

Without Harry

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Introduction

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WITHOUT HARRY[©]

ALLAN C. HUTCHINSON*

He is not any Tom, Dick, or Harry. He is “HWA,” “King Arthur,” or “The Harry.” And he is not only a legend in his own mind or office. He is someone who has become so identified with Canadian law, legal scholarship, and legal education that it is difficult to talk about their development and trajectory over almost the past half century without grappling with his legacy. He has left his mark on the Canadian academic scene in a way that few others have or could ever hope to do. This is nowhere more apparent than in his moulding of Osgoode Hall Law School (“Osgoode”) and York University. Both institutions owe much of their reputation and prestige to his guiding energy. But his influence stretches much further afield. He is an intellectual colossus whose influence and vision have enriched the whole of Canadian law and learning; his name has become synonymous with an uncompromising combination of erudition, imagination, rigour, and dedication. It is to be hoped that his distinctive work and engaging wisdom will continue for many years to come.

This symposium on the occasion of Harry Arthurs’ retirement is a small gesture of respect and recognition for his unparalleled contribution to Canadian law and letters. Indeed, as impressive as it is, a sketch of the basic landmarks in his career fails to capture the true measure of his worth. After completing his graduate work at Harvard University, Harry joined Osgoode’s faculty in 1961. He went on to become Dean of the law school and, in 1985, was appointed President of York University. Widely known and honoured for his academic achievements by the Royal Society of Canada and by the British Academy, he was awarded the Killam Prize in the Social Sciences in 2002 and the first Bora Laskin Prize for contributions to Labour Law in 2003. He is a member of the Order of Canada and has received eight honorary degrees for his outstanding work in education and law. His scholarship has considered labour law, legal education, administrative

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law, law and globalization, legal ethics, and governance of the legal profession. It is a truly enviable record that speaks for itself in terms of his stature and standing in the academic community.

This symposium is a mere sampling of the range and depth of his scholarship, leadership, and overall influence. So wide-ranging and encompassing is his work that the difficulty was more in what to include than what to leave out.¹ The objective is to celebrate Harry's scholarship and achievements; it is not intended to be a retrospective appraisal of Harry's work and ideas. Rather, the ambition is to pick up on some of the themes and challenges in his writings—legal pluralism, law-and-society, progressive education, administrative law, legal history, legal profession, labour relations, and globalization—and to plumb the contemporary resonance of those interventions. True to his own scholarly temper, it was thought that the best celebration of Harry's career would be to use his body of work to launch a more future-oriented exploration of related directions and initiatives in law and education. In short, it is less about dwelling on the past and particulars of Harry's work and more about using those achievements to pursue related ideas and provocations in others' work. A host of celebrated speakers and commentators immediately and enthusiastically accepted an invitation to take part. This volume contains the wonderful and stimulating essays that were presented at the symposium.

The true measure of Harry's worth is to be found less in the formal landmarks of his stellar career and more in the tone and sensibility that he set. He has been an inspirational force and example to all those scholars who have sought to hold legal education and scholarship up to a more challenging and rigorous vision of themselves. In this sense, while certainly no jock himself, Harry is an Olympian scholar who has egged-on and chivvied his colleagues to run faster, jump higher, and, in the process, become stronger—*citius, altius, fortius*. Like the founder of the modern Olympic movement, Pierre de Coubertin, Harry's spirit has, typically, found its most memorable vocation in urging others to perform to the best of their critical ability: "the most important

¹ See Harry Arthurs' Curriculum Vitae, (2006) Osgoode Hall L.J. i.

thing ... is not the triumph but the struggle ... [and the] essential thing is not to have conquered but to have fought well.”² Like many others, I have been a grateful beneficiary of that demanding encouragement; my work has prospered enormously from his good-natured chastisement and unrelenting motivation. While it is doubtful that I have lived up to the highest ideals that Harry demands of himself and others, I have become a better scholar by dint and courtesy of Harry’s extraordinary efforts and exacting standards. He is the best of taskmasters and the warmest of critics.

Harry and I first met in 1977 in London. Whereas I was a callow graduate student and insufferably cocky individual, he was a seasoned and sophisticated campaigner in the academic trenches. The venue was a large office at the Institute of Advanced Legal Studies in Russell Square, and the occasion was an exploratory interview about a junior position at Osgoode. I was interested in going over to Canada to escape the stuffy confines of the contemporary English academic scene and to advance my academic career. With the self-assurance of youth and ignorance, confident that Canada would surely be delighted to benefit from my newly-coined law degrees and barrister’s qualification, I asked this imposing character what my qualifications might get me in Canada. Harry’s response was sharp and to the point—“a cup of coffee?” Looking back, this seems to be about right and entirely deserved for one with my unreconstructed colonial mentality. At the time it was one of the deflationary experiences of my fledgling career. Yet it began a relationship which has now, as boy and man, stretched to almost thirty years. What began in conceit and intimidation, however, has now moved on to respect and affection on both sides. Of course, I still occasionally stand slightly in awe of Harry’s huge intellect, critical intelligence and enormous capacity for scholarly enterprise. But, for the most part, I am now able both to buy Harry cups of coffee and go toe-to-toe with him on the scholarly issues of the day.

So, in this short introductory essay to the symposium, I intend to chance my friendship with Harry and to switch the roles of our first meeting. I want to interview Harry (or, more accurately his work) and ask some challenging questions about its overall stance and perspective. As a legal theorist, I will concentrate on the deep jurisprudential

² Olympic Creed, online: The Olympic Movement <<http://www.olympics.org.uk/olympicmovement/olympicmovement.asp>>.

commitments that seem to animate his scholarship. In doing so, my goal is not to unravel or invalidate his work, but to take it seriously and signally as a major source of insight into the Canadian legal mind-set and prevailing intellectual milieu. In the spirit of HWA himself, I wish to push and prod him a bit in a brief exercise of the kind of scholarship which he has cultivated and nurtured throughout his illustrious career. It is intended to be less of a damp squib at the party and more of a live firework at the celebration. In a congratulatory volume such as this, he would accept and, hopefully, expect nothing less of me.

There are many Harrys. After all, he is a self-proclaimed pluralist. Or at least he is some of the time. Stretching across the vast expanse of his considerable scholarly oeuvre, there are a number of different and underlying motifs. While Harry is not always explicit in his jurisprudential attachments, it is possible to identify two major and, I suggest, conflicting themes in his scholarly studies. On the one hand, he is an unapologetic critic of centralism and offers a pluralist-inspired demolition of its intellectual pretensions; this is most apparent in his highly-regarded *Without The Law*.³ On the other hand, however, he has also taken a less-than-pluralist stance in his efforts to transform the enterprise of legal education and research; this is most fully showcased in the celebrated *Law and Learning Report*.⁴ I maintain that these battling approaches not only generate a productive critical tension in Harry's work, but also potentially undercut its ultimate cogency and appeal. Accordingly, I want to show that, although Harry is a pluralist some of the time, he is distinctly un-pluralist the rest of the time. When it comes to his descriptive scholarship, he is a pluralist; but when it comes to the normative or prescriptive strain of his scholarship and administrative activity, he is most definitely not—and *this is no bad thing*.

As a pluralist scholar, he rejects the formalist mindset that dominates, even if less so and in more sophisticated modes, legal

³ H.W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985).

⁴ The Consultative Group on Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: Minister of Supply and Services, 1983) [*Law and Learning*].

academe. Despite cries that “we are all realists now,”⁵ HWA knows that this is mere facade. His best work, especially *Without The Law*, is devoted to playing out that pluralist critique. It is a dismissal of legal centralism as both a valid historical phenomenon and as a universal world view. In *Without The Law*, Harry offers an extended historical critique of the formalist approach that is dominant to both lawyering and legal theory, with especial reference to administrative law and its nineteenth-century development. Moving stylishly between general theory and detailed practice, he skewers the centralist tendencies to both designate as law only those formal edicts that emanate from the state and to understand law as being “a thing apart from society, politics, or economics.”⁶ In particular, Harry is skeptical about the distinct and self-serving identification of law with, among other things, “authority, justice, rationality.”⁷ Indeed, for HWA, it is particularly depressing that, not only do lawyers see law as a set of formalized rules and intellectual habits, but that “life should imitate art, that the centralist paradigm should be enshrined in the rules of positive law, that pluralism should be suppressed ... [and that there is] this subordination of life to law.”⁸

The power and insight of Harry’s critique, however, is to be found in the way he painstakingly strips away these formalist pretensions to demonstrate how law in the nineteenth century (and he argues largely up to the present day) operated as an ideology and as “a means of advancing and legitimating political positions and of mystifying and concealing the very existence of those positions.”⁹ In contrast to this impoverished and deceptive centralist way of thinking, Harry juxtaposes an historical and jurisprudential account of law that is much more pluralist in scope and substance. The prime attribute of this pluralist account is that the legal process is largely informal and bottom-up in its growth and legitimacy. The law is more functional than positivist (in other words, it seeks to meet certain social purposes rather than operate as a closed system), more organic than static (it is a living activity more than a fixed thing, one that responds to and impacts upon its informing

⁵ *Supra* note 3 at 1.

⁶ *Ibid.* at 11.

⁷ *Ibid.* at 4.

⁸ *Ibid.* at 7.

⁹ *Ibid.*

milieu), and more diffuse than central (it is generated at many different sites rather than emanating from one official source). All this, of course, takes place within the push-and-pull of vibrant political, economic and social forces. For Harry—at least the Harry of the *Without The Law* mentality—the legal enterprise is less about deliberate design and more about contingent default; legal and administrative life goes on while lawyers and others are making plans.

Things look slightly different if we turn to Harry Arthurs' output as administrator and policy-wonk. This is where we meet the prescriptive HWA, the un-pluralist pluralist. Oddly for a professed pluralist of the *Without The Law* ilk, he has committed his life to the noble cause of “policy” and, particularly, the elaboration and implementation of educational reform.

Throughout his eminent and successful career as an academic administrator, he has evinced a staunch belief that we can diagnose prevailing situations, identify their failings, plan a new paradigm, and then move actively to implement it. This relatively top-down approach is best exemplified in his chairmanship of the Consultative Group on Research and Education in Law (“the Group”). The conclusion of the opening chapter to its *Law and Learning* Report sets up both the challenge for the Group and the tension between a centralist and pluralist mindset:

People are getting on with the practical tasks of educating law students, lawyers, and the public; people are striving pragmatically to improve the quality of practice, of the legal system, and of legal research. What strikes us, however, is the extent to which most of these efforts lack roots in systematic planning or theoretical preparatory studies, escape rigorous evaluation and exposure to informed, systematic criticism.¹⁰

Harry, as chair of the Group, however, is decidedly part of the centralist understanding that the organic and eclectic growth of legal studies is fundamentally lacking in systematic design and that the pluralist pattern of development must be, at a minimum, supplemented by a more centralist and rational model. For someone who believes that law is an organic, decentred, and ideological product, he retains an

¹⁰ *Supra* note 4 at 7. I am aware that *Without The Law* follows *Law and Learning* chronologically, but there is ample evidence that Harry did not disown or alter his approach in *Law and Learning* after 1985. Indeed, his work as University President, particularly in his ambitious “2020 Vision: The Future of York University” (1992), is a powerful and emphatic illustration of his guiding non-pluralist commitments and approach to administration.

impressive attachment to an almost centralist command-and-control account of development and change. There more than lingers a hefty reliance on instrumental rationality in the Report's proposal to move away from an "unstructured and eclectic law school curriculum" to a more rigorous and overarching schema for legal education and research, even if that is based upon "a plurality of educational strategies."¹¹ In the *Law and Learning* campaign for a genuine pluralism, there is clear and unvarnished support for the merits of a detached, reflective, and overarching reason. This seems a long way from the organic and decentralised growth acclaimed by *Without The Law* and its lack of sympathy for any approach which retains faith in the centralist creed that "law commands, people obey, and the course of future events is fixed."¹²

The preference of the Group was, ironically, to "replace eclecticism with a new structure—pluralism—which offers a genuine choice of identifiable alternatives."¹³ This shift to an "educational pluralism" is intended to be effected by a definite, coordinated, and almost centralized implementation of administrative structures and programmes. In promoting a new paradigm in a "Scholarly Discipline of Law," Harry touts the importance of a systematic and almost scientific approach:

while "science" in the [legal] context obviously has a different meaning than in, say, medicine or engineering, ... it is intended to connote 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.¹⁴

Yet this approach seems to smack of the very kind of "centralist" thinking that Harry took such clear aim at in *Without The Law* when he chastised the common law and its lawyers for "becoming self-consciously ... 'modern', 'rational', and 'scientific'."¹⁵

Perhaps a little too starkly, it can be asked if the real Harry Arthurs would step forward and throw some light on this apparent contradiction. Of course, Harry would be fully entitled to respond with

¹¹ *Ibid.* at 153, 155.

¹² *Supra*, note 3 at 2.

¹³ *Supra*, note 4 at 56.

¹⁴ *Ibid.* at 138.

¹⁵ *Supra*, note 3 at 8.

Whitman's riposte: "Do I contradict myself? Very well then I contradict myself, (I am large, I contain multitudes.)"¹⁶ A better and more satisfying response might be "look at what I do, not what I say." There can be no doubt that Harry has done so much on so many fronts. The fact that he might not have ploughed a consistent theoretical furrow seems almost beside the point (and my emphasis on it may well appear churlish at best). A few of those elements in the Arthurian canon of normative commitments include:

- *interdisciplined*: he has championed almost all work that seeks to place law in a broader and more encompassing context;
- *intolerance of sloppy thinking*: he has been courageous enough to give no quarter in his drive to make law into a serious scholarly and educational pursuit;
- *a more-than-liberal, less-than-radical support for democracy*: he has parlayed a Fabian sensibility into a workable and practical mandate for popular emancipation;
- *a resistance to concentrated power*: he has been uncompromising in his efforts to disempower remaining enclaves of judicial or corporate elites;
- *public service*: he has dedicated his life and career to advancing the "public interest" in its many diverse and demanding manifestations;
- *ethical integrity*: he has asked of the legal profession, and of himself, that the highest standards of professional responsibility be enhanced; and
- *a Canadian sensibility*: he has been first and last someone who has infused all he does with "true patriot love" for Canada and its own noble expectations.

In conclusion, it might be reported that Harry appears to be a "constrained pluralist" in that, while opposing centralism and homogeneity in a broad social sense, he does accept some of its merits and accompanying qualities in more isolated and discrete contexts (for example, universities). He remains more a disappointed centralist and an almost reluctant pluralist. HWA is a card-carrying pluralist when it comes to abandoning the formalistic pretensions of legal centralism. But, he is a much less enthusiastic pluralist when it involves resisting the

¹⁶ Walt Whitman, "Song of Myself" in *Leaves of Grass* (Philadelphia: Rees Welsh and Co., 1882) at 78, online: Whitman Archive <<http://www.whitmanarchive.org/works/leaves/1882/text/81soms.html>>.

lingering appeal of “rationality” and its related top-down attributes in administering smaller and more limited domains. His is a balancing act that demands, at the very least, subtle skills and deft judgment. Indeed, HWA can count himself among those late eighteenth- and early nineteenth-century pluralist administrators of stature and sensibility—William Hutton, Acton Ayrton, and Herbert Mackworth—whose achievements Harry so ably and devotedly chronicles. He is heir to their proud tradition, which, as well as making humane and decisive contributions to their chosen administrative areas, manages to negotiate a relatively safe, if precarious course between the dangerous shoals of an autocratic centralism and a debilitating pluralism. This is no small achievement.

The *Law and Learning* Report asked whether legal education and scholarship had progressed and how it might move forward in a more sophisticated fashion. If it has, then HWA has been a major reason for this: he has been its most formidable mentor and champion. However, we are not sure whether it has moved forward or what that progress would look like. This is, in so many ways, an even greater compliment to Harry’s contribution. He has through his critical example obliged Canadian (legal) education to come of age and to confront itself in continuing acts of responsibility and improvement. In these efforts, he has become the best of critics and catalysts. If you cut Harry, he bleeds Osgoode (and, to lesser extents, York and Canada). You need not agree with him, but you can never ignore him. He has and will continue to leave his mark, which, I believe, will only grow stronger over the years. Many of us, particularly those at Osgoode, work under his influence whether we know it or not. And, when we seek to reject that influence, we fulfill Harry’s legacy most. Many thanks, Harry—you can buy me that coffee any time.



