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Legal Knowledge For Our Times: Rethinking Legal Knowledge and Legal Education

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INTRODUCTION

"Legal Knowledge For Our Times: Rethinking Legal Knowledge and Legal Education"

by
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In memory, Marlee Kline, 1960 – 2001

The essays gathered for this symposium reflect a number of overlapping concerns about contemporary legal knowledge and education.

Though they are considerably diverse in focus and subject-matter, ranging from admissions to films to "marketing" of law faculties, each of these articles addresses aspects of legal education, the construction of legal knowledge and the character of what Ian Duncanson calls "the law discipline."[2] Educational practice, knowledge and disciplinarity are thoroughly inter-related. The contributors to this volume are all acutely aware that, *as educators and researchers*, we both:

> participate in the construction of legal knowledge (for the readers of learned journals, for our students, for ourselves, occasionally for the media or in representative roles)
>
> *AND*
>
> are subjected to constructions and constraints on legal knowledges produced elsewhere (in courts, in legislatures, government ministries, law offices, law societies, in the research of others, in political parties, in the media and the discourses of daily life and, pre-eminently, in radio talk-shows, US television sitcoms and television commercials).

In short, we "construct" legal knowledge, but not entirely under conditions of our own choosing. The construction of legal knowledge is important to us. It affects our lives. In many ways it is our lives.

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1 This symposium issue emerges from a general effervescence of interest in and research on legal education during the past five or so years. Some projects have taken shape in the series of meetings documented by Constance Backhouse in her contribution to this volume, others from individual initiatives of all sorts. Six of the articles in this volume emerge from a research project funded by the University of British Columbia Hampton Fund for Research in the Humanities and Social Sciences on "The Challenge of Change: Rethinking Law as a Discipline." This supported research, workshops and a working conference in which Margaret Thornton, Christine Boyle, Marilyn MacCrimmon, Rebecca Johnson, Ruth Buchanan, Susan Boyd, Annie Rochette, W. Wesley Pue and Margot Young, amongst others took part. Professor Marlee Kline was central to the inspiration and development of this project at the University of British Columbia. A warm and engaging person, outstanding scholar and fine colleague she is much missed.

2 I. Duncanson, "Degrees of Law: Interdisciplinarity in the Law Discipline" (1996) 5 *Griffith L. Rev.* 77-103.

Surprisingly, perhaps, legal educators and researchers have not always been terribly cognizant of these seemingly obvious points. We have as a group been stunningly silent about such things. While others have had much to say about legal education, its defects and its aspirations, the legal academy has infrequently directed its mind to such matters.

We cannot long afford this. The world around us is changing. Modern times and the challenges of change require rethinking of law as a discipline. The task of approaching social and legal change "in the round" and the implications of either or both for education and other constructions of legal knowledges are immense. The various consequences and relationships amongst education, globalization, neo-liberalism and social diversity clearly cannot be fully broached in a few pages. But issues and forces such as these buffet legal knowledge and legal education about, sometimes violently. They raise big questions concerning the construction of knowledge in society at large. They also raise questions relating to the role of legal education and legally educated citizens in the service of diverse communities. Smaller, but important, issues relating to curriculum, pedagogy and the learning environment within law faculties are also relevant.

This collection includes essays that focus on a "big picture" framing of issues in contemporary legal education. La Trobe University's distinguished legal scholar, Professor Margaret Thornton raises important questions about the relationships between contemporary political economy, culture and legal knowledges in her alarmingly-titled contribution **"Among the Ruins: Law in the Neo-Liberal Academy."** Although her jumping-off point is a particular programme review at her own university, Thornton's discussion of neo-liberalism, the rise of the corporate university and a narrow, impoverished understanding of technical expertise which characterizes "western/global" culture will be familiar to greater or lesser degree to readers in many different environments. Indeed, her concluding observation that "the technological revolution, globalisation and postmodernism, as well as corporatism and commodification, have thoroughly disrupted the idea of the universal in the university" resonates with deep-seated concerns expressed by a stunningly diverse array of university scholars over recent decades. Surprisingly, perhaps, such concerns are shared in common by the "cultural left" and the "cultural right."

Similarly, Constance Backhouse's **"The Changing Landscape of Canadian Legal Education"** outlines contemporary challenges to Canadian legal education, identifying economic, structural and demographic forces that are shaking Canadian legal education to the core. Acknowledging a series of positive outcomes flowing from these forces—including greater scrutiny and accountability, more creative thought about legal education, inter-faculty collaborations and so on—Backhouse raises a number of concerns about the negative outcomes that are being felt. These include inter-university competition, elitism, tiering of Canadian law faculties and a sort of ideological capture of legal education as it is "privatized." Though Backhouse's focus and starting point are both quite different from Thornton's, distinctly similar patterns emerge.

Harry W. Arthurs' contribution, **"The State We're In: Legal Education**

in Canada's New Political Economy," develops an approach that integrates an analysis of the sorts of concerns raised by Thornton and Backhouse in the specific context of early twenty-first century Canadian legal education. Arthurs notes that globalization and neo-liberal ideology have combined to redefine the state and hence law. Many of the consequences are well-known. The activist state has been discredited and, along with it, the idea of using law and state to pursue social justice. In combination globalization and neo-liberalism have "diminished the power and authority of the state and increased the importance and legitimacy of market forces."[3] Many particular areas of law are warped and re-worked in response to these combined forces (including intellectual property, corporate and securities law, tax, etc.—almost always to bring Canada into conformity with US expectations[4]), but, more profoundly, the way we think about law and state is altered. As Arthurs explains, "The neo-liberal state uses law... to teach us to expect little from government, to despise politicians, to resist taxation, and to view the Canadian state as an obstacle to progress."[5] The structures and daily ebbs and flows of legal practice, of course, are being profoundly warped by all these changes around us, making the legal profession "in many ways ungovernable," rendering it hard to define "what it means to be a lawyer in Canada today" and, therefore, producing difficulties for legal educators as it is now "difficult to imagine how we ought to educate them."[6] Following a survey of highlights of the Canadian law discipline during the twentieth Century, Arthurs concludes on a note of qualified optimism. Even if law schools cannot "change the world," "transform the law or save the soul of the profession," they can, he says, "certainly change themselves."[7]

Christine Boyle and Marilyn MacCrimmon's essay **"To Serve the Cause of Justice: Disciplining Fact Determination"** also picks up on the theme of law in relation to its larger culture, though taking a rather different starting point. Focusing in particular on the construction of "fact," the meanings of knowledge and the interplay between cultural understandings on that scale and the law of evidence, Boyle and MacCrimmon note that the shifting boundaries of the discipline of law are engendering debates about what is marginal and what is core. They draw on challenges posed by the increasing diversity of producers and consumers of law in searching for the core idea of what lawyers do in contrast to, say, anthropologists. They argue that a core idea of law is to engage in legal reasoning that pays attention to the values of human rights in its broadest sense. From this starting point they explore the extent to which this core idea is reflected in recent developments in the law of evidence, such as its increasing focus on basic principles in terms of doctrine and its arguably increasing regulation of the

3 H.W. Arthurs, "The State We're In: Legal Education in Canada's New Political Economy" (2001) 20 *Windsor Y.B. Access Just.* at 36.
4 *Ibid.* at 44.
5 *Ibid.*, at 39.
6 *Ibid.*, at 48.
7 *Ibid.*, at 54.

hitherto highly intuitive process of fact finding. In examining methods whereby the knowledge grounding legal factual determinations can be made consistent with fundamental human rights such as equality and access to justice, Boyle and MacCrimmon draw on a variety of topics Aboriginal rights claims, sexual assault, contracts and self-defense.

Similar issues are explored through quite different means in the next article **"Getting the Insider's Story Out: What Popular Film Can Tell Us About Legal Method's Dirty Secrets"** by Ruth Buchanan and Rebecca Johnson. In this paper, the disciplinary boundaries that divide legal "insiders" from legal "outsiders" are examined as they are refracted through the medium of film. The authors suggest that the slippage between law's view of itself and its representation in popular culture, particularly Hollywood films, reveals the ongoing work that is required to construct and maintain law's disciplinary boundaries. In sharp contrast to positivist conceptions of law as an autonomous sphere of principled fact finding and decision making which continue to powerfully inform most regimens of legal education, law as represented in popular films is a messy political, and imperfect sphere permeated by moral dilemmas and social injustices. By relocating law firmly within its wider cultural contexts, Johnson and Buchanan problematize law's claim to have privileged access to "truth" (as do Boyle and MacCrimmon in the context of fact finding). By examining the role of narratives in filmic portrayals of law, they begin to reveal law's function as a "meaning-making" as well as a "fact finding" institution.

Rose Voyvodic's contribution on clinical legal education is also about relocating law from the sanitized context of the law school classroom to another sort of cultural field: that of legal practice in general and "poverty law" in particular. Her article on **"'Considerable Promise and Troublesome Aspects': Theory and Methodology of Clinical Legal Education"** raises important questions about the "fit" of clinical teaching in Canadian legal education. Arguing for a stronger practice of integrating the "skills training" aspects of clinical education with theoretical reflexivity and the sort of detailed "recipe knowledge" that permits substantive law training to take effect, Voyvodic argues that clinical training is superior to conventional approaches to legal education both in terms of its educational philosophy and the epistemology it grows out of. Unfortunately, perhaps, the theory that informs clinical legal education has often gone unstated, much to its detriment. This article sketches out the pedagogical, theoretical and epistemological foundations of clinical legal education "in order to imbue its programs and instructors with a greater degree of acceptance within traditional legal education ... to further the cause of social justice, and to generate further theory."[8]

Another sustained challenge to the often anemic framework of legal positivism is found in Susan Boyd's **"Backlash and the Construction of Legal Knowledge: The Case of Child Custody Law."** Boyd offers a

8 R. Voyvodic, "'Considerable Promise and Troublesome Aspects': Theory and Methodology of Clinical Legal Education" (2001) 20 *Windsor Y.B. Access Just.* at 140.

much more robust conception of legal knowledge, one that is attentive to and encompasses "the relationship between social knowledge, legal knowledge and power" by examining the social struggles that take place over legal changes. She notes that family law—and particularly the allocation of parenting rights and responsibilities after divorce—is one site in which much larger struggles about the place of the family in social life, the appropriate roles of mothers and fathers and the gendered nature of caregiving are played out. The failure of judges, lawyers and law teachers to fully acknowledge this dimension of legal discourse can lead to its successful appropriation by some groups, such as father's rights groups, to the detriment of women. The success of father's rights groups in influencing the development of custody law in Canada is offered up as one powerful example of an effective "backlash" movement in law. Boyd concludes that it is "still crucial to struggle for initiatives in legal education that assist future lawyers in understanding the gendered power relations, and other power relations, that influence the processes of legal change."[9]

"'Back to Basics?' University Legal Education and 21st Century Professionalism," by Annie Rochette and W. Wesley Pue moves closer to the core constituency of the legal academy by focusing on constructions of legal knowledge and legal education that originate within the organized legal profession and which directly impact on the forms of education provided in turn-of-the-century Canadian law faculties. Ironically, despite the tremendous forces of "diversity" politics on the one hand and "globalism" on the other, Canadian legal professions tend to view issues of legal professionalism parochially, interpreted largely against their own collective bureaucratic memory. Survey data reveals that law students are very nearly overwhelmed by a narrowed version of technocratic legal knowledge, emanating in part from the ethos of organized professional culture, possibly to the detriment of the larger communities lawyers serve and also, ironically, to their own careers.

Julie Macfarlane also focuses on the questions of what should be taught at law school in her article on **"Legal Practices and Teaching Practice: What Does the Changing Culture of Legal Practice Mean for Legal Education?"** Starting from the position that law schools should teach in a way that bears some relationship to the things lawyers need to know, Macfarlane points to "a significant cultural change" taking place in North American legal practice. The traditional model of "lawyer as a manager of war" is giving way to an increased focus on negotiations and alternative dispute resolution as both lawyers and clients seek ways to resolve disputes more amicably (sometimes), more efficiently and quicker than the litigation-as-war model permits.[10] Through carefully comparing the developing professional culture focused on alternative dispute resolution with existing

9 S. Boyd, "Backlash and the Construction of Legal Knowledge: The Case of Child Custody Law" (2001) 20 *Windsor Y.B. Access Just.* at 164.

10 J. Macfarlane, "What Does the Changing Culture of Legal Practice Mean for Legal Education?" (2001) 20 *Windsor Y.B. Access Just.* at 191.

patterns of legal education, Macfarlane argues for reform across the law school curriculum. This is needed, she believes, in order to incorporate and reflect not just new knowledges and skills, but also a "vision of lawyering practice and ... dispute resolution"[11] that more accurately fits contemporary circumstances. Taking ADR seriously into account would produce changes in course offerings, content of existing courses and pedagogy.

"Law Students, Law Schools and their Graduates" addresses questions related to "diversity politics" and legal education through an exhaustive empirical analysis. Larry Chartrand, Dolores J. Blonde, Michael Cormier, Kai Hildebrandt, Christopher Wydrzynski and Edward J. Czilli conducted a comparative study of admissions, law school environments, and careers of law graduates[12] from the law faculties of the University of Windsor, the University of Western Ontario, the University of Alberta, Dalhousie University and the Université de Montréal. One of their over-riding concerns in conducting this research was the relationship between all aspects of law school functioning and the goal of "building" diverse communities into the legal profession. As they contend, this is important to the rule of law: "to ensure that the legal system reflects and balances the varied concerns of all members of a diverse socio-economic and multicultural society legal education must be readily accessible to traditionally under represented groups ... ."[13] The survey data analysed in this article points to important relationships between law faculty admissions policies, educational environment, diversity and both the composition and the culture of the legal profession. Law school, it turns out, has an enduring importance to the face of law.

As the discipline of law responds to challenges of change, questions arise as to how the quality of legal education is to be evaluated. Two methods growing in popularity in Canada are rankings and surveys of law schools. Margot Young's **"Making or Breaking Rank: Some Thoughts on Recent Canadian Law School Surveys,"** explores the consequences of this trend and concludes that such rankings are unsuitable vehicles for institutional and professional accountability and that they may operate to undesirably limit innovation in the curriculum teaching methods.

In sum, the articles presented here raise serious questions about the nature of contemporary common law legal education, its relation to larger legal knowledges and its adequacy to the needs of our times. No symposium of this length can possibly aspire to "solve" all the problems and potential problems that follow in the wake of significant social, political, economic and demographic transitions (such a goal would be unmitigated arrogance at any event). But in pointing to issues of pressing importance at various points of disjunction between diverse legal knowledges and existing legal education we hope to contribute modestly to the collective project of rethinking our legal and social worlds.

Those of us who participate in the culture of universities or of profes-

11 *Ibid.* at 193.

12 L. Chartrand *et al.*, "Law Students, Law Schools and their Graduates" (2001) 20 *Windsor Y.B. Access Just.* at 214.

13 *Ibid.*, at 213.

sions should live in constant fear of reproducing what John Ralston Saul calls the "central problem," that we have developed:

> a university community that does not teach the elites to rise above self-interest and the narrow view. It cannot because it has itself slipped into the self-interest and the narrow view that comes so easily in a world of professional corporations.[14]

14 J.R. Saul, *The Unconscious Civilization,* (Toronto: House of Anansi Press, 1996) at 71.