LAW IN THE UNIVERSITY: COLLOQUIUM

Chair: Mary Hatherly*

Harry Arthurs: First of all, let me express my very great admiration for Prof. Turner's comments before I work my way back through the others. I am torn between two metaphors. One of them is the metaphor of the great public figure who was present for an unveiling of a statute of himself in a public square. And he said, sure makes you feel differently about pigeons. And on the other side of the metaphor, the value which I could never before today perceive, of the instant reply upon which commentary is delivered by those who are not themselves engaged in the action. And quite frankly, I much prefer the second metaphor. I think your comments were extremely helpful, said in about a tenth of the time I took to say it, what I wish I actually had said and I really do appreciate that.

I would like to try and offer just two or three comments linking the extremely fine papers that we heard today. I think it is somewhat easier, surprisingly, to link the two papers we heard this morning to each other than either of them to Prof. McIntyre's paper because I think in a certain sense there was a convergence between the critical legal perspective which had as its endpoint the ambition of community, the ambition of a new kind of discourse, the ambition of extending the kinds of interests and rights protected by the liberal tradition, extending that protection to people presently excluded through this device of community. That, it seemed to me, linked in quite an interesting way with the notion that a return to orality would produce very positive outcomes. A return to history would produce positive outcomes because what it was really saying, the proposal of Prof. Howes, was that we should return to history and orality. The assumption of that is that there is a shared history, a common language through which orality can be conducted, the basic assumption of a proposal for community is that community facilitates discourse. It is very difficult for people who belong to different communities, who speak different languages, who don't perceive themselves to share a history to engage in that form of discourse. It seems to me that if I could encapsulate the two as reminiscence about the future, that would come somewhere near to doing it. There was a convergence between these two papers which I felt was at least for me quite strong. I feel somewhat uncertain about where Prof. McIntyre sits in relation to that theme, the theme of community, the theme of shared discourse, the theme of common history accepting that the history has in fact been written, as so much history has, by those who have predominated in the historical struggle, accepting that the language has been created by those who use it for their own purposes.

What remains unclear and I would be very grateful if she would care to comment on this, what are the prospects for a future shared language, what are they for a future community, not to be naive about it, not to be short term about it. Sudden transformation of people, objective conditions, of life, of all

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of the cultural paraphernalia which presently ratifies the position of various people in our society and the sexes and the classes and so on, what are the prospects of moving towards community. Will the community envisaged by Prof. Devlin ever be possible in terms of reaching across the boundaries between men and women. Will the kind of oral discourse which Prof. Howes is seeking to recapture, ever be capable of being recaptured in terms which genuinely include all participants. And I think she herself feels a degree of ambivalence about it and I see this ambivalence as the one linking element between or amongst the three papers, a somewhat surprising and a slightly disappointing conclusion. From Prof. Devlin we heard a degree of hope, somewhat forlorn but hope nonetheless. That, for example, the fact that three law schools required courses in professional responsibility, that was a portent of the future, there is hope there. From Prof. Howes, a compulsory course in legal history and from Prof. McIntyre CAUT procedural guidelines which are the notional equivalent of course in professional responsibility. And these I appreciate, not meant to be taken as total solutions by a whole long shot, I do understand that, but we are driven back to somewhat impoverished institutional mechanistic responses to what I think all of us in our own way perceive as quite profound problems. . . . I think if push come to shove none of our three papers today would say a whole lot is going to happen even if everybody has to study professional ethics, God help them, even if these procedures are complied with to the letter.

[Unidentified]: Are there any questions?

[Unidentified]: Let's go home!

[Unidentified]: The reception starts at 4:30 but there must be some questions before people are relieved.

[Unidentified]: No one can go to the reception unless they have asked a question.

Linda Hill (Law student, UNB): I merely want to quote Bert Brecht:

So it comes to a happy ending,
Everything under one hat.
If the necessary money is around
The ending is usually good.

Shauna McKenzie: I don't know that I had the same sensation, I must admit that I was quite excited by the opening remarks made by Professor Devlin this morning and I felt it continued through to the afternoon discussion. There are a lot of tensions that have to be identified and that's not a negative experience, a very difficult experience. The real challenge was that there would not be continued silence. I think that that is another point that was made, that we can be able to articulate it through mechanization. Women's studies should not be seen as a very exclusive realm within a program of study and I found that it was a not so much a doomfull statement but a statement that sheds much light on what can be a very real thrust towards a change, not only

within the law school structure but within, the whole higher educational structure.

Tim Rattenbury: I just have one small question I think on which I would appreciate comments from anybody on the panel or anywhere else which is -- how do you go about combining all of the things that you have been talking about today with actually teaching law students the things they have to know? The law students in year one know absolutely nothing about law and by the time they come out in three years they are expected to know pretty well everything--they'll do a short period of articling and there will be a Bar Admission course which will be more or less formalistic according to which part of the country they are learning in. Certainly in New Brunswick, by the time they graduate from law school they have to know a lot--having started from nothing . . . I think during lunchtime I was talking to Richard Scott and he mentioned the extensions to the curriculum recently. I don't know exactly what time scale he was talking of but a lot of new options have been added to the curriculum over the course of years in law schools generally and what happened at the end of the day was the students picked the practical courses because those are the ones which, when they get out in the real world, may give them at least some information to enable them to function in the field they have chosen to function in. Roman Law, I expect won't do all that much for them in practical terms--with respect--I enjoyed Roman Law too but that was some years back, so how do you do the combination?

Devlin: I'm not sure law students before they come to law school don't know what the law is about. I think they come with very high expectations in terms of what they are going to get. . . . The way I have tried to deal with that in the couple of years that I have been teaching is to suggest to them that you will be a better lawyer if you can ask some of the bigger questions. . . . So it can be done but it has to be done in a very particular sense except with Professor Turner's ideas again that there isn't a master plan but you do it interstitially. I think that the importance of politics of education is not a grit process of curriculum reform but through a microcosmic approach you do a little bit here, a little bit there and that way you can shift a little bit and maybe shift in a better direction. I don't know whether that helps at all, but.

Arthurs: I would just like to make a modest proposal in response to your question. One of the, I think, most imaginative people ever to teach law in Canada was a man named John Willis and Willis once said that the legal system would be greatly improved, if judges remembered that they were civil servants in a department of dispute resolution, if you can sort of forget that he is not talking about their tenure he is talking about their social task, and if you can sort of say the same thing about lawyers and realize that lawyers are doing most of the time, most of them, necessary perfectly mundane tasks. Bills don't get paid, people get run into, wills have to be made, all that stuff. It is a very liberating notion. It is also a very humbling notion. I think one of the problems that we have in legal education is that we want at one and the same time to produce civil servants in the department of dispute resolution and people who are capable of profound thought and very important funda-

mental reconstruction of our society. I think the conflation of those two activities is really the most fundamental problem we have with legal education. I have been saying for some years and persuaded several of my colleagues on the committee we had five or six years ago to this effect that really the greatest impediment to the development of serious intellectual work in law is that we are trying to do it at the same time by the same methods with the same people that are also being asked to perform a number of very mundane social tasks. So I think one of the great culprits frankly is, as I said, the conflation of these two things in the law schools which by the way mirrors the conflation of these very different social roles in practice, that is to say there is only one ticket to practice for the most humble practitioner, the most ultimately elevated jurist--there is only one ticket to practice. I think we could do wonders, wonders if we just said there is going to be a certain number of people who are going to get limited ticket to practice and they can go out and solve their disputes, and help people along and that's a very valuable social task. Now I know the problems in medicine, I know the problems of hyper-specialization but if at least for purposes of discussion you can treat it metaphorically, it seems to me that that would be an enormously liberating move in terms of thinking seriously about the large questions in law and at the same time turning out very well trained technicians which society is entitled to. I'm not going to say another thing.

Kuttner: It seems to me the question refuses to accept that one should question the nexus between the law schools and the profession. You see I think there are some in the law schools that would totally disagree with what you have to say that they must be preparing people to go out there to the real world. I frankly think that I'm living in the real world myself at the law school. It's a different world than the world some of my students and in my view unfortunately too many of my students decided they want to live in, which is the world of practice which you seem to identify as to the real world. I don't know where to go from there other than to say that the whole problem is one of that nexus. We are so wedded to it and all of us are fearful about breaking it I think even in a discussion such as this. I think if push came to shove and one were to ask "Would you rather teach at UNB Law School or at the Department of Law in a Faculty of Arts at Carleton," most of us tend to say "Oh, its got to be Law School"--we've internalized the nexus and even when we fight against it we want our lives to somehow reflect it. Personally, I have always respected Professor McWhinney, who left the Law School to go to Simon Fraser and become a great constitutionalist outside of the Law School culture. I notice he is the one that is asked to testify as an expert on Meech Lake. At our own Law School there was some discussion at one time of having two streams of degree. It never got beyond the first initial discussion stage before everyone was at each other's throat because many felt that those who chose the non-professional route would become marginalized from the culture of the law school.

Mary Hatherly (Law, UNB): I would like to say something. It seems to me that somehow it is much like a two-tier law school where we produce technocrats who service the public in mundane legal matters and we reserve sort of fun-

damental issues for an intellectual elite of law students, or am I misreading you?

Arthurs: Well you are inserting a few verbs.

Hatherly: I didn't use the term bludgeon like my colleague. The only problem I have with that is that it seems to me that very often we at the law school are guilty of drawing a false dichotomy between law as it is taught and law as it is practised and I think many people in the room would be the first to concede that out of what you might term "mundane" cases emerge the most profound issues. I mean, the obvious ones are those emerging under the Charter where you have a breathalyzer case, which has to be one of the most common of offences, but it involves a very fundamental legal issue which is, when do we have a right to counsel? When is an individual who is in interaction with law enforcement authorities entitled to have a representative whose function is to minimize or serve as a buffer against the coercive power of the law so I'm not so sure that I agree with Professor Arthurs. Richard and I were talking about this at noon that we have to acknowledge the validity of the student's consumer interest and we have to try and satisfy that interest while alerting them to the fact that one cannot perceive the practice of law as simply performing a technocrat service. The fundamental issues emerge all the time and they may emerge in the most trivial or what we might call the most frivolous of circumstances--so I guess I'm simply saying that I don't like this separation between theory and practice as if they are two mutually exclusive entities. It seems to me that you can fuse theory and practice to make a better practicing lawyer.

Karl Dore (Dean of Law, UNB): It seems to me that Professor Hatherly has a point there, President Arthurs, because if you put the verbs in that she's put in, I detect you don't like that because that sort of loads the dice but if we take it back to your original terminology, I think it was the practice stream and the academic stream. The difficulty is that the typical law student has this image that even though they might see themselves perhaps eventually as an academic, nevertheless they still want the practice ticket, and even people of your ilk, I am told, have this leaning. I can recall hearing Martin Friedland, your good friend and I gather fellow student at one time, when you were students saying that if at the time you were students there were two streams--one practice and one academic, you both would have taken the practice stream. That would have been most unfortunate.

McIntyre: I know that I am coming in a very ill-focused way to a slightly different read on this dichotomy and I think it may turn around what we all mean by academic as distinguished from practice. My sense is that the larger questions matter and can, in fact, be used teaching *Peevyhouse* or any other core case and in every core casebook. My sense of the larger mission, if you like, of turning out more than technocrats is two things: (1) I think the consumerism of students is something we foster. I don't think they all came wanting to get packaged knowledge for consumption. I think we create a lot of that in our classrooms by streaming responses in terms of what ones we do

have time for and don't have time for. It's not a new idea but I think we do a lot of that. What questions we say "talk to me later" about and what questions we create a lot of space for in the classroom discussion. So, I think we create a good portion of what courses should you take before you graduate and what courses do we staff with enough people that it is understood that if your are normal, you will take those courses. I think that another way of going at the dual or the mission that we have is teaching the cases as moments of choice. I can only think of a loaded example because I'm tired but I know that some of the most loaded classroom discussions I've been in, as a student, deal with rape evidence rules and one can do enormous amounts with those rules in terms of their origin and what social assumptions are behind them but there are also questions like--while the rules are there, would you use them and what image of justice for example is behind the decision to use those rules and are you betraying your lawyer's trust if you don't use those rules and even if you don't use those rules are there ways of doing it other than say as--no names named--certain practitioners who make the news use them? My sense is--I'm also thinking about did I convert anybody? My sense of my function as a feminist teacher is to make my students, and that part is coercive, know that they have choices in terms of do they agree or not with this outcome as a moment of value choice but also do they want to enter the practice on what terms, working for whom--labour or management, large or small or themselves? But also where they are going to use these technocratic skills as a daily question of choice, so it is actually open to anybody in my classroom to say any answer to those questions, but my experience of legal education was that those were the questions not asked. The question was much more strongly--what's the rule, how could you argue the other side? Not, would you or what is the meaning of choosing to argue it this way or who does this impact upon? Those are, of course, political questions but it doesn't matter what political label you give so long as non-abdication to the rules is the outcome.

Leslie Smith: I am one of those strange people that practise law. I feel very strongly that the law schools' work has been academic and I think theory is a similar word, maybe not exactly the same. The law schools have to teach that. I think you do an injustice to think that everyone who goes into practice is a technocrat. I think you do an injustice to think that in order to teach someone to practice you must teach them simply that technocratic tasks, the routine mundane things, the defense of a breathalyzer case by relying on the Charter. I don't think law schools should be teaching what Charter arguments are available with the breathalyzer case. I think they should be teaching what are the concepts this Charter includes and how do those impact with examples perhaps for the breathalyzer, because what happens if you teach it at too mundane and technocratical level the lawyers you turn out . . . are out in a whole lot of areas and they can't grow if what they have learned is the law that applies to today. They can only grow if they learn how did it get there and what is the theoretical framework in which we put this thing. Then as law develops, as society moves, as things change the lawyers can move with them. I think it is important that they have a theoretical understanding of why things work the way they do much more so than the technocrat. They

can learn--the form for a deed is on a word processor--and any competent legal secretary can teach them that. The format of a Notice of Action or whatever you call it in whatever province you are from--a secretary can teach you that. What you need to understand is when you have got an unusual situation--you've got a change in the law to be able to bring this stuff forward and that is the law school's role and I think, if anything, they are going a little too technocratically. Having said that I think they do have to give this theory in a wide-ranging number of areas, I think we still come back to Tim Rattenbury's problem of how do you do this and also raise their consciousness level about minorities, about sexism and all sorts of other things, and I think you come back to Mr. Devlin. It almost has to be done, aside from the odd course, interstitially. It has to be done by a Professor McIntyre teaching the course on Contracts and focusing some of these choices on what do they mean in sexist terms? Not teaching a course on sexism in modern society, I think simply because you haven't got time to teach courses on all these things--at least in most law schools but an awful lot of that stuff by good professors--and that's what you need--good professors can teach their course and interstitially in the way they present it, present these other issues. If you have a good mix on a faculty, the law students will get these various things interstitially. Professor McIntyre will give them one thing, Professor Devlin will give them something else but meanwhile they are still getting that basic theoretical background they need, but I do think the law schools are maybe getting a little too concerned to teach the nuts and bolts of doing law. The nuts and bolts can be learned very quickly if you have the framework in which this stuff is set and in the theory on which it is based.

Arthurs: To just respond to that--let me start with the point about learning the nuts and bolts I think you said from the secretary. I am making perhaps a more radical suggestion than you imagine. I'm suggesting the secretary should be the person who is out dealing with the nuts and bolts, I'm suggesting that we should not be educating people for six or eight years through the post-secondary system in order to deal with things which people with much less education could deal with. People who don't have access to post-secondary education, people who don't charge prices like lawyers charge ought to be dealing with most of these problems. I'm talking about a redefinition of the professional monopoly, that's what I'm talking about for starters. I'm saying that we don't need to process people as we presently process them to do the mundane social tasks which need to be done. I'm not disparaging them. I'm talking about barefoot doctors. I'm talking about para-professionals, I'm talking about a whole range of legal tasks for which most lawyers are presently very much overqualified and for which they overcharge relatively for the nature of the task. That is for starters.

Similarly, I am afraid I cannot accept that problems dealt with interstitially are dealt with thoroughly. Yes we deal with them interstitially because there is no opportunity to deal with them thoroughly, but if you wanted to decide whether people who are arrested for flunking their breathalyzer test should be allowed to have counsel or not--that seems to me the very worst forum you could choose would be a forum in which the question is first of all

colored by the circumstantial evidence of the particular case that throws it up, in which the questions are, which lawyer happens to get hold of the case first? Which lawyer happens to be assigned the case for the Crown? Which judge happens to be sitting on the Bench what day? Which Provincial Court of Appeal hears the issue first of all the arguments and the relevant facts are circumscribed by, of course, the time constraints, the intellectual traditions, the evidentiary rules and all of the other things which define legal argument. None of those things make for a full and adequate ventilation of what might turn out to be a very complicated social issue. That is disposing of that issue interstitially and I'm saying these issues are too important to be disposed of interstitially. Of course we all do it. We do it with a passion and to good affect today because that is the form of legal education that is available to us. I'm putting it to you that if some group of people had the opportunity to extract themselves from that professional culture, from the burdens of practice, from the demand to prepare technologically for the service of individual clients, if we could find in this country some few places where those people would have a refuge, where they could take more than the interstitial opportunities offered--often, as I think Sheila McIntyre was saying, with considerable resistance from their fellow students and from other professors and if you like--luxuriate in these questions, pursue them seriously, open-endedly, with the benefit of intellectual exchange, then I think we would understand our legal system a great deal better than we do. So, I hope you understand I was making what I conceive to be a somewhat radical proposal.

McIntyre: I couldn't disagree more with both parts of that argument. As for subdividing the world of legal professionals into the mundane functionary who won't be overpaid for his or her work and the overhead elite member who sometimes has to do mundane work, I'm for integration, not more job ghettoization. I mean I think well-paid, high-brained educated people should have to do some mundane work once in a while and then maybe they would know what they are talking about when they describe those occupations. That isn't to say that you don't, it is to say that further specialization to create space for true intellects to do unburdened in-depth inquiry strikes me as exactly what is wrong with the University I criticize today. I think exactly the opposite: that the discussion of the breathalyzer case cannot be understood without which judge was sitting, which facts were left out, what were the circumstances here that distinguish it from there, where was the location, what was the gender or the race of the parties and so on. There may be a non-interstitial way of doing it but I can't imagine why we would want to talk about it. It's sort of like a parody of the case method--remove all the facts, don't do any trial judgments and pre-edit your casebooks to end up including only what you or the editors think is the most important nugget of the case, not how they reach that conclusion, not what facts were presented or omitted and then you can really talk about the issues raised by it--is exactly what I am in education to stop.

Kuttner: I totally disagree with what you say. There was a great debate among the rabbis after the destruction of the temple when cultic worship came to an end. What to do with the mass of law about cultic worship? I think, thankful-

ly, the rabbis decided that this continues to be a subject worthy of study, not only worthy of study--it is compulsory to study it. It is a good example it seems to me of the study of a legal system which cannot possibly have any utilaritian value because there is no temple, there is no possibility to sacrifice and yet out of this discussion 2,000 years on (and it continues today in faculties of learning) much of value, I think, actually comes forth. I have a feeling that this is partly what Harry Arthurs is saying. Why can we not study law and the legal issues outside of the context of practicable application? Why do we fear doing that? It seems to me that this is part of the University tradition. This is, of course, the criticism of all the arts. What can I do with a French degree that anybody who was born French cannot do? Well, there is something more to it. Society is benefiting from the contemplation of this particular body of knowledge outside of its practical impact. I don't believe that one has to always have a mix of the practical and the theoretical. We can also separate the two and it is good.

Fernand Landry: My perception of universities and of law school has always been as agents of change, as places where we search for a better society, where we search for progress in the social and economic areas. I have always been concerned with the degree of conservatism that comes out of universities and in particular law schools. I have been out of teaching law now for 12--13 years and I get concerned when I hear Professor McIntyre tell us that since 1971 we have only gone from 11% of faculty members who were women to 16%. That certainly does not auger well for universities as agents for change or social progress if they can't even get their own house in order--in order to meet the expectations for social change. I get very concerned when I hear that aboriginal people only account for 1% of the students in law schools--and we started back in the mid--sixties or early sixties to try to address that problem. Maybe the solution is to set up an aboriginal law school and then train people--aboriginals to be ready to take over positions of power in our society. I don't know--if the universities do not respond to that need somebody is going to have to address it eventually in some way. I must plead for law teachers and law schools to try to form educated people who are flexible, adaptable, who are really managers of information. I hate to use my own experience but I went from being a civil servant in Justice to being a law teacher to being a practitioner and now I am a--I don't know what. I am not a civil servant--I am somewhere in between the civil service and the political arm of government, I guess. I think I have observed quite a number of people in those various areas of legal activity throughout the last 15 or 20 years and I must say those that have done the best in terms of helping society to progress are people who are flexible and adaptable--people who have the [flexibility] of thinking that is required to adapt and to manage information and to see that society should always move forward. Society should be a place where we seek to obtain a greater degree of justice. I know that law teachers always shy away from trying to define the just . . . I think we have to strive to educate people--and not necessarily experts in legal rules or experts in corporate law or experts in tax law, but we have to be able to form and educate people who are flexible and who are prepared to search for a greater degree of justice in society.

Hatherly: I just want to try and express more clearly what my concerns were in response to Professor Arthurs' remarks and again in response to Professor Kuttner's . My objection to this view rests upon what I think are two premises apparently shared by Professors Kuttner and Arthurs that I don't think are essentially valid. First of all, there is a pure theory of law. On this issue I would have to align myself with Professor McIntyre. I'm not sure you can even talk about law independent of the facts of a particular case. Secondly, my concern with the whole technocratic notion, the notion of lawyers as technocrats and so on, and my opposition to this idea that we train an elite to deal with the big issues of law and we have paralegals for a want of a better term to deal with the mundane matters--I'm not sure there is such a thing as the mundane matter. I know from the lawyer's perspective we tend to regard cases as routine, but I think from the client's perspective even the most mundane matters assume monumental proportions. So while we might say a breathalyzer is a routine case, I'm quite sure that a person who is picked up and given a breathalyzer demand doesn't see this as routine at all. Rather this is a very important event in their life. I am concerned that we might create an elite in the law that operates to the disadvantage of people in society, where we characterize in advance certain matters as mundane and say, "If you have this sort of problem you'll only get a technocrat whereas if you have a big problem you are entitled to have this problem dealt with by a group of individuals who have the time and money to sit around and reflect about all the imponderables raised by your situation." To me I wonder where the impulse for reform will be if we remove lawyers, legally trained lawyers, from these ordinary cases. I must be in love with the mundane now after a year with the Crown's office but I see a great beauty in the commonplace. It is these sorts of everyday occurrences that generate the issues and unless we have the factual context I'm not sure the right questions would ever even be asked.

Kuttner: I want to thank everyone for participating. As to the question of the place of law in the university--I think all of us can leave the room recognizing it has a place. I don't think we've come any closer as to what place.