the early 1970s⁸². The second part saw government test its participatory model of development strategy on a smaller scale.

79. Trebilcock, *supra*, note 50 at 289. Also, returning to Schrecker's emphasis on the Canadian regulatory process, it is worth emphasizing its contrast with the American practice. In the area of regulation, the consultations are beyond the hands of government and business interests. Through the innovation of "notice and comment" procedures, government bodies are legally required to give reasonable public notice of regulation hearing for all regulatory reform.

80. Page, J.E., Carvalho, M.E., "Southern Manitoba: An Experiment in Regional Action", from Leiss, W. *Ecology Versus Politics in Canada* (University of Toronto Press, 1979) at 209-32.

81. *Id.*, at 209.

82. *Id.*, at 220.

From these preliminary steps, the Manitoba government initiated a process that integrated 75,000 square miles of the province into one development strategy under the name of the regional access program⁸³. At the outset, government was concerned with more than economic factors: of equal value were environmental and social values.

The basic issue was the need to balance regional development rationally. Winnipeg was getting much larger; rural communities were getting smaller⁸⁴. The Manitoba government wanted to know which communities it should encourage to grow and which communities it should leave to die.

Social values were in issue because the government knew that community values would determine a particular community's future. Effective use of government resources depended on government appreciating the individuals forming such communities. Did they want to stay or did they prefer to go? What factors determined their decision?⁸⁵

Environmental values were in issue because certain communities were situated in more arable land than others. Government needed to know the particular constitution of each region's ecosystem and its potential for agricultural growth⁸⁶.

The project had several phases⁸⁷. It began with a questionnaire circulated to five per cent of the population. Phase two involved putting this information together without drawing conclusions. Phase three was the most important: it involved the exchange of information between the government and the particular communities. The government's premise was that community evaluations deserved as equal a weight as their own. The process of integration involved two caravans going out to the communities, sharing and gathering reactions to the database formed in phase two. It is worth noting that the government's particular concern lay in appreciating the attitude of the "under 30" crowd⁸⁸, since they would constitute the future of the communities. The fourth phase involved particular responses to the integration of community and government interests. This involved "clustering"⁸⁹ concerns and establishing lead agencies for the implementation of development strategies⁹⁰.

83. *Id.*, at 209, 210.

84. *Id.*, at 210, 223.

85. *Id.*, at 212.

86. *Id.*, at 215.

87. *Id.*, at 220-221.

88. *Id.*, at 222.

89. *Id.*, at 223.

90. *Id.*

Thus, the Manitoba experiment provides an example of large-scale, polycentric⁹¹ environmental reform. It may be favourably contrasted with the American attempt at governmental cooperation in the example of the Delaware River clean-up, for example⁹². The Manitoba example shows a provincial government providing an initial database and then going out to other levels of government, both federal⁹³ and local, to gather further information. Moreover, the Manitoba experiment departs from the technocratic model by not presuming a rational outcome, but rather going out and gathering its consensus.

By contrast, the American experience in the Delaware River clean-up began with a division of expertise along its familiar policy of balancing powers. Ackerman⁹⁴ shows the limitations of this approach. Certainly one of its drawbacks was its technocratic emphasis⁹⁵. The basis of the study was cost-benefit analysis, not citizen opinion. Ackerman reinforces the conclusions drawn above concerning the consequence of this approach within American decision-making. There was

a fundamental tension between the demands of sound technocratic decision-making and the nature of American federalism. The technocratic political decision, whatever its ultimate value, requires tight integration among fact-finders, analysts and politicians. In contrast, federalism is instinct with the demand that power be fractionalized among competing groups and levels of government, and the suspicion that a coherent, tightly organized governing structure will, by virtue of that fact, possess too much power and so act irresponsibly. Unfortunately, the federalist attempt to eliminate the possibility of the abuse of power can often make it impossible to use the power intelligently as well⁹⁶.

It is not suggested that what happened in Manitoba may happen everywhere; nor is it suggested that the balance of powers approach taken in the United States with respect to the clean-up of the Delaware Basin is always so ineffective. What is suggested is that the Manitoba example provides a definitive Canadian example of environmental reform, for it takes into account factors in our tradition that distinguish us from both the American and British legal traditions.

91. The term "polycentric" contrasts with the normal adjudicative structure. While adjudicative proceedings involve two conflicting interests settled by one intermediary, polycentric reform has many interests without defined opposition. The Manitoba experiment is polycentric since it gathered results from many groups, representing many interests.

92. See Ackerman, *supra*, note 35 at 189.

93. Federal government involvement came out at the level of organizing environmental data using the Federal Canada Land Inventory.

94. *Supra*, note 35.

95. *Id.*, at 73-8. See also at 28 for an example of the "technocratic numbers game" with respect to environmental harm.

96. *Id.*, at 189.

The Manitoba reform emphasis on community standards is not meant to restrict the involvement of the federal government in environmental reform. Community standards merely reflect the involvement of the public. A national community seems no less possible than a local community. Manitoba is distinct not for its local emphasis, but for its example of a government determined to involve the public.

The fact that such determination arose out of prior legislative failures is of little consequence. It is of consequence that government realized that reform is most effectively implemented when the public has had a say in establishing it.

V. *Conclusion*

This paper has examined environmental law in an uncharacteristic way. While most approaches involving the integration of law with other fields of interest or inquiry tend to assimilate such approaches into a legal framework⁹⁷, this paper began from the strictest legal framework and gradually worked outwards, away from law towards other reformist disciplines.

Throughout, the paper has relied on Trubeck's emphasis on the extra-legal influences on law. Schrecker's work questions the effectiveness of the law's adjudicative-enforcement picture by revealing structural problems in the very formulation of government standards. He moves law into policy science. Sagoff disengages legal thinking from merely institutional concerns to show the value of history and tradition in understanding present institutional biases. Habermas raises questions about the instrumentalist notion of law — particularly, the integration of law and economics — by revealing basic ethical values that precede instrumental concerns. Finally, Page and Carvallo have shown how even something as close to home in law as the notion of reform may nevertheless be wrenched from the grasp of lawyers. By placing reform in the hands of planners, the Manitoba experiment provided a comprehensive development strategy that matched its context as much as any reform could.

97. For example, in the early 70s, Sweden encouraged the formation of community discussion groups nation-wide to discuss the future of nuclear power in the country.