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John D. McCamus

Osgoode Hall Law School of York University, jmccamus@osgoode.yorku.ca

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Introduction

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After Arthurs: A Preface to the Symposium on Canadian Legal Scholarship

AFTER ARTHURS — A PREFACE TO THE SYMPOSIUM ON CANADIAN LEGAL SCHOLARSHIP

BY J.D. McCAMUS*

This symposium issue of the Journal is devoted to a discussion of the present state and future prospects of Canadian legal scholarship in a variety of areas of enquiry. It will be obvious that it is inspired, in part at least, by *Law and Learning*, the report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law (the Arthurs Report).¹ It is appropriate, therefore, that the symposium includes a call to arms from the Report's principal architect, President Harry Arthurs. With one exception, the remaining papers represent attempts by scholars from across the country to offer either an account or a critical assessment of the current state of Canadian legal scholarship in particular areas of enquiry, and to offer some guidance as to the kinds of work the contributors feel could be fruitfully undertaken in the future.

The one exception to this pattern is a contribution from the Editor-in-Chief in which he offers a skeptical view of the "humanistic pluralism" which is said to underlie the analysis of the Arthurs Report and urges that only a more radical transformation of Canadian legal scholarship will effect significant change. One suspects that this particular contribution will be welcomed by the authors of the Report as a refreshing change from the more common charges of undue iconoclasm and excessive reformist zeal.

Members of the Canadian legal academic community well know that the Arthurs Report has been considered a controversial document. It is surprising that this is so, for the major thrust of the Report, the encouragement of more theoretical and interdisciplinary scholarly work in law, is hardly controversial. And yet the Arthurs Report has provoked considerable debate at law schools across the country. Indeed, there are those — one suspects them to be a very small minority — who not only question both the diagnosis and the prescribed remedy offered in

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* Dean, Osgoode Hall Law School.

¹ (1983) (Chair: H.W. Arthurs).

the Report for the current ills of Canadian scholarship in law, but who see the Report as having a potentially pernicious influence.

Part of the explanation for this antagonistic response, I believe, is that the Report contains little or nothing in the way of a celebration of the achievements of Canadian legal scholarship. Indeed, the positive side of the story could have received more emphasis than it did in the Report. Given the relatively recent emergence of the legal academic profession in Canada, it is remarkable that as large and rich a body of literature as now exists has been created. As the Arthurs Report indicates, much of it fits within the mould of conventional or traditional scholarship. Much of it does not, however, and in any event it would have been fair for the Report to point out that the conventional work needed to be done and will, perhaps to a lesser extent, be required in the future. The Report might also have noted that the alleged deficiencies of Canadian legal scholarship find their parallels in other jurisdictions and, moreover, that the finest work by Canadian scholars compares well with the finest work of scholars in other jurisdictions, and so on. Those who lament this alleged deficiency in the Arthurs Report appear to be concerned that unsophisticated readers from other jurisdictions and disciplines will draw unduly negative conclusions about the current state of the art in Canada. No doubt there is some basis for this concern.² And yet, there can surely be few who would not agree that there is substantial room for improvement in what we do, and that the path to improvement lies, in part at least, in the directions charted in the Arthurs Report.

A less defensive reaction to the Arthurs Report would be to view it as a harbinger of the coming of age of Canadian legal scholarship. Imagine having so substantial a body of scholarship that it can be studied, assessed, and, indeed, criticised for being too heavily focused in certain areas of enquiry. My own experience as a law student in the late 1960s was that there was very little Canadian secondary literature to draw upon. The achievements of the past twenty-five years are, in this context, quite remarkable. Perhaps there would have been no harm, then, if the authors of the Report had thrown a few more bouquets. But surely, a vibrant discipline welcomes searching criticism as well as praise.

² See, e.g., the general tone of a review of the Report by I. Fletcher, an English law teacher in (1984) 4 Leg. Stud. 349 at 349-50 where, to be fair, the reviewer suggests that Canada may simply be an "extreme case" of a "more universal malaise." Cf. W.D. Moull, "Law and the Social Sciences in Canadian Legal Education: Some Perspectives on the Arthurs Report" (1984) 34 J. Leg. Ed. 515 at 516-8, attributing current Canadian problems to, *inter alia*, the malign influence of English academic tradition, and quoting, with respect to the English scene, Professor Ronald Dworkin's acerbic assessment in "Legal Research" (1973) 102:2 Daedalus 53.

This is not to say, of course, that the Arthurs Report is itself immune to criticism. Indeed, one suspects that its somewhat provocative tone was meant to stimulate debate. If so, that strategy has succeeded. It is not too much to say that the debate it has sparked at law schools across the country is one of the Report's most important legacies. The present symposium is meant to explore an aspect of the Report's analysis that is not fully developed in the Report itself. Even those who are sympathetic to the general thrust of the Report would have to agree that it provides only a very abstract and general view of the kinds of theoretical and interdisciplinary work it wishes to encourage. We know, for example, that the Report means to encourage a greater degree of interdisciplinary work. But that being said, the Report offers little guidance as to the precise direction this work should take. Indeed, the Report might be thought by some to have an indiscriminating view of the value of such work. Can it be that all interdisciplinary collaboration is destined to be fruitful? Does past experience with interdisciplinary work here and abroad offer useful guidance with respect to the areas of enquiry or forms of collaboration that are most likely to succeed? Does the Report mean to suggest that interdisciplinary work *per se*, regardless of its methodology and objectives, is to be encouraged and, perhaps, given priority over other kinds of scholarship? What is interdisciplinary work? Is it possible, as the Arthurs Report seems inclined to suggest, to distinguish with relative ease between research 'in' and research 'on' law? In the area of contract law, for example, we know that empirical research on contracting practices will be placed on one side of the divide and most pedestrian doctrinal analysis on the other, but when does legal scholarship which 'draws upon' other disciplines move from one category to the next? On questions such as these, the Arthurs Report operates — perhaps inevitably — at a high level of generality with which it is, of course, almost impossible to disagree. It is a level that many will find unsatisfying, however.

More telling vagueness is to be found in the Report's discussion of "theoretical" work in law. Readers of the Report no doubt still recall the now famous box³ into which the "Types of Legal Research" are placed. At the top of the box is a thin layer of "Legal Theory" and "Fundamental Research" which is said to be currently under-represented in the canon of Canadian legal scholarship and which it is the aim of the Report to encourage. "Legal Theory" is defined by the Report in the following terms: "legal theory — research designed to yield a unifying theory or perspective by which legal rules may be understood, and their

³ *Supra*, note 1 at 67.

application in particular cases evaluated and controlled; this type would include scholarly commentary on civil law, usually referred to as *doctrine*.”⁴ That this definition should include mention of doctrinal work in the civilian tradition is intriguing. The Report apparently means to suggest that doctrinal work in civil law is more theoretical in nature than doctrinal work in common law. But on what grounds could the authors of the Report have concluded that the writing of a treatise on the civil law of obligations is theoretically more complex an activity than the work of, say, Linden,⁵ Waddams,⁶ or Waters?⁷ Is the definition meant to exclude doctrinal scholarship in public law? Surely, public law scholarship of this genre is not less theoretical than work in private law, whether undertaken by scholars of civilian or common law training. Similarly, when measured by this definition of legal theory, it must be conceded that much of the content of modern Canadian law reviews aspires to be and, indeed, is theoretical. Contrary to the views of some readers, then, the Report appears to have a rather comprehensive view of the kind of work that may constitute “legal theory.” If all this is so, however, the Report’s conclusion that the vast preponderance of Canadian work is atheoretical and merely “conventional,” that is, “research designed to collect and organize legal data, to expound legal rules, and to explicate or offer exegesis upon authoritative legal sources”⁸ simply cannot stand.

Perhaps it is, after all, quite unsurprising that the Arthurs Report does not attempt to offer a precise view of the kinds of interdisciplinary work that ought to be undertaken, and does not appear to offer a coherent view of what might constitute “theoretical” as opposed to “conventional” research in law. In this respect, the Report simply reflects a prevailing lack of consensus in the legal academic community concerning the aims and objectives of scholarly work in law and the role of ‘theory’ within it. In recent years, for example, there has been a substantial increase in the production of self-consciously theoretical work about private law. And yet, it is often quite unclear what the ‘theory’ in any particular case is meant to explain and what kinds of evidence, therefore, would serve either to undermine or validate it.

To choose an illustration from a literature with which I have some familiarity, there is apparently an important difference on a matter of

⁴ *Ibid.* at 66.

⁵ A.M. Linden, *Canadian Tort Law*, 3d ed. (1982).

⁶ S.M. Waddams, *The Law of Contracts*, 2d ed. (1984).

⁷ D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (1984).

⁸ *Supra*, note 1 at 65.

theory separating Professor Atiyah,⁹ on the one hand, from Lord Goff, Professor Jones,¹⁰ and Professor Birks¹¹ on the other. Simply stated, the latter group favours the reshaping of the English law of quasi-contract and constructive trust into a law of restitution based on the unjust enrichment model, more or less in the manner of the American *Restatement of the Law of Restitution*.¹² Professor Atiyah vehemently disagrees on grounds which he and no doubt others would view as theoretical in some sense.¹³ Professor Atiyah has in mind a rather different plan for “redrawing the conceptual categories of the law”¹⁴ which will include within it a “new theoretical structure for contract, which will place it more firmly in association with the rest of the law of obligations”¹⁵ and which will subsume the law of restitution in a broader category of doctrines organized around “the idea of recompense for benefit.”¹⁶

There is no question that the quality of the scholarship undertaken on both sides of this issue is remarkably impressive and, indeed, ranks among the finest achievements of private law scholarship in this century. Further, there appears to be no room for doubt that the point of theory separating these writers is an important one. It is not at all clear, however, what the point of theory in question is all about. Do these writers disagree on a rather practical question of how the law ought to be organized by treatise writers in order to, say, facilitate effective performance by various actors in the legal process (such as lawyers and judges who might wish to increase their ability to remember existing doctrines, think of fruitful analogies, or decide similar cases in like fashion)?¹⁷ Or, do these authors have different theories about how judges ought to decide particular cases? Or, do they have different theories about the nature of “the value systems underlying present day ideas”?¹⁸ Or, about the actual relationship or the desired relationship between such value systems and doctrine or treatises about legal doctrine? Perhaps these writers have differing views about what they see as the inarticulate major premises of the reported

⁹ P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

¹⁰ R. Goff & G. Jones, *The Law of Restitution*, 2d ed. (1978).

¹¹ P. Birks, *An Introduction to the Law of Restitution* (1985).

¹² American Law Institute (1937).

¹³ *Supra*, note 9 at 764-70.

¹⁴ *Ibid.* at 779.

¹⁵ *Ibid.* at 778.

¹⁶ *Ibid.* at 779.

¹⁷ For a suggestive analysis of how one might assess the success of such a venture, see R.A. Samek, “Unjust Enrichment, QuasiContract and Restitution: A Study in Organising Legal Rules” (1969) 47 Can. Bar Rev. 1.

¹⁸ *Supra*, note 9 at 779.

judicial decisions and how these considerations might best be woven into the fabric of the articulated doctrine. If these differences of opinion rest on theories of the above kind, or some other kind, how are we to referee among contending theorists? Certainly, the failure of the typical work of private law theory to articulate its nature and purposes makes such an assessment difficult to effect.

Theoretical writing in law, at least in the private law of obligations, is markedly reticent in attempting to articulate the nature and function of underlying theory. No doubt this derives in part from the sorts of professional pressures identified in the Arthurs Report. Much private law scholarship, even quite theoretical work, is intended in part to have some influence in professional circles. We work within a tradition, after all, in which the judiciary has only recently come to the conclusion that it is acceptable to refer to and rely upon the work of living authors.¹⁹ It is thus not surprising that much of our scholarship masks the creativity and theoretical assumptions of the author in question. No doubt there are other factors that explain this theoretical reticence such as the complexity of the legal world and the inherent difficulty in theorizing about it. Whatever the explanation, however, law is a discipline which appears to be singularly lacking in a literature dealing with its own theories of knowledge. What kinds of truths, if any, is legal scholarship meant to uncover and, as importantly, how will we recognize them when we find them?

Again, it is not surprising that a committee, even as distinguished a committee as that chaired by President Arthurs, did not attempt to grapple with issues of this kind. Nor, perhaps, is it surprising that a rich literature of this kind has not yet developed here, or elsewhere. Nonetheless, there is a growing literature, especially in the United States, tackling questions of this kind on a sophisticated and normally quite abstract level, of which the recent symposium of the Yale Law Journal on "Legal Scholarship: Its Nature and Purposes"²⁰ is perhaps the best known. The present symposium takes a rather different approach to this problem by attempting to develop, from the ground up as it were, some perspective on the current state of our scholarship in particular substantive areas and to identify a range of appropriate objectives for future research. The strategy of many, if not all, of the contributors appears to be one

¹⁹ See B. Laskin, *The British Tradition in Canadian Law* (1969) at 94-5; G.V.V. Nicholls, "Legal Periodicals and the Supreme Court of Canada" (1950) 28 Can. Bar Rev. 422, criticizing the refusal of Rinfrett, then Chief Justice of Canada, to allow counsel to refer during argument to an article in the Canadian Bar Review in *Reference re Validity of the Wartime Leasehold Regulation*, [1950] S.C.R. 124 and gathering Commonwealth illustrations to the contrary.

²⁰ (1981) 90 Yale L.J. 955ff.

of attempting to bring the Arthurs Report down to earth and to consider, in the context of specific literatures and fields of enquiry, the need for particular shifts in emphasis and direction for Canadian legal scholarship. To varying degrees, they have, as part of this exercise, attempted to develop their own more general perspectives on the objectives of legal scholarship.

In so doing, the contributors have, as did the authors of the Report before them, gathered together raw material that may ultimately assist in the writing of an intellectual history of Canadian legal scholarship. As well, it is hoped, they have created a resource that will stimulate further thought along these lines from colleagues and graduate students here and elsewhere, and from all others who are concerned with the future directions of legal scholarship in Canada. We are much in their debt.

