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Legal Knowledge, Practise, Culture,
Institutions and Power in a Changing World

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Author Contact: Prof. Harry Arthurs
Osgoode Hall Law School, York University
4700 Keele St., Toronto, Ontario M3J 1P3, Canada
Email: harthurs@osgoode.yorku.ca

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**THE SPIDER, THE BEE, THE SNAIL AND THE CAMEL
LEGAL KNOWLEDGE, PRACTISE, CULTURE, INSTITUTIONS
AND POWER IN A CHANGING WORLD**

Abstract: This keynote address, delivered on the occasion of the 5th Canadian Graduate Law Students Conference, held in Toronto on May 6.7, 2005, addresses the challenges for legal theory, legal practice and education in a globalized environment. Legal education is described as deeply embedded in the changing political economy of legal scholarship and legal practice. With increased subjection of law schools to allegedly clearly definable market demands, strong winds blow through the law schools in North-America and elsewhere. From the LL.B./J.D. program through graduate studies, curricular reform becomes enmeshed in larger considerations of greater inter-school competition and greater compatibility to the outside world. In the midst of it, the aims of the law, its potential and its limits, move out of sight.

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Osgoode Hall Law School, York University
4700 Keele St., Toronto, Ontario M3J 1P3, Canada
Email: harthurs@osgoode.yorku.ca

**THE SPIDER, THE BEE, THE SNAIL AND THE CAMEL
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Harry Arthurs

**Remarks to the Graduate Law Student Conference
Osgoode Hall Law School
May 6, 2005**

The people in this room represent the future of Canadian legal scholarship. I read admissions files, supervise graduate students, sit on dissertation committees, participate in oral examinations and evaluate graduate programs. I know that legal scholarship has never been in better hands.

In my title, I promised to introduce you to a number of strange legal creatures, starting with the spider. I'm a man of my word; in fact, I'm better than my word. I'm going to begin by introducing you not to one spider but to two.

In the first sentence of his history of English law Frederick Maitland famously said that "the law is a seamless web" which he hesitated to disturb by plucking at one strand. The metaphor is striking. It endows law with qualities of strength and adaptability. It assumes the continuity and coherence of law. It suggests that law is produced by an all-powerful juridical spider which designs and executes the law with genius and tenacity, or in, in a more modern version, which merely extrudes it in the form of a naturally occurring social protein.

The spider's web metaphor reappears in the writings of Lon Fuller 100 years later. Fuller argued that many social problems are polycentric – like a spider's web. Pull at one strand and you disturb another. Markets, for Fuller, were the quintessential polycentric problem. Attempt to regulate one aspect of market

relations and you immediately trigger unexpected and unwanted consequences elsewhere. Fuller even offered a graduate seminar at Harvard on the state and economic life – a very irritating seminar, actually. It was built on the premise that it is essentially impossible to regulate market behaviour by law. Fuller's spider web, oddly, gets tangled up with Maitland's in much of what emanates today from the World Bank, the law and economics movement and other neo-liberal propagandists for the rule of law. Law is the indispensable instrument of governance, they argue: it is just and it is rational; it protects us from oppression by the state; it is the foundation of our freedom, security and prosperity. But law, they say, should never be used to interfere with markets.

Not to belabour the obvious, but these encounters with spiders remind us that judges, lawyers and legal scholars often disguise law's ideological content by making legal institutions and outcomes seem natural, inevitable and immutable rather than the product of human agency and the expression of ideological belief and social choices.

Next, the bee. The bee doesn't appear by name in the famous case of *Harrison v Carswell*. However, there is no other way of explaining the majority and minority judgments which were written by two of Canada's finest judges. The case involved the right of a striking employee to picket in the shopping centre where her employer was located. The majority judgment of Mr Justice Dickson held that the landlord had a common law property right, enforceable under the Petty Trespass Act, to exclude the picket as a trespasser, and that only the legislature could take away that right. Chief Justice Laskin, dissenting, argued that under certain circumstances, trespassers may enjoy a privilege which overrides the landowner's right to control access. As it happens, I studied property law with Laskin, and I remember the point precisely: if you are raising bees on your property, and they escape from the hive, you have a privilege to trespass on your neighbour's property to recover them, so long as you are in hot pursuit.

Laskin himself was clearly in hot pursuit of a way to legalize picketing in shopping centres, a most worthy objective; and Dickson was hotly pursuing an equally worthy objective: defending democratically elected legislatures against judicial adventurism. Alas, their good intentions and hot pursuits took these two fine judges madly off in opposite directions. Law, it seems, can be expressed in the form of admirable and indisputable legal principles whose application produces totally contradictory results. You choose your principle; you determine your outcome. Or more accurately, you decide on your outcome and then choose your principle. Law, even for excellent lawyers, is result driven.

And now the snail. Everyone knows about the snail: its presence at the bottom of Mrs Donaghue's ginger beer bottle prompted the House of Lords to articulate a principle of negligence law which allowed her to sue the manufacturer of the drink, rather than the shopkeeper who sold it to her friend. Yes: everyone knows that snail. But thanks to some excellent legal historians, we now also know that *Donaghue v Stevenson* never went to trial; that there remains considerable doubt about whether the snail ever existed; and that it is by no means clear that Mrs Dohaghue was drinking ginger beer.

Law, as it turns out, requires no empirical foundation to command obedience; it needs only to be rhetorically compelling, to appear to be just or sensible and to emanate from high authority.

Finally, the camel. William Twining - like Maitland, an historian and legal theorist - tells the story of how as a young law teacher in Khartoum, he introduced his students to an English tort case in which a child was bitten by a camel in the London Zoo. "Please sir," a Sudanese student asked "What's a camel doing in a zoo?" That question, says Twining, changed his understanding of law, and launched him on his famous theory of "law in context" - an important early contribution to socio-legal studies.

Law, according to Twining, does have an empirical foundation after all. It is a series of culturally contingent sub-systems which

are shaped by the specificities of time and place. Law in context, then, really is a camel. It is a bigger and more complex idea than the spider, the bee or the snail. It has two humps: it challenges both traditional views of law as decreed by God or nature, and contemporary attempts to describe law as a universal or global phenomenon. Like camels which apparently cannot reproduce without human assistance, Twining's insight reminds us that law is a human artefact, as ubiquitous, various, perverse and sociable as humans themselves. And finally, once having pushed its way, camel-like, into the tent of legal consciousness, there's no getting rid of this idea.

So there you are: a brief history of legal thought over the past hundred and fifty years: from legal formalism, positivism and natural law to legal realism, functionalism, and pluralism. I haven't quite made it all the way to postmodernism, I admit. But since postmodernists hold that it is the reader who ultimately imparts meaning to the text, you are free at this point to nominate your own favourite animal.

My objective, however, is not to leave you with a history or taxonomy of legal thought. It is to show how these differing ideas about law shape what I might call the political economy of legal scholarship.

Whether one thinks of law as a profession, as a university discipline, as a cultural phenomenon or as an institution of social control, at the centre of one's understanding is a set of assumptions about legal knowledge. Legal practice is different from accountancy or medicine because lawyers know things and do things that doctors and accountants don't and can't. Law schools are different from philosophy or psychology departments because legal academics read different books, use a different vocabulary and employ different methodologies. Law is different from, say, the visual or performing arts because it conveys its symbolic and emotive messages through different conventions of dramaturgy. And law is different from the market or the church as a technique of social control because it employs different

strategies of persuasion and coercion. In each case, the assumption is that there is something distinctively “legal” which ultimately has to do with the nature of legal knowledge.

However, I’m giving law the benefit of the doubt when I say that legal knowledge is different. For reasons you can readily imagine, an excellent case can be made that law is a derivative discipline, that for the past 100 years or so it has been borrowing much of what it knows from other fields of study, that there isn’t much that is distinctively legal knowledge, and to the extent there is, it’s pretty suspect. Law’s distain for empirical facts and systemic analysis are but two of many examples. Put all of that off to one side.

What I want to say is that even taking at face value the claim that there is a distinct and describable corpus of knowledge that we might label “law,” it is clear that law people disagree strongly amongst themselves over what that corpus might comprise.

For practitioners, what they don’t need to know in their own practice might as well not exist. Stop any tax lawyer on Bay St.; ask her or him about criminal law or intellectual property, and chances are you will get a blank stare. Stop any lawyer in a small town and ask about securities law or constitutional law, and you’re pretty sure to get a look of incomprehension or worse. And being utterly frank, stop any law professor and ask about fields other than those she or he teaches and writes about, and you may well find equal puzzlement. The only lawyers likely to profess omniscience are those you’ll find on the bench. Because our courts are courts of general jurisdiction, it’s understandable that they should claim to be able to transcend their professional specialties. However, after reading their judgments, one sometimes has to wonder whether a little more judicial modesty wouldn’t be appropriate.

I want to say, next, that the internal division of knowledge amongst lawyers, both reflects and requires a division of legal labour. It also reflects and requires a division of wealth and power.

Legal labour is divided in several ways. First, it is divided in terms of professional specialization, as I have already suggested. Tax lawyers and criminal lawyers, constitutional lawyers and securities lawyers obviously inhabit different universes of discourse – unless of course you believe, with Maitland, that the law is a seamless web. It is also divided amongst those who litigate and those who advise, those who judge and those who produce legal knowledge. But law is also socially stratified. At the top of the legal hierarchy are those who increasingly work in nation-wide and trans-national blue ribbon firms which serve a predominantly corporate clientele, and practice almost exclusively in areas of interest to these clients. They are at the top not just because they associate most closely with the rich and powerful, enjoy the greatest financial and psychic rewards, and exercise the greatest influence in public affairs and the economy. They are also at the top because they get the chance to do the most complicated and interesting legal work, which brings them great professional recognition and esteem. At the bottom of the professional hierarchy are solo practitioners and lawyers in small firms who typically serve individual working class or middle class clients in local communities, earn relatively modest incomes performing what are often fairly routine tasks, and gain influence and prestige, if at all, only in their own community and amongst lawyers of their own kind. Finally, the hierarchy within the profession to some extent reproduces social stratification in the wider society. The usual suspects – recent immigrants, women, and people of colour – have a difficult time penetrating the elite firms and tend to congregate elsewhere in the profession.

So: who you are in the legal community, what you do in that community, to some extent determines what you know about law. That's relatively easy and uncontroversial. Now, however, I want to make a harder and more important argument. So far I have been talking about different domains of legal knowledge – criminal law, taxation and so forth. Now I want to argue that there are also profound differences in legal epistemology – in what we understand law to be. This requires me to revisit the menagerie I

described at the beginning of my talk. Spiders, bees, snails and camels have different understandings of the world they inhabit.

It is difficult to say which animal represents legal practitioners. They don't act like spiders, for sure. Lawyers who work with legal rules know that law is no seamless web; nor do they want it to be: they want to be able to pick and choose, to pluck and tear so that they can weave together the arguments they need to advance the interests of their clients, whatever the consequences for the coherence of the legal system. On the other hand, lawyers tend to talk as if they believed in the seamless web theory of law, and they often exhibit the same antipathy to state regulation that lay at the heart of Fuller's spider metaphor.

If not spiders, are practitioners snails? Almost certainly not: if practitioners were called on to demonstrate that legal rules have some basis in empirical reality, they would be in deep trouble. I'm about to publish an article in which I and my co-author argue that the Charter may well be a non-event. As the empirical evidence shows, it hasn't changed Canadian society very much, and it isn't likely to do so. If we're right, this article ought to be deeply unsettling for Canada's finest and most idealistic advocates. But it won't be. They will dispute our evidence; they will challenge our logic; and they will make every effort to retain their world-view intact, to insist that the Charter has been a transformative event. My point is not that they are wrong and I am right; it is that they will not know how to engage – will not wish to engage - with the empirical evidence we are putting forward.

Practitioners and judges come closer to being bees than anything else. As *Harrison v Carswell* reminds us, even the best of them is prepared to use any expedient argument, seize on any useful theory of the case, to make the result come out the way they think it ought to. And, paradoxically, I'm going to argue that practitioners are part-camel as well. Like Twining's Sudanese student, they have an intuitive sense that law is context-specific. Contract principles which seem to govern employment contracts may not be very useful in the context of banking or property

transactions; which jurisdiction and whose court you get tried in is very important if you're facing a criminal charge; the meaning of words in a statute depends on its history and purpose; and how one resolves disputes in the entertainment industry may differ greatly from the way they're resolved in construction.

And what about us – “us” meaning legal intellectuals and academics? We naturally have strong affinities with lawyers and judges. We speak the same language, though not necessarily the same dialect. We share the same basic law school education, though ours is modified by subsequent graduate studies. We measure our successes, in part, by the extent to which we are able to convince lawyers and judges to look at legal issues in a particular way. So in some ways, we have a recognizable connection to the creatures that can be found in any courtroom or law office. But in other ways, we are as different from most practitioners and judges as Darwin's birds and turtles out there on the Galapagos are from their distant relatives in Patagonia or Pago Pago.

In part, the differences can be seen as an extension of the division of labour which exists in professional practice. We also have our specialties though we tend to view them more reflectively and critically than most practitioners. In part, too, scholars can be seen as a social stratum within the profession, somewhere between solo practitioners and members of large law firms. Our incomes are comparable to those of the lower orders of the bar, though our perks and benefits are probably better. On the other hand, we resemble members of prestigious law firms in several respects: we generally did pretty well at law school; we do important and worthy work; we enjoy a reasonably high profile both within the profession and in the public domain. But unlike members of these law firms, we choose to lead our lives in less privileged precincts.

In part, this says something about our temperament and values, about how we prefer to work, with whom and for whom, and on what. However, what mostly sets us apart from practitioners is

our epistemology. Most practitioners look at law from the inside out. That is, they take legal rules and institutions and practices pretty much as a given, and then try to work with them. Legal intellectuals, on the other hand, generally treat law as a subject of enquiry; they look at it from the outside in and try to understand not only what it is and how it works, but what are its social causes and consequences. This arm's length relationship from law testifies to the extent to which we have detached ourselves from Maitland's view, which for most legal intellectuals has long since ceased to be a credible account of the nature of law. Instead we have committed ourselves to the kind of broad philosophical, social and cultural enquiry which enables us not only to go off in hot pursuit of Laskin's bees, but also to expose the absence of Donaghue's snail and meditate on the significance of Twining's camel.

I'm not saying that legal academics have ceased to do traditional legal analytical work, or that they should cease. Indeed, in areas such as tax law and constitutional law, they do analytical work of great elegance and distinction. Rather, I'm saying that if legal analysis is all they do, it's not enough. All their hypotheses would be dubious, all their arguments incomplete, all their conclusions suspect, because they will have failed to make use of the full range of intellectual tools available to them.

Those useful tools, of course, are not distinctively "legal" and they are not really ours. We borrow them, sometimes shamelessly, from our neighbours in economics, literary theory, sociology or political science. And to be honest, they are often tools which have been subject to a good deal of axe-grinding by liberals and neo-liberals, by feminists and critical race theorists. In other words, the people who design, use and sharpen them often have an ideological agenda as well as an intellectual one – as who does not? The result is that innovation and critique in law are largely derived from other disciplines, whether this is explicitly acknowledged or not.

This is a point worth dwelling on for a moment. Interdisciplinarity may be essential for serious scholarly work in law; but few of us who do that kind of work are properly qualified for it. And how could we be? I wrote a book on legal history without knowing the first thing about historiography. I've done surveys and interviews without studying sociology and I've taught a course in political science with nothing more to go on than the courses I took as an undergraduate. I'm not boasting; I'm embarrassed. And so should we all be, because our commitment to interdisciplinary scholarship almost inevitably exceeds our competence. Of course, no one person could be possibly be knowledgeable in the dozen or so disciplines necessary to function as well-informed legal intellectuals. That's why I think that graduate programs in law ought to set themselves two modest goals: (1) to ensure that future legal scholars demonstrate basic fluency in at least one of the social sciences, and (2) to ensure that they acquire skills and attitudes which will help them to work in partnership with colleagues in other disciplines.

Now let me move on to the next stage of my argument. On the one hand, we have the practising bench and bar: still spiders at some level - true believers in the coherence of law, even though they ought to know better - and still bees - opportunists who will use any argument that works. On the other hand, we have legal intellectuals who may not actually themselves search for snails or herd camels, but are nonetheless committed to the crucial importance of such activities. These two groups clearly create, possess, dispense and are defined by, different kinds of knowledge. The one locates itself at the core of the legal community, the other at its periphery. They have different "relevant others," different lifestyles, different values, different hierarchies and different rituals and rewards. And not least, they espouse different ideologies, with different degrees of explicitness and self-consciousness.

These differences manifest themselves in debates over the content of the law school curriculum, over bar admission and continuing education programs, over what judges ought to read and how

litigants ought to make arguments, over the extent of self-congratulation or self-flagellation that is appropriate for the bar's public utterances, over the propriety of appointing law professors to the bench and practitioners to law faculties, over the kind of evidence needed to assess the working of legal institutions or to justify law reform initiatives – and most of all, over what law is and what it does.

These debates amount to something like a culture war amongst people who embrace competing visions of law and legal knowledge. But not just a culture war. To the extent that these competing visions have a significant ideological content, this is a political struggle as well. Law and economics, feminist theory, critical legal studies, liberal legalism: these embrace radically divergent visions of the public good, of democratic process, of the role of the state, of the very terrain of politics. And the war isn't just cultural and political: it is economic too. Remember: legal intellectuals and legal practitioners earn their livelihoods and their reputations by preaching and practising their respective versions of legal knowledge. Radical changes in legal practice or legal education enhance or diminish the value of their intellectual capital and the returns that capital earns them.

Culture, politics, economics: these are words we use when we talk about power. But power doesn't exist in a vacuum, at least not a vacuum called "law." Law isn't sealed off from the broad political economy; it is part of it. It is therefore profoundly influenced by globalization and neo-liberalism – forces which are transforming virtually all power relations, including those based on legal knowledge.

Globalization has changed the world of legal academe enormously. It looms large as a topic of scholarly writing; it has carved out a niche in law school curricula and syllabi; it has inspired some fairly radical experiments with trans-national and trans-systemic law degrees; it has bought law professors tickets to conferences all 'round the world. As you can imagine, all of this represents a major change in our consciousness and imagination, in the range

of sources scholars must read and the people they talk to. More important yet, globalization forces us to revisit long-standing assumptions about how to regulate economic and social behaviour. Statutes passed by national legislatures don't take us very far when it comes to regulating global markets for money, natural resources, intellectual property or labour. But so far there is no global political process, no global legislature, no global regulatory regimes. The result is that much market based activity effectively escapes regulation. Dissatisfaction with this situation has led, in turn, to the invention of new non-state mechanisms of regulation which are of great interest to legal scholars – or at least to those who take an expansive view of law.

Finally, at the level of legal theory, globalization pits Maitland against Twining, spider people against camel people. Spider people claim that, in a global age, law too must be global, and that pending some means for making it so, domestic law must be built upon a platform of universally accepted legal norms including human rights, an independent judiciary, the rule of law, respect for property and free markets. Camel people, on the other hand, do not see domestic law as global law waiting to happen. In fact, they emphasize the power and persistence of local politics, local culture, local societies and local law.

These few examples will explain why I think that globalization has generally enlivened legal scholarship. But of course we have paid a price. For Canada, globalization means integration into the American economy. Whether they approve or oppose integration, Canadian scholars therefore find themselves at risk of being absorbed into debates framed up by American ideology, public policy, law and legal-academic culture. In some other academic disciplines – economics for example – similar developments have greatly diminished the attention paid by scholars to Canadian issues. I hope law will not go the same way; but it certainly could.

However, the direct effects of globalization on the legal scholarly community are as nothing compared to its impact on the Canadian bar. By transforming the Canadian economy,

globalization has shrunk the domestic market for high-end legal services, harmonized away some of the distinctive elements of Canadian law thereby making irrelevant much of what Canadian lawyers know, lured many of our best and brightest young lawyers to practice opportunities offshore and – though it's too soon to tell - possibly launched a process which will end up with Canada's major leading law firms reincarnated as branch plants of foreign based global law firms. This is likely to have a profound impact on our legal institutions and processes, on what our students expect to be taught, and how legal scholars define their agendas.

The progress of globalization has proceeded in tandem with – has been a key factor in - the rise of neo liberalism. Over the past ten or twenty years, the Canadian state has retreated considerably from the role it played in social and economic life from, say, the 1940s to the 1960s or 1970s. This retreat has had important consequences for legal scholars, students and practitioners. For one thing, there's less money: less to support legal research, less to subsidize the costs of legal education, less to pay for academic "frills," less to pay for legal aid plans and public sector law jobs. For another, there's less regulatory activity by the state. Land use and environmental law, labour law, human rights and securities regulation have all dwindled in importance as sources of legal work and of academic inspiration. True, some of the slack has been taken up by the Charter which has become a leading field of academic research and appellate litigation. But overall, the reduction of the state's role in the economy has been paralleled by a reduction in the presence of regulatory issues on academic bookshelves and on lawyers' Blackberries and Daytimers.

By far the most important effect of the rise of neo-liberalism, is that we seem to be launched on a long-term transition from an "old normal" to a "new normal." For people of my generation, and those born through to the end of the 1960s, the "old normal" meant that the state would provide and the state would protect. If the state didn't do that, the state was in default of its obligations to its citizens. Allowing for disagreements over degrees and modalities of state intervention, it is still broadly true to say that

most legal scholars during that period had been brought up to expect and applaud the activist state. Well, those people begat disciples and their disciples begat more disciples. However, at some point – just about now - the blood lines begin to run thin. More recent generations of students will have grown up in an era when state activism is regarded as exceptional and presumptively undesirable. They are likely to react very differently than I did to the notion that people need jobs or pensions or protection against the economic power of large corporations. “Let the market provide” tomorrow’s legal scholars are likely to say, “or fix it with the Charter;” but not “let’s invoke the regulatory and redistributive apparatus of the state.”

In short, because of globalization and neo liberalism, many of the deep structures and hidden assumptions of postwar legal scholarship are coming under increasing stress as the old normal is slowly being displaced by the new normal. The result will be, I predict, increasing dissonance between the old progressive scholarship of the postwar period and the new neo-liberal paradigm of the state and legal system; this in turn will cause great intergenerational stress in the legal-intellectual community.

You - the people in this room, the next generation of legal scholars and intellectuals – are going to find yourselves right in the middle of all that dissonance and all that stress. In fact, you and your contemporaries will be the cause of it. But fear not: as someone who generated a good deal of dissonance and stress in his time, I promise you that being involved in these fundamental, paradigm-shattering debates will be the making of you. Spiders, snails, bees, camels: name your animal. You and your colleagues will have the opportunity - you will have the responsibility - of redefining the very nature of law and of legal knowledge.

What a challenge. I wish I were on the other side of this lectern, starting all over again!