On the Relationship of *Law and Learning* to Law and Learning

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The Arthurs Report on *Law and Learning* presents a vision of what legal scholarship should be and attempts to compare the work of Canadian legal scholars to that vision. The Report concludes that legal scholarship in Canada falls woefully short of its vision and offers recommendations to improve scholarly performance. This essay criticizes the vision of scholarship in the Report, arguing that it misunderstands the nature of scholarship and misjudges the impact of its criticism on individual scholars. It offers and attempts to justify an alternate vision.

Le rapport sur *Le droit et le savoir* présente une vision de ce que la recherche juridique devrait être et essaie de comparer cette vision aux travaux des juristes canadiens. Le rapport conclut que la recherche juridique au Canada cadre mal avec cette vision et formule des recommendations visant à améliorer le rendement scientifique. L'auteur critique la vision présentée par le rapport, alléguant qu'il se méprénd sur la nature de la recherche et évalue mal l'effet de ses critiques sur les juristes. Cet essai propose ainsi une solution de rechange.

Synopsis

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Each of us has experienced parental criticism and disapproval. When we are young, we equate our parents' standards with the world's. To deviate means to disturb the natural order. As we mature, we learn relativity; we observe other standards, other person's failures, our parents' fallibility. We contextualize their criticism, measuring ourselves not simply against their words but against their conduct and the conduct of others, and measuring their words against other words. We continue to care about the source of the criticism and its truth, but we understand how much turns on its timing, on its tone, on its quantity.

The Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law,[1] dubbed the Arthurs Report by the Minister of Justice,[2] is a critical document. Its principal author is a senior, well-known and well-respected legal scholar and teacher, a former law dean.[3] For members of the community about whom it speaks and to whom it in part is addressed, the document is parental criticism. The question it poses is: how to take it? My answer is: with partial acceptance, partial resistance, considerable irritation, and, predominantly, with sadness.

The document is titled *Law and Learning*. More accurate would be *The Sorry State of Legal Research in Canada: Its Cause and Its Cure*. The actual title not only is bland; it is misleading. Although describing the structure of legal education in Canada as a background for the portrait of law professors as researchers, the Report shows little interest in learning. It addresses neither the way things are learned in law schools nor the links between research and personal knowledge or between research and teaching. Some sections of the Report even claim a negative link between research and teaching, not only by the usual argument that doing one fills time that might have been devoted to the other, but also in the almost incredible assertion that law teachers find in the subjects they teach no stimulation, no incentives to probe beyond the mimimum necessary to conduct a class.[4]

What does interest the author is research, the definition and classification of research, the practice of research, and the means for promoting and encouraging more research and more significant research.

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[1]Consultative Group on Research and Education in Law, *Law and Learning* [:] *Report to the Social Sciences and Humanities Research Council of Canada* (1983).

[2]*Speech to the Canadian Association of Law Teachers,* (2 June 1983) [unpublished].

[3]Harry Arthurs, Professor of Law and former Dean of Law, Osgoode Hall Law School.

[4]"[Law professors] seem hard put to it to find intellectual inspiration in the legal curriculum." *Law and Learning, supra,* note 1, 88.

I. Definition

> We are interested in articles, books, reports and studies that together constitute a body of literature available in the public domain with a pertinence beyond the particular moment at which it was prepared.[5]

According to the Report research must produce writing; writing must exist in the public domain (read: it must be published); and it must have more than momentary pertinence. Research is defined by its product, its status in the world. This definition is not uncommon, and given the Report's vision of teaching and research as bifurcated and unrelated, it is not surprising. Its outside-in, instrumentalist structure echoes in the other sections of the report.

Another approach is possible; call it inside-out. It would begin with the teacher, locate her in her world, address her obligations or role, explore the significance of research for her as she develops in that role, and examine its significance for her students. Consider Harold Laski.

> Every teacher. . .has three great obligations. He must continually research, he must keep a fresh mind, and he must know his students not as a shapeless mass seen from a dais, but as individuals whom, if he can, he will cultivate as friends. These are grim conditions, physically exacting and intellectually wearing. By continuous research I do not mean constant publication. The modern tendency to judge men by their volume of published output is, I believe, responsible for not a little of inadequate teaching standard. It is a facile test of promotion naturally welcome to busy administrators; it is not the slightest proof of intellectual inadequacy. . . . By research I mean in part a devotion to the reëxamination of the ultimate principles of a subject, and also an endeavor to extend their boundaries by solution of the problems to which they give rise. . . . In this sense, the teacher's real task is himself to embark on the investigation of a really big theme, and use the new insight that research conveys to illuminate the whole subject he expounds.[6]

Arthurs and Laski share concern for the big theme; they share little else. The Report takes as given the obligation to research and makes little effort to articulate its source. To the extent that it accepts research as part of a teacher's job description and attempts to classify research activity without understanding its source, the Report commits the primary sin for which it castigates other academics. Research should not be designed "to collect and organize. . .data, . . .to explicate and offer exegesis on authoritative. . .sources"[7] but should "make underlying assumptions about [research] explicit, coherent, and sufficiently detailed to provide us with hypotheses that we can use to evaluate past, present or future events".[8] To the extent it does not accept job description as authoritative, the Report reveals a

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[5]*Ibid.*, 65.
[6]H. Laski, *The Dangers of Obedience* (New York: Harper and Brothers, 1930) 112-3.
[7]*Law and Learning, supra*, note 1, 65.
[8]*Ibid.*, 69-70.

particular view of the source of the obligation to research. It is a social obligation, and its end is not, as is occasionally protested, knowledge for its own sake, but social change. We should do it for its impact on the social world. For Laski the obligation to research is a teacher's obligation. Research produces better teaching. Understanding what teachers do, what produces knowledge, why universities should not close their doors tomorrow is the key to defining and classifying research.

In a world of increasing pressure on academics from university administrators, Laski's approach promises more than the one in the Report. It offers a teacher a method for understanding herself in her community and for sorting legitimate from illegitimate in administrators' demands. When demands to do more, to do something else (research, not teaching; different research), seem to issue from above, seem unrelated to an individual's role in her community and tied to financial pressures or administrative fiat, resistance, anger, incomprehension are the likely responses. If university teachers can perceive research as integrated with their other activities, as, say, essential to finding out how much they do and do not know, to extending their grasp of a subject and hence their students' grasp, as part of their personal and professional development within their institutions, they might be encouraged to take some risks to develop. If a scholar is responding to demands that are perceived as arbitrary and as based on the power to withhold salary or other perquisites, she will be a grudging minimalist. If she is responding to encouragement to grow in her job, she might be more imaginative, more daring.

The Report's approach to research provides a weapon for interested non-academics to add to their arsenals for fighting offending academics. It offers nothing to encourage academics to understand the importance and centrality of research in their lives. It reinforces the wedge between administrator and teacher, between teacher and researcher, between community and university. Failing to link research and teaching, it ensures negative response.

II. Classification

The Report offers a four part, hierarchical classification of research. From lowest to highest it identifies: 1) conventional texts and articles; 2) legal theory; 3) law reform research; 4) fundamental research. The language of the classification gives it away. Disapproved is what is "conventional",[9] "predictable",[10] what is not new. Approved is what produces "reform",[11]

[9] *Ibid.*, 66.
[10] *Ibid.*
[11] *Ibid.*

what shows law's "causes and effects".[12] Understanding is treated as an instrument for change, a valuable instrument, but nevertheless an instrument. Law, too, is an instrument, and the highest level research investigates its instrumental function. Here are the examples of fundamental research:

> Empirical inquiries concerning the actual effect of bail procedures, the actual distribution of losses from industrial and traffic accidents, the actual practice of courts issuing labour injunctions have all helped us to reevaluate the efficacy and fairness of important areas of law. While immersion in the conventional materials of the law might (or might not) have generated intuitive reactions to those issues, it would not have left us as well informed as the empirical studies that were undertaken. Moreover, such immersion would not have placed debate over long-established legal rules and procedures on a footing that permits us to consider their social utility rather than their internal logic or symbolic significance.[13]

When law is viewed as an instrument, fundamental research probes its social utility. When social utility matters, empirical studies dominate. The deepest law study becomes, not the study of law, but the study of "law and"[14] (sociology, economics, whatever you like).

> As we begin to explore all questions save the first — that of legal entitlement — we have to make our assumptions more and more explicit, and draw more and more upon the insights of other disciplines. As this process continues, legal research slides along the spectrum from legal theory to what we have called fundamental research. But it will be noticed that in so doing it is pulled loose from its roots in conventional legal materials, which become increasingly objectified, increasingly treated as phenomena to be investigated rather than as the embodiment of ultimate (if not obvious) truths.[15]

As classification this is nonsense; as prescription it is worse. It is nonsense to suggest that research *in* law is less fundamental than research *about* law, that detached observation consistently should be preferred to what George Fletcher calls "committed argument".[16] It is nonsense to suggest that research that helps "law respond to a changing society"[17] is fundamental, while "exegesis upon authoritative legal sources"[18] is trivial. Most of us would have thought Northrop Frye knows something about and practices fundamental research.

The value of exegesis as research doesn't depend upon belief in the authority of a text such as the Bible. We can accept ultimate skepticism toward any legal text, case or statute, and understand as fundamental the

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[12]*Ibid.*, 69.

[13]*Ibid.*

[14]I have taken the phrase "law and" from Arthur Leff's delightful article of that name: Leff, *Law and* (1978) 87 Yale L.J. 989. This article offers extensive criticism of the view of fundamental research proposed in this report.

[15]*Law and Learning, supra*, note 1, 68-69.

[16]Fletcher, *Two Modes of Legal Thought* (1981) 90 Yale L.J. 970, 1003.

[17]*Law and Learning, supra*, note 1, 69.

[18]*Ibid.*, 65.

effort to comprehend it, to justify it, to provide its structure. Doing so requires refusing the Report's dichotomy between law as gospel, which it rejects, and law as impact, which it accepts. The Report suggests, correctly, that we should reject the vision of law as an autonomous system to be studied in isolation from its connection with the world. But in its insistence on the primacy of "law and" research it offers the opposite vision: law as totally merged with the world. Lost in this clash of opposites is any sense of law as a partially autonomous system.[19] Lost is any sense of the value, say, of studying law as a language, of seeing what it includes of other languages and what it leaves out, of discovering its textures, of investigating how it enables a person to address other individuals in the world.[20] Lost is any sense of the value of attempting, before rejecting doctrine, to provide a coherent justification for it, to link it to other doctrines, to see it as part of a system of meaning created over time by cooperative human effort. Lost is any sense of the value of taking seriously the common law process.

The value of this work is lost, not because it goes totally unrecognized in the Report, but because it is denigrated by label and subordinated to other types of work. Instead of examining types of research to expose the depths to which *each* could go, the Report offers a typology of worth. As a result, individuals attentive to the Report, instead of being shown how their various chosen paths might be enriched, are prodded to move like lemmings in a single direction. Those unwilling to march justifiably may be left behind.

Finally, this classification is nonsense, because it asserts the pre-eminence of the objectification of the material of the law over its treatment as an embodiment of lasting truth. One need not be committed to the view that law embodies truth simply because it is law or because it issues from an authoritative source to see the value of the effort to construct the truth embedded in a series of decisions, a statute, a constitution. As Lon Fuller has shown,[21] good legal exegesis can be very good indeed.

III. Practice

From this perspective appear the best and the worst of the Report. The authors suggest that law professors suffer from low aspirations, that they risk little in their research and writing. We are urged to aim higher, to attempt more.

The Report is right. Legal education too often is training in excess caution. Legal language and legal advocacy can facilitate hiding, can help

[19]See R. Dworkin, *Taking Rights Seriously* (1977).

[20]See J. White, *The Legal Imagination* (1973).

[21]See, for example, L. Fuller, *Legal Fictions* (1967) and Fuller, *Consideration and Form* (1941) 41 Colum. L. Rev. 794.

one convince oneself that personal and professional lives are and should be totally separate. Writing and research, on the other hand, are intensely personal; confronting and exposing one's limitations of knowledge and infelicities of phrase can be harrowing. No wonder most of us choose safe routes most of the time. We ought more often to face this collective and individual deficiency, and we need to find means to encourage ourselves to attempt more fundamental work. I already have suggested that in moving us in that direction the Report unfortunately prefers criticism to encouragement, and I will return to this theme in the last section. Here I have two other complaints.

The Report implies that in their narrowness, conventionality, and lack of ambition law professors differ from the rest of the academic community in Canada. The Report offers no evidence for that suggestion, and I doubt its existence. After fourteen years in the same university community, after having seen the work of colleagues and the work of other members of the community, after having read legal periodicals and other academic periodicals, after having been faculty advisor to a law journal and a member of the editorial board of a non-legal journal, I think the quality of work on my own faculty at a minimum no worse than the quality of work in the rest of the community in which it functions.

If my impressionistic view is shared, the criticism of Canadian legal scholars ought to be clarified or redirected. If the Report wants to accuse legal academics of falling below an achieved Canadian standard, it ought to be more careful with its evidence. If, comparisons aside, it wants to exhort us to improve our record, it ought to say so. It is one thing to suggest to a community it ought to aspire to greatness; it is another matter to tell a member of a community, and its Principal and Deans, that within that community the member does not pass muster.

While the Report measures the work of law faculties against real or imagined standards, it does not address the progress of those faculties. Many law schools are new in Canada; they have had to develop their scholarly tradition in the last twenty-five years as they contended with the difficulties of becoming established. An interesting comparison, omitted in the Report, would have been the quantity and quality of work now done to work done ten years ago.

Finally, any measure of performance ought to include a realistic assessment of possible performance. In *The Structure of Scientific Revolutions* Thomas Kuhn shows how much of the research done in science necessarily

requires resolving the puzzles identified by fundamental research (paradigm-identifying research).[22] He identifies gap-filling, problem-solving, answer-providing as valuable work, necessary for testing and refining a paradigm. Even accepting the Report's classification, must one accept its idea that there could be a significant shift of work from necessary problem- or puzzle-solving to fundamental research? Can one accept that idea without some argument how legal research differs from scientific research?

IV. Promotion and Encouragement

After the body of the Report, its recommendations are the calm after the storm. Aside from the dubious propositions that more education produces better scholarship, that the addition of disciplines produces better scholarship, and that research centres produce better scholarship and more learning, many of the recommendations are positive and helpful.[23] Some, particularly those urging more explicit academic streaming in law schools, more independence from the wishes of the practicing bar, and significant curricular reform, are interesting and challenging, worthy of debate. In tone and content they stand in sharp contrast to what precedes them. The "plurality of educational strategies",[24] urged in the section on legal education, and the responsiveness to individuals' "own sense of intellectual priorities",[25] urged in the section on promotion of research, contradict the rest of the Report. What we discover is a glaring distinction between what in conclusion the Report tells us to do and how it tells us to do it. As I have suggested, these contradictions ensure an academic response at best of bewilderment, at worst of discouragement and resentment or indifference.

Some of this response arises from the continual side-of-the-mouth, gentleman-protest-too-much style of argument. The body of the Report is full of disclaimers of competence, or scope, or ambition, followed by attempts to describe, evaluate, comprehend exactly those areas in which competence is disclaimed. These, however, are minor irritations.

The Arthurs Report disappoints, because it provides neither a model for improved research nor a mechanism to encourage academics to find their own models. It disappoints, because it ignores the personal dimension of research activity, because it treats research as commanded from above or required by others instead of viewing it as a source of enrichment or

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[22]T. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed. (Chicago: University of Chicago Press, 1970) 25-42.

[23]Slayton, rev. of *Law and Learning*, (1983) U. of T.L.J. 348.

[24]*Law and Learning, supra*, note 1, 155.

[25]*Ibid.*, 157.