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Reaction to the Arthurs Report

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Janice Dicken McGinnis

David T. Fraser

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Reaction to the Arthurs Report

I

Innis Christie: Is Academic Law in Bad Shape? Comments on Law and Learning

It is now more than two years since the publication of *Law and Learning: The Report of The Consultative Group on Research and Education in Law* to the Social Sciences and Humanities Research Council of Canada, known to all legal academics as "the Arthurs Report".[1] In that time the Canadian Bar Review has published one commentary on the Report[2] and there have been a few comments in academic law journals,[3] but the reaction in print is not commensurate with the importance of the Report or the interest in it among teachers and scholars of law in Canada generally and at the Dalhousie Law School in particular. Moreover, it is important not only to Canada's law faculties and the practicing legal profession but also to scholars in related disciplines, to the teachers and advisors of future law students and to those future law students themselves. All will do well to understand the implications of the Report, and their contributions would enrich any debate about its findings and recommendations.

The Arthurs Report focusses primarily on academic legal research and scholarship. It addresses issues of law teaching and curriculum secondarily, out of conviction that if there is to be "a new scholarly discipline of law, a distinctive science of law", the base must be laid for it in the LL.B. program. By these phrases the Report means,

> the systematic study, using all possible intellectual skills, of all aspects of law, including its basic values and assumptions, its institutions and formal rules, its outcomes and social consequences.[5]

Incidental to this concern with legal education as a base for "new scholarly discipline" and thus two removes from its primary focus, the Arthurs Report passes apparently quite impressionistic judgments on the job that Canadian law schools do in equipping people for the

practice of law. In this context and from people as experienced as Professor Arthurs and his committee members[6] such judgments are not inappropriate. Emphasizing that only "most", not all, students go to law school with practice in mind, that some who wish to enter practice will not do so and the practicing roles are becoming increasingly differentiated and specialized, the Report is prepared, nevertheless, to assume that most law students and professors "do expect that legal education will equip people for practice".[7] That is the context in which the Arthurs Report makes its recommendations for the creation of a new scholarly discipline of law and that is the context in which legal academics must strive to invigorate their teaching as well as their scholarly discipline, assuming that they think, as I do, that the Arthurs Report sets objectives that are worthwhile.

My comments on academic law and the Arthurs Report are offered here in light of the apparent reactions to it of law students, the practicing profession and legal scholars themselves. I address the Report's recommendations on both legal education and legal scholarship because what it says about legal education appears to have been the main concern of the practicing legal profession, and of law students, but in doing so I must stress again that the Report does not afford equal time to legal education and legal scholarship. It is primarily about scholars and academic legal research.

First, the students. It is not surprising that, where they have taken an interest in the Arthurs Report at all, they have been particularly warmed by statements like:

> Nor do we see any evidence that law schools have made a deliberate and conscious decision that today's teaching methods and curriculum are indeed the best way to prepare people for practice.[8]

Here the first point to be made is that, insofar as the Arthurs Consultative Group is representative, in the Report the Canadian law teaching profession is being constructively self-critical to a high degree, perhaps almost uniquely so. This was the view expressed to me by a very senior member of the Social Sciences and Humanities Research Council, who made the point as a compliment, stating that the Report stood out among similar reports from other academic disciplines, which tended to be self-serving pleas for greater research funding.

This is not to deny that there is much that can be improved in Canadian law teaching, but I take the Arthurs point to be not that we are shirking our teaching responsibilities but rather that in focussing on the changes necessary to create a new scholarly discipline of law we should not for a minute rest easy on the assumption that we do not also

have to work very hard at providing an effective humane professional education.

The schizophrenia of academic law is nowhere more apparent than in student complaints about law teaching, because while the most common complaint is that it is "too theoretical" the second most common is that there is too much material, which is dull and lacking in intellectual challenge. No doubt there often are unrealistic expectations about the amount of material law students can usefully read, probably stemming from the "condition of ambiguity"[9] in which law faculties find themselves. That is, they attempt to provide an education that is both scholarly and directly relevant to professional preparation. What for one student is a theory or critical insight of great explanatory power is another's "impractical padding"; one student's example of, or exercise in, how the law actually works is another's "sterile description". The Arthurs prescription for this ill is a mainstream curriculum concerned with the "humane professionalism", which the Report says is now the goal of all Canadian law schools, combined with expanded "experiments in clinical legal education",[10] but for some students a "scholarly curriculum". At each law school there should be a clearly defined "scholarly" stream which would

> emphasize intellectual and theoretical as opposed to professional perspectives, while perserving connections, collaboration and cross-over possibilities with the professional options.[11]

Like law students, the practicing legal profession appears to have been concerned mainly with the Arthurs Report's secondary issue, legal education, rather than with legal scholarship, and the profession's only clear reaction was against this specific recommendation. Insofar as this adverse reaction springs from a concern that a scholarly stream will become a law school outlet for a shower of graduates with no knowledge of law or any practical sense of what lawyers do I have some sympathy for it, although I support the creation of such a stream in a modified form. Sight does seem to have been lost, however, of the fact that there is no suggestion in the Arthurs Report of a total hiving off of an academic stream of future legal academics. The Consultive Committee states,

> Unless students can be assured that they are not forever excluding themselves from professional opportunities, few will select the scholarly option over the professional. Unless faculty and students in the professional stream develop some identification with the scholarly stream, they may come to resent it. Particular attention must therefore be paid to connections and possible collaboration and crossovers between the two streams.[12]

There is, though, an issue to be joined. Insofar as the reaction of the legal profession to streaming is simply a reaction against anything that is more academic, and therefore simplistically assumed to be less "practical", it must be resisted.

Legal education and law teaching should be "academic". Law students have to be prepared for an entire life in the law, not merely to produce the maximum return on their principals' merger investment during the articling year. They must be taught with the realization that what they know when they graduate is of less significance than any ability they will have acquired to find knowledge, and to continue to learn. But law students have chosen to make their particular contribution in and about law. All of them, therefore, including the most practical and the most academic, must be taught to think like lawyers, and to think about law in society and about lawyering, if they are to make the contribution that, quite properly, will be expected of them. There must be that solid common base but there must also be scope for individual development.

How is this to be achieved? At Dalhousie Law School a revised First Year program has been in place for three years and the Second and Third Year programs are under consideration. The First Year program has two fundamental thrusts. First, each of the traditional courses has been mandated with responsibility not only to explore the doctrines, principles and policy issues of its subject matter, be that the law of contract, crimes, property or tort, but also to discharge an ancillary educative function particularly assigned to each course. The Contracts course, which for some years has been taught in small classes of twenty or less, has been given the very important task of imbuing students with the method of case analysis. Through case analysis law students learn how to deal, as every lawyer must, with change and development in the law by the decisions of courts and administrative tribunals, and at the same time they get both an intellectual understanding and a feel in their bones for the ways of the common law. The course in Property law has been given a special responsibility of introducing students to legal history; the course in Crimes is supposed especially to induce students to think about the relationship between the state and the individual, and the Law of Torts has been made the vehicle for developing appreciation of the interplay between private and public ordering.

The second thrust of the "new first year curriculum" is a team taught course in "Legal Development", which puts law in a broad historical and comparative context. This presses future professionals to see themselves and the system of which they are to become a part as a

societal phenomenon and gives incipient scholars of the law a framework of sorts within which to sort their other courses.

The next step is to carry this process of focussing resources into the Second and Third Years of the LL.B. course. The perhaps insuperable difficulty is to find a consensus in identifying the Second Year courses of instruction that will best provide a common base for a Third Year program in which the students diversify, according to the social phenomena which interest them most and according to their professional or scholarly bent. The suggestion before the Dalhousie Law Faculty is that resources saved by a more narrowly focussed Second Year program can be used to mount a Third Year program in which each student elects from a range of optional courses in one term and in the other enrolls in either one of several clinical or simulation-based programs or an academic research-oriented program, according to his or her choice. The clinical programs would be a continuation of the existing programs at the Dalhousie Legal Aid Clinic or in the Criminal Law Clinic, which are now available to about a third of the Third Year class. Every student would take either one of the existing clinics, a new simulation-based program in, for example, corporate, commercial, general practice or public law, or a more "academic" term program in, for example, marine environmental law.

Just as the clinics and the new simulation-based programs would combine the learning of substantive law with structured instruction in and exposure to "lawyering" so would the more academic program or programs put special emphasis on research, beyond the kind of practical lawyers' research taught in First Year, and on the incorporation into law of the methods of other disciplines.

It is not safe to predict that the Dalhousie Law School will move to this pattern of legal education. At this point there is no clear faculty consensus and without such a consensus a radical change in direction would be foolhardy. In any event, resources may not permit wholesale adoption of the clinical or problem solving-simulation approach. In the context of a discussion of the Arthurs Report, the point is simply that there is at least some body of opinion at Dalhousie Law School, of which I am a part, that is in considerable sympathy with the general approach to legal education taken by the Consultative Group under Professor Arthurs' chairmanship.

Not surprisingly, the Canadian legal academic community reacted to the primary concern of the Arthurs Report, legal scholarship, as well as to its concerns about legal education. In some respects their reaction was the most disturbing.

The central statement of the Arthurs Report is that there is in Canada a shortage of fundamental insightful legal research which

systematically studies "all aspects of law, including its basic values and assumptions, its institutions and formal rules, its outcomes and social consequences"[13] and in doing so uses "all possible intellectual skills". For "intellectual skills" we are apparently to read "interdisciplinary" skills. Sadly, many saw this as *ad hominum* condemnation and reacted on that level.

The challenge in the Arthurs Report is great and there is plenty of room for serious debate about the relative importance of the various kinds of legal research, but it is silly for Canadian legal scholars to deny the immaturity of their discipline or to refuse to recognize that few of us are equipped with the intellectual skills to engage in rigorous systematic study of aspects of law other than the elaboration of formal rules, their applications and logical outcomes. A disciplined and intellectually rigorous study of just those aspects of law may make an excellent contribution and is, of course, something to be proud of, but that does not argue against the need for, or the challenge of, equipping ourselves, or combining with others, to engage in disciplined and intellectually rigorous studies of the basic values and assumptions of the law, its institutions and its social consequences.

The Arthurs Report challenges the law school professoriate on the legal education front as well. If there is to be a scholarly stream those teaching in it must have true interdisciplinary qualifications. It will not be good enough simply to be sympathetic, as many of us are, to the need to assess the effects of laws and their application in an intellectually rigorous way. We will have to have the capacity to do so. Nor can it be forgotten that, insofar as the mainstream of law school education is to continue in the direction of humane professionalism, law teachers will not only have to master the broad perspectives but will also have to be able to bring their expertise to bear in the highly specific, and ultimately practical, ways that teaching in the clinical or simulation-problem solving context demands. A law school can only hope to meet this challenge collectively. There are very few law teachers who individually can meet all of these demands in both teaching and scholarship.

To return, be it perhaps belatedly, to legal scholarship, which is what the Arthurs Report is all about; on page 67 of the Report there is an ingenious diagram of the Consultative Group's conception of the types of legal research in which academics engage. On the vertical axis there is a continuum, in terms of the constituency to which their writing is addressed, from "professional" to "academic". On the horizontal axis the continuum is in terms of the methodology employed, from "doctrinal" to "interdisciplinary" research. Portrayed on the four corners of the square in which these axes intersect are "conventional

treatises and articles" (doctrinal research for a professional constituency), legal theory (doctrinal research for an academic constituency), "fundamental research" (interdisciplinary research for an academic constituency) and "law reform research" (interdisciplinary research for a professional constituency). The axes are unevenly placed so that the square is not divided into quadrants but into four unequal parts, the largest of which is "conventional treatises and articles" and the smallest of which is "fundamental research", with "law reform research" and "legal theory" each occupying considerably less space than the largest, but roughly equal to one another.

The diagram is obviously not intended to be quantitatively precise but it conveys the primary message of the Arthurs Report with forceful clarity. Canadian legal academics devote most of their efforts to doctrinal research for a professional constituency by writing conventional treatises and articles, and there is very little fundamental research on law done in an interdisciplinary mode by legal or other academics. That is the assertion of fact, and the value judgment is that there needs to be much more fundamental research on law. "Research 'on' law is inescapable if law is to respond to a changing society and a changing intellectual milieu".[14]

According to the Report what is also needed is more emphasis on legal theory, the casting into a unifying perspective of legal rules so they may be better understood and their application in particular cases better evaluated and controlled. Legal theory, as the Report defines it, deals with traditional legal materials and "makes certain assumptions about the nature of knowledge, language, law or society"[14] which fundamental legal research, with its emphasis on empirical inquiries and "its rejection of code, case and statute as the basic and exclusive subject matter of analysis",[15] subjects to scrutiny.

Who would not agree that what the Arthurs Group defines as "fundamental research"; is not much done in Canada, that done well it begins to give answers rather than merely reformulating the questions and that to do it in a worthwhile way requires an unusual mixture of disciplines as well as a serious expenditure of effort and money? But that is not to say that such legal scholarship is the only kind worth doing. Indeed, I do not read the Arthurs Report as saying that. The Report refers to "the arduous but essential task of producing high quality, authoritative treatises in various fields of substantive law"[16] and recognizes that even in this aspect of legal research Canadian academics have only recently come of age. Practicing lawyers and the society they work in are well served by clear and perceptive expositions of what the law is, the more so when its theoretical underpinnings are exposed, and of course students too benefit. Beyond that, both "legal

theory" and "fundamental research on law", whether or not aimed directly at law reform, must build upon such conventional research. The wood must be hewn and the water drawn.

I see nothing in the Arthurs Report to suggest that excellent conventional legal research, insightful legal theory and progressive law reform research are other than praise-worthy, and more praise-worthy than "empirical" research on law that lacks rigour or significance. We are only now emerging from an era when the far too common phenomenon among Canadian legal academics is not the professor who does conventional legal research but the professor who does none at all. If we read the Arthurs Report positively, as an exhortation to strength where the record of Canadian legal academics is weakest, it can only help. Only if the Report is read negatively, as a condemnation of all but one or two types of legal research, and indeed of the only legal research of which a good many Canadian academics are capable, can it be harmful.

In legal scholarship as in law teaching, no one person can fill all the roles. If Canadian legal scholars are to truly serve their students, their peers, the practicing profession and our law makers they can only do so by collectively doing all kinds of legal research, and by doing each kind very well. The Arthurs Report is surely right in suggesting that we are a long way from that goal. It is probably right in suggesting that the market will produce a good measure of conventional legal research and writing and is therefore right, too, in exhorting legal academics and granting agencies, such as the Social Sciences and Humanities Research Council of Canada, for which the Report was written, to concentrate on the most difficult aspects of the work of legal scholars.

NOTES

1. Harry Arthurs, former Dean of the Osgoode Hall Law School and now President of York University, was the chairman of the Consultative Group. More important, as Maxwell Cahen put it in his comment in The Canadian Bar Review (1983), 61 Can. Bar Rev. 702 at p. 704, "The style of the Report is patently 'Arthurs'."
2. Ibid. The Canadian Bar Review is the journal of The Canadian Bar Association, but such commentaries do not, of course, reflect the views of the Association.
3. I note those of my colleagues, Leon Trakman in (1983), 21 Osgoode Hall L.J. 554 and Tom Cromwell in (1984), 22 Osgoode Hall L.J. 761, and of Mark Waisberg in (1983) 29 McGill L.J. 155.
4. Social Sciences and Humanities Research Council of Canada, *Law and Learning* (Ottawa: Ministry of Supply and Services, 1983), at p. 137.
5. Id., at p. 138.
6. John Courtney, Department of Political Science, University of Saskatchewan; F. Murray Fraser, Faculty of Law, University of Victoria; Constance D. Hunt, Faculty of Law, University of Calgary and Mobil Oil Canada Limited; Andree Lajoie, Faculty of Law,

University of Montreal; Hon. Judge P.J. O Hearn, Halifax County Court; E.A. Tollefson, Coordinator, Criminal Code Review, Department of Justice, Government of Canada; Pierre Verge, Faculty of Law, Laval University. The Consultative Group worked with an Advisory Panel drawn from bench, bar and academic, both legal and non-legal, of which the former Chief Justice of Canada, the Right Honourable Bora Laskin, was honorary chairman.

7. Ibid., footnote 4, at p. 48.
8. Id., at pp. 52 and 53.
9. Id., at p. 36.
10. Id., at p. 52.
11. Id., at pp. 141 and 155.
12. Id., at p. 142. There is a fine paradox in the suggestion by some sophisticated practitioners that a "scholarly stream" may well be regarded as the elite, recruited with particular diligence by the largest law firms.
13. Id., at p. 138.
14. Id., at p. 68.
15. Id., at p. 69.
16. Id., at p. 124.

II

Janice Dickin McGinnis: Reflections on the Law and Learning

There is a children's verse which starts:

> Yesterday upon the stair
> I met a man who wasn't there;
> He wasn't there again today,
> I wish, I wish, he'd go away.[1]

Many members of the legal profession in Canada may not, as yet, have met Harry W. Arthurs upon the stair but he is lurking there, waiting for them all the same.

Harry W. Arthurs is former Dean of Osgoode Hall Law School and, more to the point for our purposes, Chairman of the Consultative Group on Research and Education in Law. The Consultative Group itself is a creature of the Social Sciences and Humanities Research Council of Canada, the Committee of Canadian Law Deans and the Canadian Association of Law Teachers. Although its immediate impetus is attributed to SSHRCC curiosity over why so few funding applications come from law, such a body was envisioned in 1975 by the Symons Report which called for "a major study of the state of legal education in Canada".[2] The Consultative Group, after cross-country hearings, produced such a report in April 1983. The effect upon the

legal profession of *Law and Learning*, or the Arthurs Report as it is popularly known, has been something less than earth-shattering.

In fact, it is rather presumptuous to refer to the Report as being "popularly known" by any title whatsoever; aside from legal academics, few Canadians seem to be aware of the Report. The fact that it only rated thirty column centimetres in *University Affairs*, is, to say the least, unfortunate given the importance of law to all fields of academic endeavor. But the ignorance of the Report among the legal profession seems positively wilful. Although asked by the Group to submit briefs, no formal response came from any professional, governmental or quasi-governmental body and most did not even acknowledge the invitation.[4] As of August 1984, only six out of Canada's twenty-two law reviews had published reviews of the Report.[5] The profession's national monthly newspaper, the *National*, has given it very short shrift, not even bothering to cover the National Conference on Legal Research and Education in Canada,[6] held at the Château Laurier in Ottawa on 2 and 3 December 1983, the purpose of which was to discuss possible ramifications of the Report.

Meanwhile Harry Arthurs is waiting there, immovable upon the stair. What he has to say is of importance not only to an obstinate profession but to anyone interested in the structures of Canadian life and particularly to scholars in the social sciences. Academics particularly have two specific reasons to ponder the Arthurs Report. One is that many of us do research that is directly or indirectly related to the nexus of law and society. The other is that we educate students who are eager to enter law school. Perhaps it would be more useful to deal with the second aspect first.

The best remark I ever heard regarding legal education came not from the Arthurs Report but from a senior classman who had done well as an undergraduate in history but was flummoxed by law school. Commenting on his need to do remedials, he said that "law school isn't hard; it's just that there's so damned much of it". Achieving success at law school requires, as some malcontent once said about obtaining a first class at Oxford, a photographic memory and legible handwriting. The work is loaded on: some students manage by giving their lives over entirely to legal studies; some cope by taking verbatim notes in class and regurgitating on exams; others, who have come to law school for reasons other than acquiring their union papers, sometimes manage to keep hold of their sense of perspective and strike a balance between the need to pass and the desire to learn.

Those students who travel well in herds get the highest marks for the least work. Much of law school "learning" is done through the use of summaries, commonly called "cans", compiled by groups of students

and handed down from year to year to be taken (legally) into exams. Good marks on these exams are highly dependent upon being able rapidly to identify a series of inter-related and specific problems (known as "spotting the issues") and to organize arguments in a manner the teacher finds acceptable. Spotting the issues is not really all that hard; the real enemies are teacher expectations and time. Teacher expectations are far more rigid than in any other discipline I have ever had the pleasure to deal with. In the name of clarity and "tight legal reasoning", one is often expected to quote exactly from class notes, legal cases and statutes. If ever you have a student who wants to know "will this be on the exam" and who gives you back the very words you poured out in class, send her/him to law school. S/he will excell!

Pressure is purposely added to this tense situation by allowing too little time in exams for anything other than reflex reactions to questions. The typical law exam is three or more hours long and covers ground that easily could keep a thoughtful student busy for a week. In one of my courses, the final exam consisted of three problems laid out as fact situations which covered nine single-spaced pages. One of the best moments of black humor in my entire educational career occurred during my second year of law when one of my fellow students complained to a professor that an exam had been too long for the time allotted. His answer: exams have to be that long or everyone woud get an A! This does not say much for his opinion of the quality of the substantive law he was supposedly purveying.

I hope I have made the point that law school is not an environment that encourages—even less, creates—reflective, critical or independent thought. It is not meant to be. The process, rather aims at what is called professional formation by which is meant the ability to do a quick study of available "law"; to spout it out in an almost ritualistic format easily recognized by all others similarly trained; and otherwise to think, talk and act like other lawyers. I had not expected this from a professional training I had always assumed to be exacting and intellectually challenging. We are all, to some extent, under the delusion that law is, indeed, a learned profession. I am not the only one who questions that assessment—so does Harry Arthurs.

The Report has little good to say of legal education in this country. Any concessions it does make stem from an acknowledgement that law must cater to the demands of the profession as well as to academic aims. The damning thing is that the profession is, has been, and probably ever shall be, unsatisfied with what is taught in law school.[7] I am not sure what the profession wants—neither is the Consultative Group, owing to the profession's failure to take any part in the debate—and I am not sure it should get it even if it can articulate it. At

the Law and Learning Conference, R.H. McKerchar, President of the Canadian Bar Association, rose to tell us an ancedote which was meant to convey his outrage at the failure of law schools. One of his articling students came to ask for some guidance on how to go about handling some aspect of family law. Mr. McKerchar was violently indignant that the young man had not been compelled to take that particular course at law school. But surely the student had learned basic legal reasoning and could think. Just send him to the library! The profession keeps on going on about being one in which one's education never stops. I think it must take responsibility for the more specialized aspects of professional training. Law school is rather a place for teaching people how to be suspicious of facile answers, to attack superficial arguments critically and, at least, to go to the library yourself before asking stupid questions of the senior partner.

Even if one does not accept that the "teaching" of specific professional "skills" should play only a minor part in law school curricula (I am certainly more emphatic on this than is the Report), one must accept the profession's assertion that they are not now being taught successfully. Is this training sacrificed at the altar of academic reflection? I think it is already obvious that my answer is no. Again, my criticisms are much more acerbic than are Arthurs' but our conclusions are the same.

Most law teachers concentrate on extracting legal doctrine through what they flatter themselves is the "Socratic method". The more apt analogy is not to the Greek philosopher who spent his hours on the town green trying to teach idle Athenian youths to reason inductively, but to a priest coaching a would-be communicant in the catechism. The proper answer to the question "why was this case decided in this manner" is always something like "not all statements made at the time of the contract are contractual terms". Responses such as "there was a rubber glut in 1913"[8] go unappreciated and unexplored. They will also cause one to fail law school if one spends too much time thinking about them. In my first year class only two students failed: one had already completed an M.A. in history, the other had caused some disappointment in the history department when he opted for an LL.B. rather than accept funding to do an M.A. Neither man was lazy or stupid—they just failed to get the knack of the new game.

And there is a legitimate game going on here—one well worth learning. Law has to do with the ordering of societal priorities. It has a language and reasoning process all its own. It must be remembered that law is often the final recourse in a dispute. Cases only come to court (ideally) after all other forms of negotiation have broken down. This is the ultimate point—the point at which *some* decision must be

made. That decision must be made according to a regular and foreseeable system. My argument, and that of the Report, is that teaching and learning of this system can only gain from integration with knowledge of the society in which it functions. Realization of this dawned in the 1960s when the so-called eclectic curriculum was introduced into Canadian law schools. This featured courses with titles such as "Law and Society" and "Law and Economics". These have largely been unsuccessful. Students stay away from them in droves and there is little wonder: frequently the bibliography is under-developed and the teachers taking the courses on are under-trained for the task. Besides, law students are in law school to learn law. What is needed is not "alternative" liberal arts courses but a transformation of how law is taught in the first place. During a coffee break at the Law and Learning conference, I had just this argument with Dr. A.J. McClean, former Dean of Law at U.B.C. and new editor of the *Canadian Bar Review*. He said there was no room to teach anything more at law school, that courses could not cover everything in the area as it was. I was trying to get across that I was not suggesting that the Feudal System be taught in addition to the Rule against Perpetuities but that the Rule be taught in the context of the System. This would not cost students and teachers time, it would actually save time. He could not see my point. We parted and he likely has no memory of the episode.

I am reminded of Sir Peter Medawar's statement on the problem of popular pseudo-science. He lamented the appeal facile approaches to problems have to unevenly educated people. "The spread of secondary and latterly tertiary education has created a large population of people, often with well-developed literary and scholarly tastes, who have been educated far beyond their capacity to undertake analytical thought."[9] We have the reverse problem here—very bright people highly trained in analysis but with very little taste for or knowledge of literature and scholarship at all.

Precisely the same problem pertains to the second topic examined by the Arthurs Report. If anything, the Report is more pessimistic regarding legal research than it is about education. It comes to the reluctant conclusion "that law in Canada is made, administered and evaluated in what often amounts to a scientific vacuum".[10] Lest the profession say "who cares, we're pragmatists; all your fancy theories are of no practical use to us anyway in getting through our daily toil", the Report warns: "A profession that lacks a scientific base cannot properly serve either its clientele or an increasingly complex society, cannot maintain a credible claim to its privileges and powers, cannot attract to itself the best minds or employ those minds to best effect."[11]

What is wrong with legal research in Canada, anyway? A largely unappreciated remark made during a session of the Law and Learning Conference by Dr. DeLloyd Guth, visiting professor in legal history at U.B.C., summed the problem up neatly, if not entirely politically. Legal research, he said, is not so much research as it is search. The Arthurs Report overwhelmingly backs this up. The main research source—almost the only research source—used by legal academics in this country is the law library.[12] It would not seem that this practice is followed due to a wilful eschewing of other sources but to a real ignorance of how one pursues one's prey to its lair. I can do no better than offer the following rather lengthy quote from the chapter "Inventory and Analysis of Legal Research".

> Ninety per cent of the research by law professors involved doctrinal analysis. Second in frequency of use was the historical methodology, used by 56 per cent in their primary research area. Yet it seems that "history" must have a special meaning for legal researchers, since only 4 per cent listed Canadian legal history as a first, second or third area of their research, and only 1 per cent listed other legal history this way. Respondents seem to have interpreted historical methodology more broadly than was the intention of the definition offered in the questionnaire itself, perhaps to include conventional legislative analysis and the evolution of particular legal rules. Another indication of the same problem is the fact that only 14 per cent of respondents conducted over 10 per cent of their library-based research using the general university library. The vast majority use the law library or their personal library. Moreover, unpublished, non-legal documentation was seldom consulted by our respondents. All this suggests that reports of reliance upon historical methodology probably refers to strictly legal sources and developments, relatively unrelated to social, economic and political history.[13]

Similar misunderstandings are held about other types of interdisciplinary research.

This brings us to the question of why legal research should be so inadequate. Arthurs posits some reasons that I think simply do not hold up. One is lack of time. The Report calls for more release time so professors can devote time to research and writing. There is some idea that law professors carry heavier teaching loads. As evidence we are offered the statistic that in 1979-80, the student/teacher ratio across all disciplines in Canada was 16.7 students per full-time professor. In law it was 19.4 per full-time professor.[14] This may be true, but much more teaching in law school is done by part-time teachers than in most other faculties. I have personal knowledge of only one law faculty, the University of Calgary, but there six hours of classroom time a week is the heaviest load any full-time professor seems to carry. Neither are the classes huge, requiring much more marking time. Due to the small size

of the school, it is virtually impossible for a class to be more than sixty and, except in first year, few number as many as thirty. Besides, law school traditionally has few assignments and many students still opt for 100 per cent finals. Even given the argument that it may be more important for law professors to keep current than it is for most professors, I just cannot see that time is the problem here.

Another reason given is money. At first glance, this seems surprising given the fact that the Report was set up to ascertain just why there were not more requests for funds from law. But the problem is not that there is not money available for legal research, it is that there is more money available for not doing legal research. The first attraction is practice. Recent statistics for 1981 show that the average salary for partners in Canadian law firms with forty or more partners is $133,812. The average salary for law professors in Ontario in 1982-83 is $47,776 for those ten to fourteen years from their first law degree and $62,282 for those twenty or more years from the LL.B.[15] That means that if one had chosen practice rather than teaching—a likely choice to be presented with as most law professors did very well at school—one would be earning double. Many, many answer the siren call. Canadian law professors tend to be young—as they mature they move on. Students are robbed of seasoned teachers and academe of seasoned scholars.

Even should a legal academic decide to remain at the university, there is more profit in research other than academic. There are memoranda to be written for law firms in the city—a well-paid sideline—and government reports to be churned out—not only well-paid but prestigious. It is all very well for academics with less marketable skills to sneer at such venality but how many of us would be prepared to make what legal historian Robert Gordon terms " 'a reverse Faustian bargain': give back the world, regain one's soul"?[16]

Still, I submit the root cause of inadequate legal research lies within legal education. The type of student whose innate curiosity verrides the desire for prestige (in terms of the real power, respect and money that legal practice can offer) does not find much encouragement in law school. In fact, such persons sometimes do not make it through to graduation, be it due to basic ennui or an inability to look at law through a microscope. Should an intellectually-inclined student get through, do well and have enjoyed the process enough to want to hang around law schools for her/his professional life, s/he will find her/himself with pitifully few research skills (the Report repeatedly emphasizes that the LL.M. is really little more than a "fourth year" at the LL.B. level) and in a milieu where there are few more experienced colleagues from whom to learn. The prospects of advancement of

research from within the system as currently constituted are disheartening.

This brings us to the Report's most controversial recommendation[17]—a scholarly stream through law school. In reading the Report, one gets the idea that the Group is not really behind this. In talking to one member of the Group, I discovered that this proposal was pretty much Harry Arthurs' own baby and, in writing the final draft, he probably felt he had to hedge. In some ways, it seems the perfect solution. The profession which, if anything, is pushing to have admissions to law schools reduced in number, could be mollified by assurances that students entering the academic stream would not enter supposedly overcrowded practice. There would be no reason to upset the old "substantive" courses nor the teachers thereof. There would be no pressure on students hell-bound for practice to waste their time on theory. "Academic" students need not sully their minds with the vulgar practicalities of downtown law. The result would be a fragmentation of law that would be far from satisfactory. I do, though, see one real advantage to the academic stream: over the short-term, it could produce a new breed of law professor. If there is no guarantee that these would be better teachers (I personally think it hasty to take on the teaching of law without some experience in practice), at least they would hopefully be different. Perhaps some sort of chemical change might occur from mixing "academic" and "professional" professors in the same pot. I also see one overwhelming disadvantage to the academic stream: I cannot, for the life of me, figure out who is going to teach it.

I do not like the idea of dichotomization of law because I think it tries to skirt the real problems by introducing an organizational solution. Western education has become fragmented enough already, let us not chop it into any more pieces than necessary. I favor more the idea of joint-degree programs allowing students to combine liberal graduate with legal undergraduate degrees. I would also favor some sort of post-doctoral law degree, much like the post-doctoral M.B.A. program sponsored by the SSHRC. Ideally, people with advanced credentials should be allowed to pass courses by writing challenge exams. Were this instituted, any committed Ph.D. in a hurry could get through in significantly less than the three years now required. Challenges or some sort of curtailed program might also solve a problem Arthurs himself poignantly pondered at the session on "The Prospects for an Academic Stream in LL.B." at the Law and Learning Conference. He remarked at the number of Ph.D.s and M.A.s he had known who came to law school because they wanted to teach law but who eventually articled and were lost to academe. From personal exper-

ience, I would guess that it was the environment of the law schools themselves that made them move on. The herd instinct so carefully cultivated among law students follows them when they take up positions on the other side of the podium. Anyone who wants to change the direction will have tough going.

Perhaps the publication of the Arthurs Report has changed the direction somewhat already: it has certainly sparked discussion among legal academics. It is now a question of how much can be done given the influence of the practicing bar upon legal education and given the tender feelings of legal academics. The Report is a pretty bitter pill to swallow. How well would other disciplines stand up to such a grilling? Many of the reactions to the report have been very personal in nature. It reminds me of the second edition copy of Hilda Neatby's *So Little for the Mind*[18] I picked up once in the university library. Across her preface—meant to mollify feelings hurt by the first edition—was scrawled, no doubt by some offended teacher, "THIS BOOK IS FULL OF SHIT". I am afraid some reactions to the Arthurs Report are at about this level of sophistication.

So, why should other academics care about this? First, I think good students should be encouraged to approach law but they should be warned that much of the material is pedestrian and some of it frankly silly. If they can hold on to their sense of perspective, not to mention humor, they can gain much satisfaction from the marriage of a good liberal education to a professional point of view. Secondly, I think scholars who are so inclined can contribute much to legal research. There has to be some cross-pollenization here, though. Before entering law school, I researched and wrote mostly in the field of medical history. Anything legal I ever did came in through that door. I am now moving into legal history but it bears no resemblance to anything I might have produced had first year of law school not occurred in the meantime. The kinds of questions I now ask are frankly legal. I use much the same research methods as I always have—after all, what is precedent if not history—but things get hung on different hooks. I urge other scholars to acquire these hooks and to involve themselves in the production of what the Report dubs "fundamental research on law".[19]

Remember that law isn't hard, even though there's so damned much of it. Read the Report, use it to help guide your own work, initiate inter-disciplinary contact. Come and join Harry Arthurs upon the stair. There is much to be done and once it has been done, it cannot be ignored.[9]

NOTES

1. Brian Lee, "The Man who wasn't there" in *A First Poetry Book*, compiled by John Foster (Oxford: Oxford University Press, 1979), p. 113.
2. T.H.B. Symons, *To Know Ourselves. The Report of the Commission on Canadian Studies*, vol. 1 (Ottawa: Association of Universities and Colleges of Canada, 1975), p. 217.
3. "Increase liberal studies and research to improve law school program, says report", *University Affairs/Affaires Universitaires* (October 1983), p. 18. Arthurs is herein described as "chairman of Osgoode Hall Law School at New York University".
4. *Law and Learning. Report to the Social Sciences and Humanities Research Council of Canada/Le droit et le savoir. Rapport au Conseil de recherches en sciences du Canada.* Consultative Group on Research and Education in Law/Groupe consultatif sur la recherche et les études en droit (Ottawa: SSHRCC, April 1983), p. 5-6.
5. Dolores J. Blonde, *Canadian Community Journal* 6 (1983) 135-9; Maxwell Cohen, *Canadian Bar Review* 61 (1983) 702-13; David L. Johnston, *McGill Law Journal* 28 (1983) 1034-6; John S. McKennirey, *Osgoode Hall Law Journal* 21 (1983) 561-7; Philip Slayton, *University of Toronto Law Journal* 33 (1983) 348-56; Gene Anne Smith, *Saskatchewan Law Review* 48 (1983-84) 171-80; Leon E. Trakman, *Osgoode Hall Law Journal* 21 (1983) 554-60.
6. Although it did publish two brief assessments of the Report itself [Alrick Huebener, "Legal research improving but is still unsatisfactory" and Carmel Dumas, "Formation en droit insuffisante", *National* 10 (October 1983) 17], devote a column to the agenda and purposes of the upcoming conference ["Report laments 'backwardness' of legal research", *National* 10 (October 1983) 17] and mention a symposium held in Halifax to prepare Nova Scotia's tactics at the Ottawa conference ["Law and Learning are focus of symposium", *National* 10 (December 1983) 23].
7. *Law and Learning*, p. 49.
8. The case referred to in this example is *Heilbut, Symons & Co. v. Buckleton* [1913] AC 30 (HL) in which the appellants were trying to use a legal technicality to get out of a deal to purchase shares in a rubber plantation.
9. Quoted by Stuart Piggott, "On the wrong track", *Times Literary Supplement* (13 January 1984) 31.
10. *Law and Learning*, p. 70.
11. Ibid., p. 137-8.
12. See chart in ibid., p. 76.
13. Ibid., p. 77.
14. Ibid., p. 29, 31.
15. Slayton, *supra*, note 5, p. 353.
16. Quoted in *Law and Learning*, p. 98.
17. See Daniel J. Arbess, "Legal education cannot ignore theory", *National* 11 (April 1984) 9.
18. (Toronto: Clarke, Irwin & Co., 1953).
19. *Law and Learning, passim.*
20. I would like to thank Prof. J.P.S. McLaren, former Dean of Law at Calgary, for funding a lowly undergraduate's attendance at the Law and Learning Conference and Constance D. Hunt, Executive Director of the Canadian Institute of Resources Law and member of the Consultative Group on Research and Education in Law for discussing the Report with me.

III

David Fraser: Harry Arthurs And The Temple of Doom — A Comment*

To live outside the law you must be honest.

—*Bob Dylan*

There is turmoil in the temple. The priesthood is troubled. The tablets have been brought down from the Mount. The theses have been nailed to the door. The Arthurs Report echoes through the hallowed halls of the legal academy.

What's all this commotion about anyway? The Arthurs Report, at the bottom line, simply points out what we have known all along—legal scholarship bears little, if any, resemblance to scholarship in other parts of the university. But why all the fuss? The Law, after all, *is* different. It has its own rules, its own professional structure. It is an empowered discipline. Contemplation of the fundamental conflict of Heidegger's ontology reaches critical importance only in departments of philosophy. Heidegger hardly determines who gets the children in a custody battle. For real problems, we have the Law. The Law is powerful because it is practical, real. Why should legal scholarship and legal education resemble other scholarship and education? Why should we worry about Harry Arthurs?

We should worry about Harry Arthurs precisely because the Law *is*, at one level, different. It is uniquely situated not above the fray of academic concern but at the real heart of the search for truth. It deals with reality but remains unwilling to face it squarely. The empowerment of Law and lawyers, combined necessarily with blatant professionalism, these are reasons why we should all be worried. We should be worried because Harry Arthurs wants to save the Law, to revise it, to breathe into legal scholarship the new life of inter-disciplinary studies. We should worry because the Arthurs Report forbodes not the death of Law but its continuing hegemony.

Public declarations on the inadequacy of the traditional methods of legal scholarship, heavily based as it is on the intense and boring study of judicial decisions, are hardly new. The Legal Realists pointed out with exquisite detail the irrationality of the Law as found in the cases. Unfortunately, Realism lead simply to Legal Process and vague state-

ments about combining "policy analysis", dependent upon the comparative institutional competence of courts and legislatures, with cases to understand the Law. While Realism justified skepticism about judicial law-making, its successors saved Law from public scorn under the mask of more sophisticated and complex forms of analysis.

Canadian legal academics are concerned about the content and recommendations of the Arthurs' Report because it embodies the public acknowledgement by the priestly hierarchy that the faith has finally been lost. The dirty little secret is out of the closet. As long as legal academics continued publicly to profess a fervent belief in the sanctity of the Law, with its discrete position in the academy, the comparative poverty of legal scholarship was not only justified, it was necessary. Now, the bishop has been defrocked, or rather, he has disrobed in public. The Arthurs' Report is a clear avowal that the holy doctrine is unsatisfactory, that legal scholarship is incomplete and is poorer for it. Believers may begin to lose faith and with that loss of faith comes the loss of prayer. Everything is on the line.

But Harry Arthurs is not an atheistic denouncer—he is a Protestant reformer. He seeks to restore the Law to its former status through discovery of the true path. The path by which legal academics may be redeemed is, it would appear, an increased emphasis on inter-disciplinary work. Arthurs is right of course. The law is different because, as political reality, it is more enpowered than other fields of academic endeavour. It is not different, however, because it deals with issues which are "legal". Law is politics.[2] It is as simple as that. If the Law is not fundamentally and essentially distinct, it can only benefit from a deeper understanding of society. This understanding can be achieved, partially at least, by inter-disciplinary work.

Alas, like all those who before him have sought to save the Law, Harry Arthurs vision is really little more than a half-baked attempt to preserve and sanctify a privileged few. Inter-disciplinary study in law school becomes nothing more than a series of "law and" courses—law and economics, law and literature, law and sociology, the list is endless. The evident grammatical superiority of Law in these course formulations is indicative of the inherent fallacy of inter-disciplinary studies in the liberal law school. "Law and"—each discipline is secondary, subservient, hierarchically inferior. The question which each course asks "What can the Law learn from X?" demonstrates clearly the retained superiority, even, in the final analysis, the independence of the Law as an academic discipline.

The second fallacy of the inter-disciplinary study for lawyers is that it is used in the Arthurs Report to instill a sense of scientific certainty. This sense of certainty is perhaps more accurately described as "scien-

tism". Having recognized that the Law, as traditionally viewed in Canadian law schools, can not provide the *right* answer by itself, we must now seek truth in economics, literature, sociology, etc. Interdisciplinary study becomes the Creation Science of the Law. The Report fails to realize that these fields are, of course, as political, as subjective, as prone to ideology, indeed as "unscientific" as the Law. Practioners of literary criticism, to take but one example, have long recognized the role of the reader[3] and her subjective input into the meaning of texts. The objectivity of interpretation and meaning is a distant theoretical memory. Lawyers, at least those involved in promulgating the blissfully ignorant view of the Arthurs' Report, are prone to idealize about other areas of study. Perhaps more interdisciplinary analysis by the authors of the Report would have avoided this pitfall.

In essence, what the Arthurs Report does not recognize is that the Law, or at least the methodology and thought-processes of the Law, are situationally unique: inductive reasoning, the heavy use of analogy, "spotting the issues", pro/con argument. But as a methodology, its principle function is to mask and mystify. "Learning to think like a lawyer" now consumes, in its varied, more or less subtle, forms, virtually all of the three-year curriculum. In reality, this skills-training is like teaching a dog to roll over. All that is required is repetition and practice for a few months and we can move on to the next trick. However, once we recognize the technical nature of most of what now constitutes legal education and reduce the time we must give to it, we must find something new, yet relevant, to fill the remaining time. Thus, as Harry Arthurs suggests, we must grant more time to "law and". Our students will become legal historians, legal philosophers and legal economists. Here, at last, the hegemony of Law becomes real. It is more than the cocktail party terminology of C.L.S. types who spend their time reading fancy dead European theorists instead of reading cases. Once exposed to Law and thinking like a lawyer, those trained in any of these other disciplines are irrevocably warped. They view history not as historians but as lawyers. The ideological perspective of their inquiry will, forever more, be that of the Law.

Worse yet, when they graduate these people will still become legal lawyers. Here we see the greatest failure of the Arthurs' Reformation. The proposal for "streaming"—an academic stream and a professional stream in law schools—seeks to ignore reality while appearing to confront it. The Report simply fails to recognize the fundamental reality of the law school's function in society. The law school now exists as a training ground for the hierarchized existence of the legal profession.[4] Its curriculum, structure and final result, the graduate, all

work to continue the role of the professional bar as a secret, powerful clergy. In practice, the law school serves as a seminary for those about to enter this priesthood. The mystical incantations with which we imbue our students as part of learning to think like lawyers serve to preserve the sanctity of the Temple and, consequently, the limited access to the secrets of the Law. The untranslatable language is revealed to a few select guardians of the collected wisdom of the ages. They go forth to spread the Word, mystifying the citizen, maintaining respect and with the mystery, the power. To create an enclave of academic lawyers is to create an ineffective colony of the unreal, those who would deny practice, the fundamental source of power for the Law. It is not surprising, then, that the "streaming" proposal is most discussed and most easily dismissed. Arthurs' vision of Law without power is no vision of Law at all.

What is to be done? Those who seek to preserve and protect the status and function of Law will learn from the Arthurs' Report; the legal academy will undergo cosmetic, inter-disciplinary change. The fundamental contradiction of Law as science will be ignored in the spirit of professional self-preservation. Arthurs' heresy will, with the passage of time, become accepted dogma.

There are, however, more radical suggestions about the future of the law school. Duncan Kennedy, the chief C.L.S. scholar to address the issue of legal education, puts forward an admittedly utopian proposal.[5] Kennedy's vision is one of the law school as a "counter-hegemonic enclave" where the law/politics dichotomy would be broken down and students exposed to reality. Upon graduation, they would venture forth, mystical incantation and three-piece suit in hand, but now politically correct, to subvert the system from within.[6] Kennedy's proposal is indeed utopian. It ignores reality and even possibility. The Law, like all ideologies of empowerment, attracts those who already have power and who seek to preserve or extend it. The few "radical lawyers" who escape law school with their politics intact face impoverishment, struggle and little hope for success in the real world. While those of us who share the political/legal values of Critical Legal Studies must continue to offer as much encouragement to those students who seek to use the Law's power for progressive ends as we can, we can not hold out too much hope for the successful implementation of Kennedy' s proposal.

The only practical alternative, then, is for those few of us in the legal elite who remain "anti-law" to engage in fundamental research. Yes, we must take the Arthurs' Report seriously, but we must take it to its logical, heretical, extreme. Our inter-disciplinary studies[7] must be used to take the fundamental bases of the Arthurs' Report and open them

up for political analysis. The goal of legal research must be deconstruction of the Temple—what Schlegel calls "the dejustification of legal rules".[8] In fact, we should take a further step. Fred Rodell, writing in 1939, has given us a more practical and ultimately more important programme:

> What is to be done about the fact that we are all slaves to the hocus-pocus of the Law—and to those who practice the hocus-pocus, the lawyers?
> There is only one answer. The answer is to get rid of the lawyers and throw the Law with a Capital L out of our system of laws. It is to do away entirely with both the magicians and their magic. . . .[9]

NOTES

* This comment is dedicated to the memory of Fred Rodell, who figured it all out.

1. Roberto Unger's description of his feelings about the world's leading legal academics as he entered the Harvard Law School is appropriate. "When we came, they were like a priesthood that had lost faith and kept their jobs. They stood in tedious embarassment before cold altars." *The Critical Legal Studies Movement* 96 Harvard Law Review 561 (1983), 675.
2. This is the vital insight and *cri de coeur* of the Conference on Critical Legal Studies. Founded in 1977, C.L.S. attempts to offer a progressive theory of law based on an analysis of the fundamental flaws of liberal theory in general and liberal legal theory in particular. *See Critical Legal Studies Symposium* 36 Stanford Law Review (1984).
3. *See e.g.*, U. Eco, *The Role of the Reader* (1979), and S. Fish, *Is There a Text in This Class?* (1980).
4. *See* D. Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (1983), and M.S. Larson, *The Rise of Professionalism: A sociological Analysis* (1977). Professionalization is both "the process by which producers of special services sought to constitute and control a market for their expertise" and "a collective assertion of special social status" *id.* at xvi. On the applicability of Larson's analysis to the modern legal profession *see* R. Abel, *The Rise of Professionalism* 6 British Journal of Law and Society 82 (1979). *But cf.* A. Fraser, *Legal Amnesia: Modernism Versus the Republican Tradition in American Legal Thought* 60 Telos 15 (1984).
5. D. Kennedy, *Utopian Proposal or Law School as A Counter-Hegemonic Enclave* (April 1, 1980), (unpublished).
6. D. Kennedy, *Rebels from Principle: Changing the Corporate Law Firm from Within*, 33 Harvard Law Bulletin 36 (Fall, 1981).
7. For a personalized example of this mode of scholarship, see D. Fraser, *Truth and Hierarchy: Will the Circle Be Unbroken?*, Buffalo Law Review (1984) (forthcoming).
8. John Henry Schlegel, *Notes Toward an Intimate, Opinionated and Affectionate History on the Conference on Critical Legal Studies* 36 Stanford Law Review, 391, 407 (1984).
9. Fred Rodell, *Woe Unto You, Lawyers!* (1939), (2d ed. 1980), 163.