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Bora Laskin and the Legal Process School

Paul Horwitz
University of Alabama - School of Law, phorwitz@law.ua.edu

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> [T]o say that judges make law is not the end but only the beginning of sophistication.
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> —Paul A. Freund[1]

> Neutral principles are not necessarily conservative principles.
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> —Neil Duxbury[2]

I. INTRODUCTION

Over his five decades in the law—as a student at Osgoode Hall and Harvard Law School, as a teacher and labour arbitrator, and as a justice on the bench of the Ontario Court of Appeal and the Supreme Court of Canada—Bora Laskin left behind an extensive paper trail with which one may attempt to describe and evaluate his jurisprudential beliefs. In particular, since the bench demands judgment on particular facts and largely assumes the validity of precedential reasoning, the unfettered academic and extrajudicial writings left behind by Laskin allow for a clear examination of his legal philosophy.[3] Why then, with this wealth of material, does confusion yet remain about Laskin's place in legal thought?

Evaluations of Laskin's extrajudicial writing have placed him somewhere among the Legal Realist movement, a loosely based school of thought that

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* M.S. (Columbia), LL.B. (Toronto). Currently a student-at-law with Borden & Elliot, Toronto. This paper was prepared for the "Canadian Constitutional Tradition" course, taught by Prof. R.C.B. Risk at the University of Toronto Faculty of Law. I wish to thank Professor Risk for suggesting this line of inquiry. This paper received the Osgoode Society Legal History Book Prize, awarded by the Faculty of Law. I wish to thank the Osgoode Society for its generous support of scholarship in the field of legal history.

1 P.A. Freund, *On Understanding the Supreme Court* (Boston: Little, Brown, 1977) at 3.

2 N. Duxbury, "Faith in Reason: The Process Tradition in American Jurisprudence" (1993) 15 Cardozo L. Rev. 601 at 679.

3 For a list of Laskin s extrajudicial writings, see the bibliography compiled in S. Kelford, "The Writings of the Rt. Hon. Bora Laskin, O.C., P.C." (1984) 6 Supreme Court L. Rev. xliii.

developed in the first three decades of the twentieth century and that attacked the dominant "Classical" school of legal thought as "philosophically naive and politically pernicious."[4] Thus, Denise Reaume's examination of Laskin's legal thinking places him in league with "the school of sociological jurisprudence",[5] an early branch of the realist school. Similarly, W. Laird Hunter writes: "When Laskin's picture of the legal world is placed in the gallery of legal thinkers, a strong resemblance is found to the attributes of the American Realist movement."[6]

However, this categorization of Laskin's judicial philosophy has been recognized as demonstrably flawed. Thus, Brian Langille and David Beatty, while noting that Hunter's characterization is "not entirely inaccurate",[7] note a number of aspects of Laskin's legal thought—most prominently, a rejection of a pure preference-based understanding of judicial decision making and an abiding faith in the judge's ability to draw legitimate decisions from a well of community consensus—that "are in sharp contrast to many of those [ideas] underlying what is commonly understood to be the Realist School."[8] Reaume also notes that Laskin differed from the school of sociological jurisprudence to the extent of his concern with "the conflict between activism and deference."[9] In short, efforts to place Laskin squarely within the Legal Realist school consistently fall short of the mark.

In this essay I wish to propose a new categorization of Bora Laskin's legal philosophy as delineated in his extrajudicial writings—one that reflects his adoption of certain tenets of Legal Realism while providing a consistent explanation for the ways in which his beliefs, his choice of subject matter and his manner of exploring legal issues diverge from the norm of Realist jurisprudence. I will suggest that Laskin can be better understood as a member of the Legal Process school. This school reached its zenith in the 1950s and 1960s, in the writings of such scholars as Alexander Bickel,[10] Ernest J.

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4 W.F. Fischer III, M.J. Horwitz & T.A. Reed, eds., *American Legal Realism* (New York: Oxford University Press, 1993). Though it is narrowly based, the best history of the subject remains L. Kalman, *Legal Realism at Yale 1927-1960* (Chapel Hill: University of North Carolina Press, 1986).

5 D. Reaume, "The Judicial Philosophy of Bora Laskin" (1985) 35 U.T.L.J. 438 at 439.

6 W.L. Hunter, "Bora Laskin and Labour Law: The Formative Years" (1984) 6 Supreme Court L. Rev. 431 at 438.

7 D. Beatty and B. Langille, "Bora Laskin and Labour Law: From Vision to Legacy" (1985) 35 U.T.L.J. 672 at 679.

8 *Ibid.* at 679-80.

9 *Supra* note 5 at 447.

10 See *e.g.*, A. Bickel & H. Wellington, "Legislative Purpose and the Judicial Process: The Lincoln Mills Case" (1957) 71 Harv. L. Rev. 1.

Brown,[11] Herbert Wechsler[12] and Henry M. Hart, Jr.[13] The school's principles were described and applied in an ambitious book of cases and materials compiled by Hart and his Harvard Law School colleague, Albert M. Sacks, entitled *The Legal Process: Basic Problems in the Making and Application of Law*.[14] Though the book was never actually published, it was nevertheless widely taught in American schools and influenced teaching in Canadian law schools.[15]

The Process school's influence was extraordinary: Morton Horwitz describes it as achieving "virtual hegemony" in "postwar legal academic thought",[16] while *The Legal Process* has been called "the most influential book not produced in movable type since Gutenberg."[17] Nevertheless, as the Process school was supplanted by other theoretical strategies—such as law and economics, feminist theory, or Critical Legal Studies—it vanished from both sight and mind in the legal academy. Recent efforts to re-examine the school have been only partly successful; such treatments are often hampered by the authors' inability to escape their own views of the law.[18]

Despite the disrepair and disregard into which the Legal Process school has fallen, this essay will show that a proper understanding of the school reveals that its concerns and principles match the same concerns and principles that animate Laskin's academic writing. Though Laskin differs in some small respects from classical Legal Process theory, his writings nonetheless manifest the same desire to reconcile Realist insights into both the indeterminacy of law and the impossibility of a historicist, conceptualist understanding of the law with an enduring faith in the value and possibility of the law as an ongoing, principled enterprise. In particular, the Process school's attitudes toward statutory interpretation are closely matched by Laskin's own attitudes. Moreover, the legal areas in which Laskin wrote—most prominently, labour

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11 See *e.g.*, E.J. Brown, "The Supreme Court, 1957 Term—Foreword: Process of Law" (1958) 72 Harv. L. Rev. 77.

12 See *e.g.*, H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv. L. Rev. 1.

13 See *e.g.*, H.M. Hart, Jr., "The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices" (1959) 73 Harv. L. Rev. 84.

14 H.M. Hart, Jr. & A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, tentative ed. (Cambridge, Mass.: 1958) [unpublished] [hereinafter *The Legal Process*].

15 Recently, Foundation Press agreed to publish an edition of the book. See W.N. Eskridge, Jr. & P.P. Frickey, "The Making of *The Legal Process*" (1994) 107 Harv. L. Rev. 2031.

16 M.J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) at 269.

17 J.D. Hyman, "Constitutional Jurisprudence and the Teaching of Constitutional Law" (1976) 28 Stan. L. Rev. 1271 at 1286, note 70.

18 For example, Gary Peller complains: "[M]ost of us trained in the law since the 1960's find it difficult to conceive of the basis for the purportedly "principled" concern about *Brown* [v. *Board of Education*] voiced by Wechsler and other fifties legal scholars." G. Peller, "Neutral Principles in the 1950's" (1988) 21 U. Mich. J.L. Ref. 561 at 562.

and constitutional law—are the primary beneficiaries of a Process understanding of legal theory.[19] To properly understand the Legal Process school is to gain new insights into the internal logic of Laskin's jurisprudence. In turn, using Laskin as a springboard to discussion of the Process school will remind us of that school's merits.

Part II will offer a brief overview of the evolution of legal theory from conceptualism to Legal Realism to Legal Process and will demonstrate that modern stories about the development of legal theory fail to see the deep roots of the Process school. Part III will offer an examination of the Legal Process school itself. Part IV will apply this understanding to Laskin's writing, demonstrating his neat fit within the Process school. Finally, in Part V I will attempt to tentatively explain why Laskin's judicial philosophy adopted the Legal Process understanding of law rather than sharing the Legal Realist school's approach, which was dominant in his formative years of legal education and is generally considered to take a more radical theoretical position than that of the Process school.

II. LEGAL THEORY: FROM CONCEPTUALISM TO LEGAL PROCESS

One reason the affinity of Laskin with Legal Process may have escaped the attention of other commentators is that, with some variations but few exceptions, a common story about the development of legal theory in the United States has taken hold among legal academics. The story is one of Legal Realism triumphing over nineteenth century conceptualism, then being co-opted by the Legal Process school. In this story, Legal Process flares into prominence in the 1950s and 1960s but quickly withers away in the face of the social turmoil of the 1960s, which demonstrates the impossibility of the Legal Process project.

Thus, as the story runs, "American legal thought faced a crisis in the 1940's."[20] Lawyers of the period faced "a rupture between old-line liberty-of-contract traditionalists and the legal realists."[21] Furthermore, Realism was rendered untenable as a valid and socially appropriate theoretical strategy in light of the rise of fascism and anti-communism, which made a positivistic approach unacceptable.[22] Legal Process theory was born in an attempt to salvage law from the Realist revolution.

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19 See R.B. Stevens, *Law School* (Chapel Hill: University of North Carolina Press, 1983) at 271: "The institutional aspect of the process school was especially important to constitutional law, labour law, and criminal law."

20 W.N. Eskridge, Jr., "Metaprocedure" (1989) 98 Yale L.J. 945 at 962.

21 Peller, *supra* note 18 at 567.

22 See G.E. White, "The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change" in G.E. White, ed., *Patterns of American Legal Thought* (Indianapolis: Bobbs-Merrill Co., 1978) 136 at 142; and W.N. Eskridge, Jr., *Dynamic Statutory Interpretation* (Cambridge: Harvard University Press, 1994) at 141.

Versions of the story vary as to the merits of this attempt. James Boyle refers to Legal Process theory as one branch of "a compulsive attempt to sublimate, deny, trivialize, or reinterpret the conclusions about the 'subjectivity' of legal decision making that the realists had reached."[23] More heroic is Jan Vetter's characterization: the Process school "redeemed the ideal of the rule of law".[24] Finally, runs the story, following the brief flowering of Legal Process during the 1950s and 1960s, "its intellectual vitality was sapped...as the disorders of the late 1960's and early 1970's showed that one could not presume that fundamental social agreement existed."[25]

If this story is correct, and Legal Process was simply a short-lived school with its roots in the post-War environment, then the concept of Laskin as Legal Process scholar becomes less plausible, as Laskin's own writings began in the 1930s and carried the same ideas throughout the course of his academic and judicial career. In fact, however, this story about Legal Process theory may be flawed. In his recent writing on the development of the Legal Process school, Neil Duxbury has advanced a compelling argument: "[P]rocess jurisprudence began to flourish once the mood of realism began to wane, but that did not mark the birth of the process perspective. Historically, the process-oriented approach to the study of law parallels, if not precedes, legal realism itself."[26] A brief outline of the development of legal theory from the late nineteenth century suggests that Duxbury's thesis has considerable merit.

The starting point—the doctrine dominant in late nineteenth century jurisprudence known generally as conceptualism or formalism—offers a fairly uncontroversial view. Three aspects of the jurisprudence of this period are of particular note. First, it offered a highly categorical view of the law. Rather than appreciating the highly contextual nature of legal disputes and the malleable quality of legal concepts, conceptualist thinking "was overwhelmingly dominated by categorical thinking—by clear, distinct, bright-line classifications of legal phenomena."[27] Thus, legal thought forced the subject of analysis to lie on the Procrustean bed of pre-existing legal concepts. As we will see, this notion recurs in Laskin's writing. Second, conceptualists believed that accurate

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23 J. Boyle, "The Politics of Reason: Critical Legal Theory and Local Social Thought" (1985) 133 U. Pa. L. Rev. 685 at 702.

24 J. Vetter, "Postwar Legal Scholarship on Judicial Decision Making" (1983) 33 J. Legal Educ. 412 at 416.

25 M.V. Tushnet, "Metaprocedure?" (1989) 63 S. Cal. L. Rev. 161 at 178. The idea of fundamental social agreement was a key tenet of the Process School; see Part III, below.

26 *Supra* note 2 at 602.

27 Horwitz, *supra* note 16 at 17.

and enduring legal principles could be derived from a careful reading of the law reports—not as a reflection of judicial attitudes, but by drawing from them Platonic legal principles; this was, in Calvin Woodard's words, law as "inductive science."[28] Third, because the law reports were considered the repository of enduring legal principles, courts became wedded to the common law and to the principle of *stare decisis*.[29]

Legal Realism developed as a critique of the dominant conceptualist mode of legal reasoning. As the Legal Realism school is outlined in ample detail elsewhere, I will simply note some central conclusions reached by the Realists.[30] First, Realism rejected conceptualism and slavish historicism in favour of a functionalist treatment of the law, preferring to base "legal science" on "the purposes and actual effects of legal rules and doctrines as well as [on] their formulation."[31] Second, Realists "challenge[d] the orthodox claim that legal thought was separate and autonomous from moral and political discourse",[32] pointing out that judicial decision making may be guided in small or large part by personal preferences and thus reflect the politics of the judge.[33] Finally, largely as a result of insights such as those detailed above, it may be said that the initial effect of Realism was to create a sense that the edifice of law had been damaged, if not blown apart. Though the law continued to operate, the prospect of finding any basis for an understanding of law *as law*, and not simply as another branch of politics or social science, seemed suddenly hopeless.

As significant as these developments plainly were, the extent to which Realism represents a genuine revolution, as opposed to simply being a natural part of the development of legal theory, is controversial. Morton Horwitz sees Realism as part of the revolution of "Progressive Legal Thought" which arose in reaction to the Lochner era of Supreme Court jurisprudence in the United States.[34] Duxbury, however, deems Realism "a rather half-hearted and largely unsuccessful attack on formalism."[35]

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28 C. Woodard, "The Limits of Legal Realism: An Historical Perspective" (1968) 54 Va. L. Rev. 689 at 701.

29 See H.E. Yntema, "The American Law Institute" (1934) 12 Can. Bar Rev. 319 at 321.

30 For a longer treatment of the Realist school, see *e.g.*, Fischer, Horwitz & Reed, *supra* note 4; Kalman, *supra* note 4; and Horwitz, *supra* note 16.

31 H.E. Yntema, "Trends of Legal Reform in the United States" (1941-42) 4 U.T.L.J. 76 at 84. See also Horwitz, *supra* note 16 at 200.

32 Horwitz, *ibid.* at 193.

33 See generally J. Frank, *Law and the Modern Mind* (New York: Brentano's, 1949). Kalman puts the point bluntly, suggesting that Realism's enduring message is that "all law is politics." Kalman, *supra* note 4 at 231.

34 *Supra* note 16 at 3-4.

35 *Supra* note 2 at 602.

Whether or not he proves this point, Duxbury successfully makes another argument, one of great import to an attempt to place Laskin in the Legal Process school: many of those who are seen as leaders of the Realist movement, along with others of the same period, are actually forerunners of the Legal Process school in many respects.[36] Thus, Roscoe Pound—who coined the term "sociological jurisprudence" and who, as a major figure at the Harvard Law School, exerted an influence on Canadian legal scholars who studied there[37]—advanced the idea that principles based on morality and reason help decide hard cases.[38] Max Radin, generally classed with the Realist school,[39] advanced the idea that the case method could be a "pathway to legal integrity."[40] Finally, Justice Benjamin Cardozo, who Morton Horwitz takes great pains to place in the Realist pantheon,[41] noted that a judge, when making decisions that fall in the interstices between settled legal rules,

> is not to innovate at pleasure.... He is to draw his inspiration from consecrated principles.... He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the 'primordial necessity of order in the social life.'[42]

In addition, Duxbury points out that Process jurisprudence was not merely a creation of the late 1950s. Instead, this jurisprudence developed from earlier criticism of Realism by such writers as Lon L. Fuller,[43] of whose writings Laskin approved.[44]

In short, it seems clear that the Legal Process school does not represent a pure reactionary force that sprang up after Realism had established itself. Instead, the Legal Process may be seen as an "evolving body of thought"[45]—a set of principles that had begun to find form even as Realism itself developed.

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36 *Ibid.* at 607-31.

37 See C.I. Kyer & J.E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario, 1923-1957* (Toronto: University of Toronto Press, 1987) at 80-97. Pound's ideas found circulation in Canadian legal literature; see R. Pound, "Sociology of Law and Sociological Jurisprudence" (1943) 5 U.T.L.J. 1.

38 Duxbury, *supra* note 2 at 613.

39 See Kalman, *supra* note 4 at 3-4.

40 Duxbury, *supra* note 2 at 608.

41 *Supra* note 16 at 189-92.

42 B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 141; see also Duxbury, *supra* note 2 at 614-18.

43 Duxbury, *ibid.* at 622-32.

44 See Laskin's review of Fuller's *The Law in Quest of Itself*, at (1940) 18 Can. Bar Rev. 660.

45 Duxbury, *supra* note 2 at 603.

This is significant for two reasons. First, it suggests that no temporal problems bar the placement of Laskin within the Legal Process school: its development is entirely contemporaneous with Laskin's own academic work. Second, by tracing the forebears of the Legal Process school, we see among them figures Laskin was certainly aware of and who were, in fact, great influences on his work. Cardozo, in particular, makes regular appearances throughout the course of Laskin's writings.[46] It is perhaps significant that Laskin, in a memoir of his relationship with Cecil A. Wright, placed these forebears of Process jurisprudence in a different category than the Realist school.[47] Thus, we may move to an examination of the Legal Process school with the understanding that its key ideas represented developments in legal theory with long roots in the law, developments of which Laskin was fully aware.

III. THE LEGAL PROCESS SCHOOL

"Like three streams flowing together into a mighty river," writes William Eskridge, "three twentieth-century intellectual developments came together to produce the legal process school."[48] These influences were a rationalism that viewed legal reasoning as a "search for the expression of coherent reason in the fabric of law", the development during the New Deal of the modern administrative state and the faith in democracy generated by the rise of totalitarianism.[49] All these influences are felt in the Legal Process school. As we have seen, two major conflicting influences were felt in the development of Legal Process theory: the rejection of transcendentalism occasioned by Realism, and the need to avoid the dangers of positivism. This is the genius of the Legal Process: "Hart and Sacks' legal process theory was a synthesis that satisfied these antipodal jurisprudential desires by creating a proceduralist framework whereby positivist commands would in the ordinary course be assuredly just and reasonable."[50]

As distinct from some varieties of Legal Realism, the motivation for a just and reasonable legal order was more than mere functionalism for the Legal

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46 See *e.g.*, B. Laskin, "Picketing: A Comparison of Certain Canadian and American Doctrines" (1937) 15 Can. Bar Rev. 10 at 11, note 5 [hereinafter "Picketing"]; B. Laskin, "The Institutional Character of the Judge" (1972) 7 Israel L. Rev. 329 at 330, where Laskin states that Cardozo's lectures are "as fresh for today as they were in 1921" [hereinafter "Institutional Character"]; and B. Laskin, "The Common Law is Alive and Well—And, Well?" (1975) 9 L. Soc. Gaz. 92 at 96 [hereinafter "Common Law"].

47 See B. Laskin, "Cecil A. Wright: A Personal Memoir" (1983) 33 U.T.L.J. 148 at 150: "It was [Canadian legal academic W.P.M.] Kennedy who introduced us to the riches of American legal scholarship, to Holmes and Brandeis and Cardozo, to Pound and Frankfurter, to the American realists, to Morris Cohen and Jerome Frank, and to so many others."

48 Eskridge, *supra* note 22 at 141.

49 *Ibid.*

50 Eskridge, *supra* note 20 at 963.

Process scholars. Rather, it stemmed from a deeply rooted faith in the law, a belief that it was not merely an instrumentally useful form of politics but a separate and special sphere of human activity. Norman Dorsen, who taught a version of the Legal Process course, writes: "The towering achievement of *The Legal Process* was its rigorous insistence that law is something more than politics, that principle is—or should be—an ingredient in decision making, and that it is not naive to hold these views."[51] This faith in law did not, however, simply signal a return to the conceptualist faith that Platonic ideals of law existed and could be determined by judges. Rather, it took as its project "a radical reconception of the situation of the judge", an effort to establish principles which would restore legitimacy to judicial decision making.[52]

The key to this reconception of judicial legitimacy was a focus on whether, in a given dispute, the proper *process* had been applied. Where a decision was the result of the proper process, it could be considered legitimate, whatever the actual outcome. Hart and Sacks put the proposition in its definitive form in *The Legal Process*:

> The alternative to disintegrating resort to violence [in the settlement of disputes] is the establishment of regularized and peaceable methods of decision. The principle of institutional settlement expresses the judgment that decisions which are the *duly arrived at result of duly established procedures* of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.[53]

What qualities make up a "duly arrived at result" of a "duly established" procedure? First, Legal Process theory focused on the need for "institutional competence"—that is, that the institution that decides a particular dispute should be the one best suited to decide it. The relevant question was: "With respect to this particular matter, is the legislature as an institution a more appropriate agency of settlement than a court?"[54] In particular, legislatures were better suited than courts to deal with polycentric, broadly based disputes, while the administrative tribunals which had sprung up during the New Deal might be better suited for disputes centering on their area of expertise.

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51 N. Dorsen, "In Memoriam: Albert M. Sacks" (1991) 105 Harv. L. Rev. 11 at 14.

52 D. Kennedy, "Legal Formality" (1973) 2 J. Legal Stud. 351 at 395: "It represents a much more ambitious undertaking than neo-positivism, proposing a radical reconception of the situation of the judge rather than merely our reconciliation with the ruins of earlier intellectual accomplishments."

53 *The Legal Process*, *supra* note 14 at 4 (emphasis added).

54 *Ibid.* at 366.

Second, beyond institutional competence was the principle of "reasoned elaboration." This principle offered a way out of the indeterminacy of Legal Realism by arguing that proper reasons for judgments, grounded in "principles which maintain the integrity and the workability of the legal system as a whole", would provide a basis for judicial legitimacy.[55] Legitimate reasons must amount to more than "mere fiat or precedent", argued Henry Hart in a harsh criticism of the Warren Court; they must provide:

> ...the underpinning of principle which is necessary to illumine large areas of the law and thus to discharge the function which has to be discharged by the highest judicial tribunal of a nation dedicated to exemplifying the rule of law not only to itself but to the whole world.[56]

Herbert Wechsler further delineated the concept of reasoned elaboration by coining the phrase "neutral principles". In his conception, judgments must be based on generally applicable reasons that "transcend any immediate result that is involved."[57]

Because the provision of duly arrived at, well-reasoned, rigorously neutral principles was so central to the legitimacy of the judicial project, the Legal Process theorists insisted on judgments that were clear, consistent and proper even as to technical matters, written by properly deliberative judges. In successive Forewords for the *Harvard Law Review*, first Ernest Brown[58] and then Hart[59] criticized the Supreme Court for taking too many cases, providing inadequate reasons and dealing shabbily with technical points. Though scholars such as Hart were ridiculed for, as Thurman Arnold said, focusing on "very involved procedural issue[s] which the Professor, for reasons which are not clear to me, thinks [are] of supreme national importance",[60] technical matters were the root of judicial legitimacy for the Process theorists. The result, as Gary Peller puts it, was this:

> The late-fifties editions of leading law reviews are filled with an amazing number of articles on jurisdiction, standing, ripeness, mootness, choice of law, federal/state comity, and procedural

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55 Duxbury, *supra* note 2 at 641. See also White, *supra* note 22.
56 *Supra* note 13 at 99.
57 *Supra* note 12 at 19.
58 *Supra* note 11.
59 *Supra* note 13.
60 T. Arnold, "Professor Hart's Theology" (1960) 73 Harv. L. Rev. 1298 at 1299.

> issues generally. It is as if the table of contents of Hart and Wechsler's *Federal Courts* casebook suddenly became the intellectual agenda for a whole generation of legal scholars.[61]

Significant aspects of the Legal Process school follow from the general principles stated above. For example, because the principle of institutional competence suggested that a duly arrived at decision of a legislature on an issue it was competent to decide was legitimate, statutory interpretation escaped the rigid literalism imposed by conceptualist thinkers of an earlier day, whose preference was for the fixed principles of the common law. For Process theorists, statutes must be interpreted "to carry out their purposes over time, an openly dynamic theory".[62]

Interpretation of the common law also allowed for a dynamic approach. This approach was subject to the limits of institutional competence and reasoned elaboration, but where a court had both a duty to decide a dispute and the obligation to give meaningful reasons, the Court could go against unpersuasive prior judgments: "the very considerations of policy which underly [*sic*] the doctrine of *stare decisis* in its ordinary applications may thus call for exemptions to it in extraordinary situations."[63] Thus, between purposive statutory interpretation and a willingness to intervene in some common law cases, judges could become "deputy legislators...bringing the legal doctrines in line with the more general policies and principles of social life reflected in legislation."[64]

Finally, a significant bedrock assumption of Legal Process must be noted. The school's faith in law and process as against pure politics—its belief that proper reasons could and should command the respect and obedience of society—stemmed in large part from its belief that common consensus existed in American society. Hart and Sacks saw society as a "common enterprise" of "human beings striving to satisfy their respective wants under conditions of interdependance [*sic*]".[65] As Eskridge and Frickey note, this reflected "a deep satisfaction and confidence that lawyers felt during the era of economic growth and consensus politics in America after World War II."[66] It is unfair to suggest, as Mark Tushnet does, that the Process school thought that "a society in fundamental agreement on the basics of the social order faced

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61 *Supra* note 18 at 568.
62 Eskridge, *supra* note 22 at 143.
63 *The Legal Process*, *supra* note 14 at 420.
64 Peller, *supra* note 18 at 596.
65 *Ibid.* at 4.
66 *Supra* note 15 at 2045.

merely technical problems of implementing its desires."[67] Disputes might still run deep; Legal Process simply suggested that decisions on such issues took their legitimacy from being decided in the right way by the right institution.

These, then, are the basic principles that animate the Legal Process school: an acknowledgment of the Realist critique of the legitimacy of conceptualist understandings of law, mixed with a belief that institutional competence and principled reasoning would legitimize the legal enterprise, and infused throughout with a faith in law and a belief in the dynamic potential of both statute and common law. Richard Posner, referring to Harvard's one-time conservativism in response to the Legal Realism advanced by schools such as Yale,[68] has criticized the Legal Process school as "Harvard's answer to legal realism...warmed-over Langdellianism".[69] This criticism gives short shrift to a project which effected a valuable synthesis—adopting Legal Realism's insights, while rejecting its worst nihilistic tendencies and restoring a basis for consistency and legitimacy in the law. As the next section will show, many of the same virtues that are found in the writings of the Legal Process school are also apparent in Bora Laskin's writings.

IV. LASKIN AND LEGAL PROCESS

For Laskin, as for the Legal Process and Legal Realism schools, the conceptualist myth of law as a perfectly autonomous, non-political phenomenon was simply no longer persuasive. As Laskin put it, "law must pay tribute to life...."[70] More stringently, he wrote in criticism of an article suggesting that the social background of a particular statute was irrelevant:

> The...[statement]...poses the question whether any serious student of constitutional law can long entertain the delusion that constitutional adjudication is 'pure' law, divorced from social or economic or political (in the highest sense) views. It is true that the Privy Council has often said that it is not concerned with the wisdom or policy of particular legislation, but surely this has meant nothing more than a token bow to the legislature.[71]

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67 *Supra* note 25 at 177.

68 See Kalman, *supra* note 4.

69 R.A. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995) at 75-76.

70 B. Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 Can. Bar Rev. 1038 at 1073 [hereinafter "Supreme Court"].

71 B. Laskin, "Tests for the Validity of Legislation: What's the 'Matter'?" (1955) 11 U.T.L.J. 114 at 117 [hereinafter "Matter"].

Unlike many Legal Realists, however, Laskin did not respond to the critique of conceptualism by rejecting the determinacy or legitimacy of law. Beatty and Langille, in suggesting that Laskin could not fit comfortably under the Realist rubric, observe:

> [O]ur reading of Laskin's early theoretical writings...reveals that they also harbour a deep conviction that the judicial function must consist of more than the venting of preferences or taking sides upon debatable and often burning questions. There is an abiding faith in Laskin's writings that judges are capable of identifying the relevant...social interests and of infusing their deliberations and judgments with the spirit of social understanding.[72]

This analysis is correct. Laskin forthrightly rejected the personal-preference model of understanding judicial decision making, thus placing himself outside the mainstream of Realist thought.[73] Rather, he retained a belief in the possibilities of the law and in the judge's ability to engage in dynamic but rational interpretation of the law. Thus, he vowed to his new colleagues upon ascending to the Supreme Court that he "had no constituency to serve save the realm of reason."[74] For Laskin, notwithstanding the Realist critique of law as indeterminate, law should be "a strong strand in the cultural evolution of our country."[75] Respect for the law and the judges who help shape it infuses Laskin's writing.

Like the Process theorists, Laskin's respect for the bench was tempered by—and was a cause of—his belief that limits should be set on judicial decision making. This is the source of the "tension between creativity and constraint" referred to by Reaume.[76] To Laskin, it was clear that "[t]he judge as automaton has always been a mythical figure";[77] but a set of principles and rules could ultimately set boundaries for the acceptable exercise of judicial creativity. The limits proposed by Laskin closely resemble the limiting principles adopted by the Process school.

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72 *Supra* note 7 at 679 (footnotes omitted).

73 See "Common Law", *supra* note 46 at 100, where Laskin indicates that he finds uncertainty an undesirable and untenable legal principle.

74 B. Laskin, "Institutional Character", *supra* note 46 at 330.

75 B. Laskin, "The Canadian Constitution After the First Century" (1967) 32 Sask. L. Rev. 159 at 160 [hereinafter "Constitution"].

76 *Supra* note 5 at 439.

77 "Common Law", *supra* note 46 at 95. See also B. Laskin, "A Judge and His Constituencies" (1976-77) 7 Man. L.J. 1 at 14: "I think...that I can safely say that Judges do not regard their function as requiring them to be indifferent to the quality of the law."

First, like the Process school, Laskin emphasized the need for reasoned elaboration. He would not accept judicial decision by "fiat or precedent" any more than Hart: "Instances in the law are legion in which the settled practice of years has foreclosed the analytical examination of a principle or the weighing of its social consequences."[78] With the Process theorists, he believed that "[t]he judge cannot count on universal acceptance of his reasons for judgment...",[79] and therefore insisted that judgments be grounded in careful deliberation and logical reasoning. Contrary to the political view of the law that was incipient in the Realist school and flowered with the development of Critical Legal Studies, Laskin viewed law as a place where rationality could be applied to pressing social issues:

> In these days, when causes of all kinds abound and are pressed with the same indiscriminate zeal regardless of their relative weight in the social scale, there is every reason for us to insist that they be sifted through the cooling and civilizing procedures which have been time-tested in our courts and in our deliberative assemblies. This will not, of course, automatically ensure their attainment; but it will assure those of us whom the advocates of various causes must persuade, that their causes can stand rational examination....[80]

Laskin demanded the same technical precision and careful reasoning that is a hallmark of judicial legitimacy under the Process school: "A discriminating or undiscriminating use of precedent, the depth or shallowness of legal argument, the relevance or reliability of extrinsic evidence are the reflections of the mind that is working on the problems of the constitution."[81] This "concern about the quality of our law, of *its procedures* and of those who make it"[82] was reflected in the same concern addressed by Hart and Brown—that judges needed adequate "time for reflection"[83] and lacked the time to write proper decisions.[84] While he did not demand that all judges provide

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78 B. Laskin, "The Labour Injunction in Canada: A Caveat" (1937) 15 Can. Bar Rev. 270 at 270 [hereinafter "Labour Injunction"]. His language at times echoes Peller's: "A final court which is prepared to overrule its own precedents puts itself, institutionally, into a partnership, albeit a junior one, with the legislature." "Institutional Character", *supra* note 46 at 341.

79 B. Laskin, "The Judge and Due Process" (1972/73) 5 Man. L.J. 235 at 235.

80 *Ibid.* at 237.

81 "Matter", *supra* note 71 at 127.

82 B. Laskin, "The Common Tie Between Judges and Law Teachers" (1972) 6 L. Soc. Gaz. 147 at 148 (emphasis added) [hereinafter "Common Tie"].

83 "Supreme Court", *supra* note 70 at 1048.

84 "Institutional Character", *supra* note 46 at 339.

reasons for all cases, he emphasized that the provision of reasons constituted:

> proof of the Court's recognition of its duty to meet the continuing expectation of the Bar that they be able to see how an existing principle of law is applied or distinguished in particular fact situations or, indeed, how an existing principle is extended or contracted, or how it is adapted to new situations.[85]

Second, Laskin was concerned with the principle of institutional competence. "[W]here social advance has outstripped legal theory and the gap between the two must be closed," he noted, "the legislature is better equipped than the courts to accomplish this result."[86] Like the Legal Process school, he identified polycentric problems as more suited to legislative than judicial resolution:

> [T]he public must be made aware of the limitations of adjudication.... [Courts] can deal with the nuisance of pollution as between neighbours but cannot prescribe a clean environment for the public benefit unless there is some constitutional or legislative basis for the prescription.[87]

This sense of needing a tribunal that is appropriately qualified to engage in legal decision making no doubt animates his approving reference to F.R. Scott's views concerning the Privy Council: "It was therefore obvious to him that our final Court for constitutional matters must be one that had some intimacy with Canadian life and would be prepared...to allow changing social and economic forces to be reflected in constitutional interpretation."[88] Of course, his competence-based understanding of institutions also led him to support institutional deference to bodies such as labour tribunals that appropriately exercise their expertise and authority in a particular area.[89]

In short, Laskin's writings indicate both a concern with proper reasons as a limit on judicial discretion and a view of institutional competence as a safeguard in the rule of law. These jurisprudential views closely track the principles that lie at the heart of the Legal Process school.

Again, as with the Legal Process school, a host of subsidiary principles follow from the two major principles discussed above. Most prominent is

85 "A Judge and His Constituencies", *supra* note 77 at 5.

86 B. Laskin, "The Protection of Interests by Statute and the Problem of 'Contracting Out' " (1938) 16 Can. Bar Rev. 669 at 671 [hereinafter "Contracting Out"].

87 B. Laskin, "The Function of Law" (1973) 11 Alta. L. Rev. 118 at 120.

88 B. Laskin, "Canadian Federalism: A Scott's Eye View in Prose and Poetry" (1968) 14 McGill L.J. 494 at 496.

89 Beatty and Langille, *supra* note 7 at 692.

Laskin's dynamic view of statutory interpretation, which in every way resembles that adopted by the Process school. Perhaps the most prominent subject of Laskin's extrajudicial writing in both labour and constitutional law is his advocacy of a purposive, flexible approach to statutory interpretation.

Laskin's approach seeks to recognize both the intent of the legislature and the possibility that the purpose of the legislation may change over time. Complaints about "constitutional rigidity"[90] in constitutional interpretation, particularly in the face of evolving social needs, recur throughout his writings.[91] Laskin harshly criticized "[the] arid conceptualism in which the state of the statute book as of 1867 has some mystic significance",[92] and called the "oft-revealed aversion to statute on the part of the common law lawyer" an "indefensible attitude".[93] His approach is strikingly different from the prevailing attitude toward statutory interpretation at the time he wrote and wholly consistent with the Legal Process view of statutory interpretation: "In legislation, above all else, a court has a manifestation of the 'popular will'; and it is safe enough to say that interpretation should reflect as much concern with realizing the object or purpose of the enactment as with its literal expression."[94] As noted above, the Legal Process school relies considerably on an optimistic belief in societal consensus. Appropriately, Laskin also exhibits the belief that the social and political culture about which he is writing shares a set of basic norms and goals. As Reaume writes, Laskin believed courts could be guided in part by their understanding of social consensus when they had interstitial opportunities to be creative. This, of course, "assumes that there is such a consensus—that there is a common view as to when change is required and what direction it should take."[95]

Finally, mention should be made of a piece of evidence somewhat more intangible and imprecise, but nonetheless telling, regarding Laskin's philosophy of law. Consider the nature of his writing on constitutional law. Unlike the firebrand rhetoric of F.R. Scott,[96] Laskin's writings aim at the Privy Council and other courts, not with a hammer, but with a chisel. For example, his criticism

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90 B. Laskin, "Correspondence: Still More on the Regulation of Insurance" (1946) 24 Can. Bar Rev. 843 at 843.

91 See *e.g.*, B. Laskin, "A Note on Canadian Constitutional Interpretation" (1943-44) 5 U.T.L.J. 171.

92 B. Laskin, "Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case" (1955) 33 Can. Bar Rev. 993 at 994 [hereinafter "Bowling Alleys"].

93 "Picketing", *supra* note 46 at 11.

94 "Institutional Character", *supra* note 46 at 342.

95 *Supra* note 5 at 462.

96 See *e.g.*, F.R. Scott, "The Consequences of the Privy Council Decisions" (1937) 15 Can. Bar Rev. 485; and F.R. Scott, "Abolition of Appeals to the Privy Council: A Symposium" (1947) 25 Can. Bar Rev. 557 at 566-72.

of the Supreme Court of Canada's decision in the "Bowling Alley Case" is a finely wrought examination of the relation of s. 96 of the *Constitution Act, 1867*[97] to the authority of municipally based tribunals.[98] More tellingly, his substantial essay criticizing the Privy Council's interpretation of the Constitution's "peace, order and good government" clause[99] is, with only a few bursts of emotion,[100] a careful examination of the "aspect" doctrine in constitutional law.

Process-oriented thinking, Neil Duxbury has observed, was "a fairly low-key attitude, an attitude which tended to bubble to the surface of, rather than to dominate, the works of those who shared it."[101] Laskin may have been unaware of the ties that bound him to the Legal Process school, and the works examined above certainly do not cite Process scholars (other than Cardozo, who as a precursor to the Process school has not necessarily been grouped with them). Nor do they echo every idea advanced by the Legal Process school; "neutral principles," for instance, do not make an explicit appearance in Laskin's jurisprudence, though they may be seen as animating some of his concerns about proper reasons for judgment.

Nevertheless, it must be said in summary that in significant ways, the ideas, concerns and approach taken by Laskin reflect a jurisprudent's attempts to wed Realist insights with a faith in law and the legal order. This suggests that he may be properly identified as an adherent to many of the same principles that form the heart of the Legal Process school.

V. LASKIN AND LEGAL PROCESS IN CONTEXT

If Laskin is wrongly categorized among the Legal Realists and is more accurately viewed as reflecting the jurisprudence of Legal Process, questions remain:

Why, given that Laskin's legal education took place at the bright dawn of Realism, do his writings not reflect the Realist philosophy rather than Legal Process thinking?

Why, when his countryman Frank Scott could be aroused to such passion by the errors of the Privy Council, did Laskin develop such a highly technical and professional attack on the decisions of that and other courts?

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97 (U.K.), 30 & 31 Vict., c. 3.

98 "Bowling Alleys", *supra* note 92.

99 B. Laskin, "'Peace, order and Good Government' Re-Examined (1947) 25 Can. Bar Rev. 1054 [hereinafter "POGG Re-Examined"].

100 See *e.g.*, *ibid.* at 1076-77. Criticizing Lord Haldane's rigid approach to constitutional interpretation—a criticism that is a hallmark of Process-oriented thinking — he writes: "He has fashioned the Procrustean bed; let the constitution, the British North America Act, lie on it."

101 *Supra* note 2 at 604.

Why did Laskin retain a faith in and a focus on process when the issues that concerned him—the failure of the courts to adapt to the changing world of labour law, and the Privy Council's constrictive interpretation of federal power under the Constitution—could just as easily have driven him to reject the possibility of process altogether?

What follows are some necessarily speculative suggestions that may help answer these questions. Ultimately, they will require proper study in the context of a life of Laskin, one which attempts to achieve a close link between his influences, his experiences and his philosophy of law. Some possibilities do, however, suggest themselves.

First, one factor militating in favour of the highly technical, process-oriented critique of constitutional law that Laskin adopted is that, to put it colloquially, that is where the action was. Unlike the more sweeping rhetoric that has long characterized American constitutional law and now characterizes the Canadian law of the *Canadian Charter of Rights and Freedoms*,[102] the constitutional law addressed by the Privy Council in the first half of this century *was* highly technical; it was precisely here, in the realm of the close reading of statutes, that the Privy Council was dealing Canadian federalism as Laskin saw it its most grievous blows. Thus, Laskin may have been drawn to a process-oriented, technical approach that engaged the Privy Council and other courts on their own terms and sought to sway them through reason and accessible principles.

Second, though we may not know the source of his faith in law and the legal process, it is certain that Laskin did have faith in the validity of the courts. As much as he disagreed with and sometimes heaped scorn on the Courts' approach to such matters as statutory interpretation, he did not appear to question their legitimacy. He would therefore be likely to adopt an approach that accepted as a basic premise the legitimacy of the judicial system, while seeking to constrain it through principles such as institutional competence and reasoned elaboration.

Third, though Laskin's education certainly was contemporaneous with the flourishing of Legal Realism, it should be remembered that he attended Harvard Law School, the birthplace of Langdellianism, which throughout this period mounted a rearguard action against Legal Realism.[103] Indeed, in the period during which Laskin attended Harvard for graduate studies, a course in legislation was being taught[104] which has been identified as an

102 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

103 See generally Kalman, *supra* note 4.

104 By Erwin Griswold, who would later come to the defence of Legal Process scholar Henry Hart following Thurman Arnold's critical article; see *supra* note 60. See E.N. Griswold, "The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold" (1960) 74 Harv. L. Rev. 81.

early ancestor of the Legal Process course.[105] Moreover, Laskin studied under and was influenced by Felix Frankfurter, whose own concerns about closely reasoned professional writing, institutional competence and judicial review mark him as a charter member of the Legal Process school.[106] Clearly Laskin had ample opportunity to be influenced by the same sources as Hart, Wechsler and the other Legal Process scholars.

Fourth, when Laskin returned to Canada from Harvard in 1937, there was as yet virtually nothing that could be said to constitute a Canadian legal academy. Though Laskin taught at Osgoode Hall, Canadian legal teaching was not then the "humanity and...social science" he thought it should be.[107] Law as an academic discipline was of less importance than basic legal teaching. Accordingly, he would have had little opportunity to engage the law on a broad philosophical level, and few colleagues with whom to do so. Circumstances militated in favour of a more technical approach to the law.

Fifth, the same reaction to totalitarianism that prompted the Legal Process scholars in the United States to proclaim a process-oriented school grounded on a faith in democracy may also have been at work in Laskin's life. Irving Abella recounts that when Laskin was first asked to teach law at the University of Toronto, he was made to swear on a bible before witnesses that "he had no connection with Communism or any other subversive movement."[108] While such speculation is necessarily weak, it is not unreasonable to suggest that such events served to remind Laskin that adherence to any seriously destabilizing or nakedly positivistic legal philosophy could work to his disadvantage.

Finally, it may simply be that, in comparing Laskin with Legal Realism and asking why he was not more hot-blooded in his extrajudicial writing, we misinterpret the character of Legal Realism. While many of its leading figures were sharp and passionate in their writings, any number of Realists or quasi-Realists toiled in relative obscurity and wrote in milder tones. In questioning the technical approach adopted by Laskin, we may be comparing it with a

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105 See Eskridge and Frickey, *supra* note 15 at 2033-34.

106 *Ibid.* at 2034; note that Henry Hart was a favourite student of Frankfurter. See also Reaume, *supra* note 5 at 453-54 (noting that Laskin more closely resembles Frankfurter than other sociological jurisprudence scholars on the issue of judicial review).

107 See R.S. Harris, "Interview with B. Laskin" (University of Toronto Archives Oral History Program: 2 April 1977) at 2. For more of Laskin s views on the importance of legal education in the academy, see B. Laskin, "The Interrelationship of a University Law School and the Legal Profession" (1970) 4 L. Soc. Gaz. 210.

108 I. Abella, "The Making of a Chief Justice: Bora Laskin, The Early Years" in *The Cambridge Lectures 1989* (Cowansville, Que.: Yvon Blais Inc., 1990) at 162 (internal quotation marks omitted).

model of legal writing that, save for the work of a few idiosyncratic figures such as Jerome Frank, did not exist.

VI. CONCLUSION

Bora Laskin, beginning his career as a legal academic in the late 1930s, faced the same crisis as legal scholars elsewhere. If he believed at all in the rule of law—which he emphatically did—how could he square this belief with the insights into the political and indeterminate nature of law that the Legal Realists had produced? If conceptualism was dead and Legal Realism was not enough, what then? Process jurisprudence, which was already taking shape as Laskin came to the academy, attempted to explain judicial decision making, "not in terms of deductive logic or the intuitions of officials, but in terms of reason, which is embodied in the fabric of the law itself."[109] It offered a step back from the abyss.

I have argued that Laskin took that step, adopting the principles that animate the Legal Process school and applying them to his explorations of Canadian labour and constitutional law. Though the historical connection between Process jurisprudence and Laskin's legal thought remains uncertain, it is clear that the Legal Process school provides a better description of Laskin's legal philosophy than does Legal Realism, the school that up until now has been used to characterize Laskin. The Legal Process School thus offers us an opportunity to reach a better understanding of a pivotal figure in the Canadian constitutional tradition.

109 Duxbury, *supra* note 2 at 602.