

## Harry Arthurs: The Law Student Years

Martin Friedland

Toronto

### 1 INTRODUCTION

It is likely that no other contributor to this volume has known Harry for as long as I have. We have been good friends for sixty years. If anyone should know what made him the brilliant, iconoclastic, critical scholar that we are honouring in this volume, I should. I can, however, offer no definitive conclusions – only speculation on what some of the early influences may have been.

I did not know Harry until after he arrived as an undergraduate at University College at the University of Toronto in September 1952. I was then in second year and probably first met him when he was a pledge at Sigma Alpha Mu, a Jewish fraternity that I had joined the previous year. I will leave it to Harry to tell us in his memoirs whether the fraternity played a significant role in his life. I know that he made some good friends through the fraternity, such as Alan Borovoy, but I suspect that Harry will play down the importance of the fraternity in his later career. I doubt if he ever gave the secret handshake to his mentor Bora Laskin, a fraternity brother from an earlier generation.

The preparation of this volume is meant to be a secret from Harry, and so I am writing this piece without interviewing the subject. I also did not look at the 33.6 metres of documents he donated to the archives at York University, which cannot be examined without his consent.<sup>1</sup> The earliest document in that collection is apparently from 1957 – probably his labour law class notes – and so the archival records would probably not shed much light on his early years. So

most of what I have to say is based upon casual conversations with Harry over the years, some googling, and much speculation. There are also archival records concerning Harry's maternal family that he deposited in the Ontario Jewish Archives in 2006, documents that had belonged to his late mother.<sup>2</sup>

I know that Harry's maternal grandparents had a strong influence on Harry. His grandmother, Dorothy Dworkin, was a remarkable woman, who, in the early 1920s, helped establish the Mount Sinai Hospital, then on Yorkville Street, and was the first president of the Mount Sinai women's auxiliary. In her early years, she was a nurse and a midwife. She later established a travel agency that brought hundreds of Jewish immigrants from Eastern Europe to Canada. In 2009, she was officially designated by the federal government as a "Person of National Historic Significance." She died in 1976, at the age of eighty-six. Harry was her only grandson.<sup>3</sup>

Harry did not know his grandfather, Henry Dworkin, who died in an automobile accident in 1928, but would have known of his reputation as a strong supporter of the labour movement. Henry Dworkin and a colleague – although both were businessmen – founded the Labor Lyceum on Spadina Avenue. A plaque was put up in 2013 by Heritage Toronto celebrating the Labor Lyceum, which states, in part:

Established in 1913 by Henry Dworkin and Sam Easser, the Labor Lyceum Association sought to advance the interests of the city's Jewish trade union movement.<sup>4</sup>

The Ontario Jewish Archives states on its website that, at the unveiling of the plaque,

Guest speaker Harry Arthurs, former dean of Osgoode Hall Law School, labour historian, and grandson of Henry Dworkin, founder of the Labor Lyceum, spoke eloquently about the role his grandfather, an enterprising businessman, played in the community.<sup>5</sup>

So it is no surprise that Harry was later interested in labour law.

Harry's father, Leon Arthurs, was a self-taught patent attorney who had left school at the age of fourteen. He was never a lawyer, but was instrumental in founding, in 1947, the Lord Reading Law Club, a society of Jewish lawyers in Toronto. Jewish lawyers were not, at

that time, admitted as members of the Lawyers Club of Toronto. (Lord Reading, a Jew, had been Chief Justice of England around the time of the Great War.) Leon Arthurs kept the organization going for many years as its executive director.<sup>6</sup> So, once again, Harry had a strong role model within his family. His mother, Honey – a lovely, refined lady – graduated from the University of Toronto in 1935, the year that Harry was born. His late sister, Cindy, was born a number of years later. Like most women with children in those years, Honey Arthurs was mainly a stay-at-home mother.<sup>7</sup>

I do not know which professors in Harry's undergraduate courses had an influence on him. We'll learn this from Harry's memoirs. I can, however, speak about his law-school days. I probably first learned that Harry was going to attend the University of Toronto Law School when we both showed up in September 1955 at the law school in Cumberland House – then called Baldwin House – on the east side of St George Street, close to College Street. Harry has briefly described coming to law school: "I arrived at the Faculty of Law of the University of Toronto in 1955, a student with a middling education, good grades, left-ish genes and a determination – formed at age four, unexamined thereafter – to become a lawyer."<sup>8</sup>

## 2 UNIVERSITY OF TORONTO LAW SCHOOL

The University of Toronto Law School was a first-class institution, with an outstanding faculty and excellent students. There had been an undergraduate programme in law for several decades in the 1930s and 1940s, but, in 1949, a professional school was established. Legal icons Caesar Wright, Bora Laskin, and John Willis left Osgoode Hall Law School and came to the University of Toronto.<sup>9</sup>

The problem was that the Law Society of Upper Canada did not recognize the University of Toronto Law School. Osgoode Hall Law School was the only recognized school. Graduates of other schools had to take their final year at Osgoode, which therefore added an extra year to their legal education. The University of Toronto Law School therefore tended to attract very dedicated students who, for the most part, were interested in understanding the law as an intellectual discipline. This resulted in a very good student body.

Our class, the class of 1958, was composed of exceptional students who were interested in legal ideas. My class notes are sprinkled with comments by our fellow students. About thirty students in our year

graduated. Many had excellent careers. John Sopinka became a top counsel and a member of the Supreme Court of Canada; several others became judges; one became a leading criminal lawyer; three of us became academics; Jerry Grafstein became a senator; almost all members of our class had successful practices. The same was true of those in the years before and after us. As it turned out, we were rewarded for our dedication to the law because in 1957, in our second year, the school was recognized by the Law Society and we did not have to spend the hated last year at Osgoode.<sup>10</sup> Instead, we formed the first class of the new Bar Admission Course. As Harry later wrote, we were students “during one of the most dramatic episodes in the history of Canadian legal education, at a crucial juncture in the debate over whether law would become a ‘normal’ university discipline, free ... to transform ... our understanding of law’s intellectual premises and social effects and, ultimately, the practice, administration and content of law.”<sup>11</sup>

So, the intellectual strength of the class had a strong influence on all of us. Four of us formed a small study group at the beginning of first year: Harry, Harvey Bliss, Jerry Grafstein, and me. We met every Sunday morning to discuss one of the first-year subjects and continued the weekly meetings until the end of our third year. We rotated who would lead the discussion, which took place in the homes of the members of the group. The mothers would prepare lunches for us. Our favourite locale was Harvey Bliss’s house, because his mother was an excellent cook. Harry’s mother was not far behind. Those discussions were stimulating and gave us a grasp of the law that we might not have had if we had worked completely on our own.

The faculty of about ten professors was remarkably able – the best faculty in Canada at the time. The majority had done their graduate work in the United States: Yale, Columbia, and, mostly, Harvard. Caesar Wright had completed his doctorate at Harvard – in one year. Other Harvard students included Bora Laskin (whom I will have much to say about later), Albert Abel, Jim Milner, and David Kilgour. One professor, Eugene Labrie, had a doctorate from the University of Toronto, and another, Abe Weston, an Australian, had done post-graduate work at Oxford.

After first year, the faculty moved to Glendon College – many years later, the site of the dinner I attended after Harry’s installation as president of York University. The move to Glendon had the effect of trapping the faculty in a beautiful location, several miles north of the

University of Toronto. There was only one lunchroom and we often sat with faculty members. I don't know whether they actually happened, but I seem to recall walks down into the Don Valley Ravine, talking law with Laskin. It may be that Harry's recollection of life at Glendon was not as idyllic as mine. Moreover, as Harry recently reminded us, the faculty was somewhat less productive than we thought it was at the time: "With few exceptions," Harry wrote, "neither [our teachers], nor their predecessors, nor other Canadian legal academics, produced much in the way of empirical studies, theoretical work, scholarly monographs or magisterial treatises."<sup>12</sup>

Before I turn to Laskin, I have to mention Albert Abel. We took a course in legal writing from him in our first year, Abel's first year of teaching at the University of Toronto. We were required to do *Harvard Law Review*-style case comments and other assignments, which Abel went over carefully. I believe this had a profound effect on all of us in terms of careful scholarship and clear writing in our later careers. Students published excellent work in the student-run *Faculty of Law Review*, which Harry and I co-edited in our third year.

I would like to think that I had an influence on Harry's career in several ways. We were not just friends, but competitors, at law school, as deans of the two Toronto law schools, and as scholars. As I state in my memoirs: "There is no question that there was academic rivalry between Harry and me throughout our careers. The rivalry probably helped both of us accomplish more than we might otherwise have done."<sup>13</sup>

There is, I think, another way in which I may have played a role in Harry's career. I have always been fairly adventurous, particularly in my younger years. Throughout university, I did a lot of travelling, including hitchhiking through Canada and the United States, physically touching all but two states. I would drive a drive-away car from Detroit to wherever the car was to be delivered and hitchhike back. Harry wanted to join me on a two-week trip that I was planning to take just before our third year of law school. In my memoirs,<sup>14</sup> I devote several pages to this trip – obviously important in my own life – describing the vehicle that we were given, a new pick-up truck with a standard gear-shift. Harry had never driven a standard gear-shift before, but he learned quickly, stripping the gears at the expense of the eventual owner of the truck. On the way down, we stopped at the University of Louisville's Brandeis School of Law, which houses the papers of Louis Brandeis, one of our heroes in law school. This was

the first time that Harry or I had ever looked through archival papers. Did it have an effect on our future interest in legal history?

After dropping the car off in Texas, we hitchhiked to Monterrey and took a bus back to the border – or vice versa. Harry will remember. In retrospect, hitchhiking on deserted mountainous Mexican roads was a rather stupid thing to do. Then, on the trip back to Toronto, we heard about a crisis in Little Rock, Arkansas, where the federal government had sent in units of the federal army to ensure that black students would be admitted to the Little Rock Central High School. Governor Orval Faubus was resisting integration. Naturally, we went out of our way to go to Little Rock to be part of the action. We hooked up with a United Press reporter who used us as interviewees to describe what was taking place. Who knows whether that trip also played a role in Harry's future travels and intellectual adventures?

### 3 BORA LASKIN

There seems little doubt that the person who had the most influence on shaping Harry's career was Bora Laskin. Harry had known Laskin through both his father and his mother, who was Laskin's contemporary as an undergraduate at the University of Toronto in the early 1930s.

Bora played a significant role in many of our careers. He helped each of the four members of our small study group by giving advice and assisting us to find articling positions. All four of us articulated – with Jewish law firms. Harry admired Laskin. “By the mid-1950s,” Harry later wrote, “Laskin enjoyed unwarranted notoriety as an intellectual and political radical, which rather endeared him to me, and a more appropriate reputation as a pre-eminent architect of Canadian labour law through his contributions as a commentator, critic, pedagogue, policy advisor, and arbitrator.”<sup>15</sup> I can picture today's students saying much the same about Harry. By the end of third year, in his own words, Harry had become an “unsophisticated legal realist.”<sup>16</sup>

Harry identifies Laskin as his role model. In a relatively recent paper, he comments on a book that strongly influenced him, Frankfurter and Greene's 1930 study *The Labor Injunction*, which Laskin had mentioned in his labour law class. This book, Harry notes, was “starred and underlined in red” in his class notes.<sup>17</sup> I can still picture

Harry's unique style of note-taking – which we all wanted to borrow if we missed a class – with different colours, underlining, asterisks, and other designations. The book was significant, not only because of its empirical examination of the use of labour injunctions, but because of Felix Frankfurter, then a professor at Harvard, later a Supreme Court justice. Harry writes: “Frankfurter – its lead author – was a Jew and a progressive academic, just like my teacher and role model, Laskin.”<sup>18</sup>

Laskin's most significant teacher at Harvard had been Frankfurter, a follower of Oliver Wendell Holmes. As I now look back on our law school days, we were all Holmesians, although most of us would not, perhaps, have known it at the time. That was the dominant philosophy at the University of Toronto law school in those years. Our professors – particularly Laskin – spouted Holmes's well-known statements from his scholarly writing, such as: “the felt necessities of the time”;<sup>19</sup> “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law”;<sup>20</sup> “the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics”;<sup>21</sup> and “the life of the law has not been logic: it has been experience.”<sup>22</sup> And we were familiar with quotations from some of Holmes's judgments, such as: “The common law is not a brooding omnipresence in the sky”;<sup>23</sup> “judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions”;<sup>24</sup> and “the best test of truth is the power of thought to get itself accepted in the competition of the market.”<sup>25</sup>

In Laskin's published articles in the 1930s arising out of his Harvard studies, he frequently cited Holmes and his followers, particularly Frankfurter and Cardozo.<sup>26</sup> In a 1938 article, Laskin cites several of Holmes's statements, such as: courts “limit their activities to molecular as contrasted with molar motions”;<sup>27</sup> “the life of the law has not been been logic; it has been experience”;<sup>28</sup> and “the very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.”<sup>29</sup>

Laskin's approach was consistent with the philosophy of Holmes and his followers, such as Harvard law dean Roscoe Pound and US Supreme Court justices Benjamin Cardozo, Louis Brandeis, and Felix Frankfurter. It was often labelled “sociological jurisprudence.”<sup>30</sup>

Caesar Wright, who studied at Harvard under Pound, followed this philosophy, and he was certainly a major force in Laskin's life. It became the philosophy of Dean W.P.M. Kennedy, the first dean of the law school where Laskin had studied law as an undergraduate.<sup>31</sup> Laskin later wrote that Kennedy "introduced us to the riches of American legal scholarship, to Holmes and Brandeis and Cardozo, to Pound and Frankfurter ... and to so many others."<sup>32</sup>

Kennedy and Wright rejected the British positivists. Kennedy had written, shortly before Laskin entered law school, that law should "serve social ends" and legislation should be preceded by "a carefully sifted examination of social facts."<sup>33</sup>

Holmes was a pragmatist; or, as Cheryl Misak, a philosopher who has studied the pragmatists, has stated, Holmes was at least a "fellow traveller" of the pragmatists.<sup>34</sup> He was one of the founding members of the Metaphysical Club at Harvard, out of which the pragmatists emerged. These included such important names as Charles Peirce, William James, and John Dewey. "Law, for Holmes," Misak writes, "grows in a fallible way, where doubt, conflict, and disputes about what the law is are resolved under the force of experience."<sup>35</sup> Roscoe Pound put it this way in 1908:

The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.<sup>36</sup>

This was Laskin's philosophy, shared by most of our other teachers at the University of Toronto law school. Jim Milner – then teaching at Dalhousie – for example, writing in 1948 in the *Canadian Bar Review*, wrote about the importance of sociological jurisprudence:

The increasing awareness of the inadequacy of the logical method to explain judicial phenomena has led to a more realistic examination of traditionally non-legal factors: the social and economic background of the law to which law is or should be subservient.<sup>37</sup>

Harry did not article immediately after finishing law school. Instead – no doubt with the advice and assistance of Bora Laskin – he



went to Harvard Law School to do an LLM in labour law with Archibald Cox, who later became solicitor general and then the special prosecutor in the Watergate prosecutions, and Derek Bok, later the president of Harvard.

Harry's mini-thesis, "Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship," was published as a fifty-seven-page article in the *Canadian Bar Review* in 1960 – Harry's first published legal piece.<sup>38</sup> There are several references to Holmes in this article, many references to Archibald Cox, and a large number to Kennedy and Finkelman's 1930 book *The Right to Trade*.<sup>39</sup> Not surprisingly, the person cited most frequently is Bora Laskin, who is mentioned nine times in the text and sixteen times in footnotes.

Harry articulated with Sydney Robins, who was also a graduate of Kennedy's law school (a BA and an LLB) and of Osgoode Hall Law School, and had done an LLM at Harvard. For several decades, Robins taught torts as a special lecturer at Osgoode. Harry has also referred to him as "my mentor."<sup>40</sup> Robins was recognized as an outstanding labour lawyer on the labour side, was a respected treasurer of the Law Society of Upper Canada, and was highly regarded as a judge of the Ontario Court of Appeal. I do not know his philosophy of law, but would be surprised if he was not a Holmesian pragmatist. I had a delightful lunch with him last year, a month before he died at age ninety. We discussed his knowledge of and affection for W.P.M. Kennedy. If I had known that I would be preparing this chapter on Harry, I would certainly have raised these more philosophical issues with him.

There are others with whom Harry was close in those early years. Alan Borovoy, for example, the general counsel to the Canadian Civil Liberties Association, worked closely with Harry after the organization was reconstituted in the mid-1960s.<sup>41</sup> And Harry was reasonably close with Jacob Finkelman, the chair of the Ontario Labour Relations Board, who had been Laskin's labour law teacher in Kennedy's programme.<sup>42</sup> But I am not going to go further in this exploration of the early influences on Harry. I'll leave that task to Harry.

#### 4 CONCLUSION

I look forward to reading the chapters in this collection to see how Harry's philosophy developed over the years, leading to his current interest in pluralism. In a relatively recent article, he stated that his

thinking on the role of the courts in fields involving social conflict or controversy “took me in the direction of legal pluralism, a bundle of socio-legal theories which suggest that law can not only exist without courts but without the state as well.”<sup>43</sup> And the report by the committee he chaired in 1983, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada*, concluded that Canada “must begin to take all types of legal research – especially fundamental research ‘on’ law – much more seriously.”<sup>44</sup> “Fundamental research, as we use the term,” the report states, “proceeds from the intellectual perspective that law is problematic rather than certain, that its causes and effects, rather than its formal rules, invite scrutiny.”<sup>45</sup> The examples of fundamental research, however, are restricted to three empirical inquiries: bail procedures, distribution of losses from industrial and traffic accidents, and – naturally – the practice of courts issuing labour injunctions. This is important work that should be encouraged, but it is hardly earth-shattering or radical.

One final question may interest the reader. What happened to Holmesian philosophy? It seems that few people in Canadian law schools discuss Holmes today. A survey published in 1995 of law schools in England, Australia, and Canada showed that Holmes was not even on the list of the forty or so legal philosophers mentioned by those responding to the survey, although, to be fair, Pound was.<sup>46</sup> This is not the place for a detailed analysis of why Holmes has been neglected, but I will mention two considerations, in particular. The first is the academic and judicial reaction to the much-criticized 1960 decision of the House of Lords in *D.P.P. v Smith*,<sup>47</sup> in which the Lords adopted Holmes’s view expressed in *The Common Law* that there should be an objective test for the mental element for crime, even in the case of murder.

Another important reason for his neglect is that Holmes – in my view wrongly – was considered by many as a legal positivist, whose views could lead to fascism. One article published in 1945, for example, was entitled “Hobbes, Holmes, and Hitler.”<sup>48</sup> Lon Fuller wrote in 1958:

During the last half century in this country no issue of legal philosophy has caused more spilling of ink and adrenalin than the assertion that there are “totalitarian” implications in the views of Oliver Wendell Holmes.<sup>49</sup>

The attack on Holmes has continued in more recent scholarship, such as by my colleague David Dyzenhaus, who compares Holmes with the Nazi sympathizer Carl Schmitt in his essay “Holmes and Carl Schmitt: An Unlikely Pair.”<sup>50</sup>

My reading of Holmes shows, however, that Holmes did not want a complete separation of law and morals, but rather, as one recent biographer states,<sup>51</sup> Holmes “replaces the question of *whether* law is separate from morals by the inquiry of *how* the two may be understood to interact.” In his important lecture “The Path of the Law,” published in the *Harvard Law Review* in 1897,<sup>52</sup> Holmes states that morality plays a role in developing the law: “The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.”

It is possible that Holmes may have a resurrection. Justice Richard Posner concluded his foreword to a collection of papers celebrating the centennial of “The Path of the Law” in 1997 by stating that, after reflection, “we see what a previous generation saw – that Holmes was the greatest legal thinker and greatest judge in our history.”<sup>53</sup> He also points out that it is hard to classify Holmes, stating that “there is unending debate over whether Holmes is better described as a formalist or a realist, a pragmatist or a logical positivist, a liberal or a reactionary, a Puritan or a Social Darwinist.”<sup>54</sup>

After reading the Holmes-Pollock letters, Dean W.P.M. Kennedy concluded that Holmes does not belong in “any clear-cut school of legal thought.”<sup>55</sup> Is it possible that we might say the same about Harry W. Arthurs? If not, it will be interesting to learn what labels the contributors to this volume attach to Harry.

#### NOTES

- 1 Clara Thomas Archives, York University, inventory of the Harry W. Arthurs accession.
- 2 Ontario Jewish Archives, Harry Arthurs accession.
- 3 See Ontario Jewish Archives, Dworkin Family; Bill Gladstone, “Toronto’s Mount Sinai Had Humble Beginnings as a Dispensary,” *Canadian Jewish News* (29 January 2015); Wikipedia, “Dorothy Dworkin”: “A plaque in front of the former hospital building on Yorkville Street, unveiled in 2010, mentions her involvement in founding the hospital.”
- 4 “Labor Lyceum,” <http://torontoplaques.com>, last accessed 24 July 2016; <http://heritagetoronto.org>, last accessed 24 July 2016.

- 5 Ontario Jewish Archives blog, "Labor Lyceum Plaquing Event" (Wednesday 29 May 2013), <http://www.ontariojewisharchives.org/Blog/Labor-Lyceum-Heritage-Plaquing-Event>, last accessed 24 July 2016.
- 6 *Ontario Lawyers Gazette* 12, no. 3 (2008): 27. A Montreal organization, the Lord Reading Law Society, was established the following year and is still in existence. See Irwin Rudick, "President's Message," *Lord Reading Law Society Newsletter* (January 2010), <http://lordreading.org/en/newsletters/2010/01>, last accessed 24 July 2016.
- 7 For further information on Harry's family, see the Ontario Jewish Archives – Honey Dworkin; and the Ontario Jewish Archives – Harry Arthurs.
- 8 Harry W. Arthurs, "Woe unto You, Judges: Or How Reading Frankfurter and Greene, *The Labor Injunction*, Ruined Me as a Labour Lawyer and Made Me as an Academic," *Journal of Law and Society* 29 (2002): 657, at 657.
- 9 See Ian Kyer and Jerome Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers and Legal Education in Ontario 1923–1957* (Toronto: University of Toronto Press, 1987); Martin Friedland, *The University of Toronto: A History* (Toronto: University of Toronto Press, 2002), 438–42.
- 10 Arthurs, "Woe unto You," 658.
- 11 *Ibid.*, 659.
- 12 *Ibid.*
- 13 Martin Friedland, *My Life in Crime and Other Academic Adventures* (Toronto: University of Toronto Press, 2007), 38.
- 14 *Ibid.*, 12–14.
- 15 Arthurs, "Woe unto You," 660.
- 16 *Ibid.*
- 17 *Ibid.*, 661.
- 18 *Ibid.*, 662–3.
- 19 Oliver Wendell Holmes, *The Common Law* (Boston, MA: Little Brown, 1881), 1.
- 20 Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897): 457, at 461.
- 21 *Ibid.*, 469.
- 22 Holmes, *The Common Law*, 1.
- 23 *Southern Pacific Co. v Jensen* (1917), 244 U.S. 205, at 222.
- 24 *Ibid.*, 221.
- 25 *Abrams v U.S.* (1919), 250 U.S. 616, at 630.
- 26 See Bora Laskin, "The Labour Injunction in Canada: A Caveat," *Canadian Bar Review* 15 (1937): 270; Laskin, "The Protection of Interest by Statute

- and the Problem of ‘Contracting Out,’” *Canadian Bar Review* 16 (1938): 669.
- 27 *Southern Pacific Co. v Jensen* (1917), 244 U.S. 2015, at 222.
- 28 Holmes, *The Common Law*, 1.
- 29 *Ibid.*, 35.
- 30 See, generally, Denise Réaume, “The Judicial Philosophy of Bora Laskin,” *University of Toronto Law Journal* 35 (1985): 438; and Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005), particularly ch. 2 (“Law School”) and 4 (“Harvard”).
- 31 Girard, *Bora Laskin*, 50–1.
- 32 Bora Laskin, “Cecil A. Wright: A Personal Memoir,” *University of Toronto Law Journal* 33 (1983): 148, at 150; see also R.C.B. Risk, “The Many Minds of W.P.M. Kennedy,” *University of Toronto Law Journal* 48 (1998): 353, at 365–70; and Martin Friedland’s introduction, “The Enigmatic W.P.M. Kennedy,” for the 2014 republication of W.P.M. Kennedy’s 1922 classic, *The Constitution of Canada*.
- 33 Girard, *Bora Laskin*, 50–1; Risk, “The Many Minds of W.P.M. Kennedy,” 366–7.
- 34 Cheryl Misak, *The American Pragmatists* (New York: Oxford University Press, 2013), 77–81.
- 35 *Ibid.*, 78.
- 36 Roscoe Pound, “Mechanical Jurisprudence,” *Columbia Law Review* 8 (1908): 605, at 609–10; Girard, *Bora Laskin*, 84.
- 37 J.B. Milner, “The Law of Contract: 1923–1947,” *Canadian Bar Review* 26 (1948): 117, at 117. Milner referred the reader to what he called a “brilliant account of this philosophy” in Lon Fuller’s “American Legal Realism,” *University of Pennsylvania Law Review* 82 (1934): 429.
- 38 Harry W. Arthurs, “Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship,” *Canadian Bar Review* 38 (1960): 346. The article was very recently cited by the dissenting judges in a Supreme Court of Canada case in which the Charter (section 2(d)) was used by the majority to prevent the Saskatchewan government from banning strikes by public service workers: *Saskatchewan Federation of Labour v Saskatchewan*, [2015] S.C.C. 4. Harry would, of course, normally be happy to be cited by dissenters, but perhaps not in this case. Would he be pleased with the majority decision? As is well known, he has expressed doubts about using the Charter in such cases. See Harry W. Arthurs, “Constitutionalizing the Right of Workers to Organize, Bargain and Strike: The Sight of One Shoulder Shrugging,” *Canadian Labour and Employment Law Journal* 15 (2010): 273–86. So one suspects that there was muted applause.

- 39 W.P.M. Kennedy and Jacob Finkelman, *The Right to Trade: An Essay in the Law of Tort* (Toronto: University of Toronto Press, 1933).
- 40 Arthurs, "Woe unto You," 664.
- 41 See Girard, *Bora Laskin*, 269; A. Alan Borovoy, *At the Barricades: A Memoir* (Toronto: Irwin Law, 2014).
- 42 Girard, *Bora Laskin*, 45–8.
- 43 Arthurs, "Woe unto You," 665–6.
- 44 Consultative Group on Research and Education in Law, *Law and Learning*, at 71.
- 45 *Ibid.*, 69.
- 46 Hilaire Barnett, "The Province of Jurisprudence Determined – Again," *Legal Studies* 15 (1995): 88.
- 47 [1961] A.C. 290. See P.S. Atiyah, "The Legacy of Holmes through English Eyes," *Boston University Law Review* 63 (1983): 341, at 343–9.
- 48 Ben Palmer, "Hobbes, Holmes, and Hitler," *American Bar Association Journal* 31 (1945): 569.
- 49 Lon Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630, at 657.
- 50 David Dyzenhaus, "Holmes and Carl Schmitt: An Unlikely Pair," *Brooklyn Law Review* 63 (1997): 165. See also Albert Alschuler, *Law without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago, IL: University of Chicago Press, 2000).
- 51 Frederic Kellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint* (Cambridge: Cambridge University Press, 2007), 172.
- 52 Holmes, "The Path of the Law," 459.
- 53 Richard Posner, "Foreword: Holmes," *Brooklyn Law Review* 63 (1997): 7, at 17; see also Robert W. Gordon (ed.), *The Legacy of Oliver Wendell Holmes, Jr.* (Edinburgh: Edinburgh University Press, 1992), particularly the editor's introduction, at 6–7.
- 54 *Ibid.*, 9.
- 55 W.P.M. Kennedy, "Review," *University of Toronto Law Journal* 4 (1942): 431.

# The Daunting Enterprise of the Law

Essays in Honour  
of Harry W. Arthurs

*Edited by*

Simon Archer, Daniel Drache, and Peer Zumbansen

McGill-Queen's University Press  
Montreal & Kingston • London • Chicago

© McGill-Queen's University Press 2017

ISBN 978-0-7735-4889-3 (cloth)  
ISBN 978-0-7735-4890-9 (paper)  
ISBN 978-0-7735-4891-6 (EPDF)  
ISBN 978-0-7735-4892-3 (EPUB)

Legal deposit first quarter 2017  
Bibliothèque nationale du Québec

Printed in Canada on acid-free paper that is 100% ancient forest free  
(100% post-consumer recycled), processed chlorine free

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada. Funding has also been received from the Osgoode Hall Law School.

McGill-Queen's University Press acknowledges the support of the Canada Council for the Arts for our publishing program. We also acknowledge the financial support of the Government of Canada through the Canada Book Fund for our publishing activities.

---

#### Library and Archives Canada Cataloguing in Publication

The daunting enterprise of the law: essays in honour of Harry W. Arthurs/  
edited by Simon Archer, Daniel Drache, and Peer Zumbansen.

Includes bibliographical references and index.

Issued in print and electronic formats.

ISBN 978-0-7735-4889-3 (cloth). – ISBN 978-0-7735-4890-9 (paper). –  
ISBN 978-0-7735-4891-6 (EPDF). – ISBN 978-0-7735-4892-3 (EPUB)

I. Arthurs, H. W. (Harry William), 1935–. 2. Labor laws and legislation –  
Canada. I. Archer, Simon, editor II. Drache, Daniel, 1941– editor  
III: Zumbansen, Peer, editor

KE3247.D39 2017  
KF3457.D39 2017

344.7101

C2016-905946-4  
C2016-905947-2

---

This book was typeset by Marquis Interscript in 10.5/13 Sabon.



# Contents

Acknowledgments ix

Abbreviations xiii

Introduction: The Daunting Enterprise of the Law  
*Simon Archer, Daniel Drache, and Peer Zumbansen* 3

## PART I THE PLURALIZATION, DECENTRALIZATION, AND TRANSNATIONALIZATION OF LABOUR LAW

- 1 The Singular Pluralism of Harry Arthurs 37  
*Brian Langille*
- 2 A Yankee Gets Schooled in King Arthurs's Court: Canadian Labour  
Law as a Cautionary Tale 49  
*Cynthia Estlund*
- 3 The Once and Future Industrial Citizen 62  
*Gregor Murray*
- 4 A Tale of Two Harrys: The Life and Demise of Industrial Pluralism  
in Canada 75  
*Eric Tucker*

## PART II LABOUR LAW'S PRECARIOUS INFRASTRUCTURES

- 5 Defining Labour Standards: Harry Arthurs's *Beau Risque* 93  
*Gilles Trudeau*
- 6 Formality and Informality in the Law of Work 109  
*Kerry Rittich*
- 7 Mapping Labour Law With, Within, and Without the State 124  
*Mark Freedland*

PART III LEGAL ORDERING'S NARROW LEDGE

- 8 Dancing with Dicey: A Tentative Embrace of Judicial Review 137  
*David Dyzenhaus*
- 9 Administrative Justice in Arthurs's Court 149  
*Lorne Sossin*
- 10 Investor Rights and the Judicial Denial of Neo-Liberal  
Constitutionalism 169  
*David Schneiderman*

PART IV THE TREE OF KNOWLEDGE - THE AXE  
OF POWER

- 11 "Imagination, Determination and Passion": A Heroic Agenda  
for Legal Education 189  
*Robert W. Gordon*
- 12 The State of Legal Scholarship and Graduate Legal Education  
in Canada 199  
*Liora Salter*
- 13 "Globalization" as Framing Concept: Some Implications  
for Legal Education 218  
*William Twining*

PART V CITIZENS AND MARKETS

- 14 Workplace Law without the State? 233  
*Kevin Banks*
- 15 Reform in Small Steps: The Case of the Dependent  
Contractor 244  
*Guy Davidov*
- 16 Labour Markets Should Be Judged Innocent until Proven  
Guilty 258  
*Morley Gunderson*

PART VI THE FRONTIER OF LABOUR LAW'S  
UNCERTAIN FUTURE

- 17 Labour Law and the Political Economy of Inequality 271  
*Michael Lynk*
- 18 "A New Thing: Shall Ye Not Know It?": On Living Metaphors  
in Transnational Labour Law 286  
*Adelle Blackett*
- 19 Inequality, Gender Violence, Human Rights 298  
*Sally Engle Merry*

- 20 Labour Law and Its “Last” Generation 307  
*David Doorey and Ruth Dukes*
- 21 The Daunting Challenge: Economic Justice for Subordinated  
Groups 315  
*Katherine V.W. Stone*

PART VII MILESTONES, IMPERFECT FORESIGHT,  
AND FORMATIVE BEGINNINGS: THE MAKING  
OF A LEGAL REALIST

- 22 Harry Arthurs: The Law Student Years 327  
*Martin Friedland*
- 23 Confronting the Dragon of Globalization: Harry, St George,  
and Me 341  
*David M. Trubek*
- 24 Reading Landscape and Power 351  
*Bruno Caruso*

An Authoritative Bibliography of Harry Arthurs’s Academic  
and Other Writings 363

Contributors 377

Index 381