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A MANIFEST REVOLUTION:
ACCESS AND SPECIALIZATION IN LEGAL
EDUCATION AND PRACTICE

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The rhetoric of crisis states its own truth in the mode of error. It itself is radically blind to the light it emits.

Paul de Man, "Criticism and Crisis"

To many the science of law has become unhinged just as the nuts and bolts of Newtonian certainty were loosened by the conflation of energy and mass. Though Einstein assuaged the world of human action that it could continue with relative safety relying on Newtonian physics, the uncertainties of law's brave new world appear to envelop professional and non-professional alike. One possible source of this instability is that the legal profession is undergoing a "crisis in legal knowledge." Crisis presumes that we are in a transition between stable frameworks, whereas we prefer to approach this crisis as the recurrent point of departure and return of legal thought and legal knowledge. Nonetheless, while mindful of the cautions of de Man, the authors have acquiesced for the purpose of this comment to the rhetoric of crisis in the hope that it allows us to "re-speak" the objectives of legal education and legal practice.

The new consciousness of legal ignorance stems from the perception that law has become more complex. It is not simply a case of there being more rules or regulations, rather, the meaning and function of law have become more complicated. Intuitions of justice, the content of "natural law," have been qualitatively displaced by positivist law-making. Legal dilemmas are less easily framed in

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terms of moral imperatives as law becomes more site-specific, more embedded in material circumstance and social histories.

The law has become more complex because the society it regulates has become more complex. More decisions need to be made because more choices exist, and in this sense, law attempts to structure a society that is increasingly defined—though this logic exceeds the very notion of “definition”—by its variance with itself, defined not by what it is but by the possibilities of what it can be or, alternatively, by what it is not. Only in rhetoric can the organization we call society be reduced to one set of values or to a single overarching principle of social cohesion—if indeed cohesion is easily distinguished from tension.

The forces effecting the articulation and construction of the law resist any simple or holistic characterization of legal knowledge. The decomposition of the unity of legal knowledge has meant that its content no longer submits to any one end; it is no longer evident to say for whom or for what it is, or should be, composed. This predicament does not, however, release us from the need to decide and re-decide these questions. It is in view of these issues that a new perspective on legal education and legal practice is offered.

While critics of legal institutions have identified both the problem of wider access to legal knowledge and the increasing specialization of legal knowledge, rare is it that these cuts are made by the same sword. Typically, proponents of access to the law oppose the concentration of special knowledge in the hands of an elite whose access to legal institutions is primarily based on socio-economic privilege. The “crisis” of legal knowledge has painted a picture that hints at even greater elitism: the knowledge lawyers require to function effectively in society is due to become even more removed from the civilian denominator of “common sense.”

We contend in this comment that the aims of wider access and of specialization can be viewed in complementary terms.

1. Legal Knowledge

In a recent lecture delivered at Dalhousie Law School, Harry W. Arthurs, professor of law at York University, argued, “we are in the midst of a fundamental shift in the nature of legal knowledge which may in the end fundamentally transform the legal profes-

sion.”¹ Failure to grasp this shift has produced a profound epistemological break between how legal knowledge is taught and assimilated by lawyers and how law manifests itself in society. Not only are lawyers overwhelmed by the exponential growth of what Arthurs designates as “technical knowledge” (information about legal rules and procedures) or by the fragmentation of “craft knowledge” (practical information and techniques of “good lawyering”), they “know least about [what] is becoming more and more important,” namely “systemic knowledge,” the “knowledge of law as a social system.”²

Arthurs points to several consequences of this “explosion” of knowledge. The increase of technical information has put pressure on the profession to recognize the need for specialization in legal training and practice, and the growing importance of “systemic” knowledge argues for greater recognition of both the interdisciplinary and non-profession based sources of legal knowledge. As Arthurs notes, these developments profoundly challenge the traditional representation the legal profession has of itself:

Central to the very notion of a profession is the existence of a common body of knowledge which binds its members together, and which defines the profession’s relationship to clients, the state, and to other groups in society. In the case of the legal profession, belief in the existence of such a common body of knowledge is reflected in our continued adherence to a single model of education and training, a singular practise credential, a single code of professional ethics, a single standard of competence, a single constituency of electors for the governing body, a single catalogue of professional honours, a single repertoire of professional regulatory strategies.

But with the growth of knowledge and the diversification of knowledge, that common core has ceased to exist. The desire to know, the need to know, the resources to know have divided us into subprofessions clustered around differing bodies of knowledge. Furthermore, these subprofessions are increasingly defined by non-lawyer collaborators with whom they work, and the par-

¹ H. W. Arthurs, “A Lot of Knowledge is a Dangerous Thing: Will the Legal Profession Survive the Knowledge Explosion?” (Paper presented to Dalhousie Law School, 24 November 1994) at 2 [unpublished].

² *Ibid.* at 5, 6.

ticular clientele they serve. As a consequence, the notion of a single unified legal profession is becoming increasingly less plausible.³

It is noteworthy that Arthurs' remarks were directed at an audience of law students, legal academics, and practitioners. He warned his listeners that he would be saying "some difficult things . . . about Canada's legal profession,"⁴ but Arthurs himself appears at times ambivalent towards these developments. The profession, he warns, must take up the challenge presented by the fundamental changes in legal knowledge, but at the same time in doing this *we* will "find it extremely difficult to maintain our collective identity as a profession."⁵ Thus, the difference emerging between legal knowledge as a whole and the knowledge that is the domain of the profession is recognized as a source of tension which the profession must overcome if it is to retain its cohesion. It is this point that the authors wish to seize upon.

i. Specialization

Specialization in law is a practical reality. What lawyers can know individually no longer circumscribes the possibilities of knowledge in the field we call "law." The likelihood that, as Arthurs observes, we will have to accept that "lawyers must become expert in some fields of knowledge and know very little about others"⁶ is already manifest in legal practice. Lawyers no longer "know everything."

The teaching apparatus, however, has failed to adapt to this reality. Law schools remain committed to the outdated model of training lawyers who can "do anything." The problem with complete reliance on this generalist approach is that there is less and less a connection between the content of legal education and the demands of the practicing lawyer. Students graduate with a broad but imprecise knowledge; few manage to acquire an expertise in any specific area.⁷ With the marginalization of knowledge, emphasis is placed on ranking students rather than on training students, and

³ *Ibid.* at 20–21.

⁴ *Ibid.* at 2.

⁵ *Ibid.* at 9.

⁶ *Ibid.* at 10.

⁷ Some exceptions do exist, for example, in criminal or corporate law or in programs combined with other degrees.

ranking, in turn, becomes more formalistic and arbitrary, having little relation to skill or expertise.

Of course, there are unattractive side-effects to this phenomena. Compared to other fields in the academy, law schools are notorious for their pedagogical cynicism, as the knowledge factor is increasingly subordinated to a kind of social Darwinism of separating the cream from the milk. The curriculum remains a hodge-podge of courses with little or no program structuring or integration. Course syllabi are over-ambitious, more suited to the demands of producing a reliable bell-curve than to the assimilation of expertise.⁸ This, in turn, is reinforced by an examination system oriented to a representative rather than comprehensive evaluation of knowledge.

These developments are inevitable when legal knowledge is marginalized. Within the context of legal education, specialization would enhance the rationalization of the institution. It would increase the efficiency of legal training by producing graduates with a greater degree of expertise than is currently the case.

Specialization would also expand the program options available. Under the present system, for example, business law tends to dominate the curriculum. Without question, the importance of corporate law is based on the commercial realities of legal practice, but in the absence of other distinct fields of legal knowledge in law school curricula, business law has become the *only* field in which a student can acquire *some* depth. True, factors beyond the control of law schools—the articling process being the most conspicuous—have contributed to this problem. Nevertheless, business law has become the essential content of the “generalist” degree in law even though it remains open to debate whether this answers the needs of the business law specialist.

ii. Law Beyond Lawyers

There is a second point to be drawn from the fact that we can no longer rely on a notion of a unified legal knowledge. Arthurs observes that specialization will have the effect of undermining the “common body of knowledge which binds its members together.”⁹ We might take the liberty to translate this statement: in other

⁸ In other words, if a course were designed where the materials were likely to be thoroughly covered, separating the cream from the milk becomes that much more difficult.

⁹ *Supra* note 1 at 20.

words, after specialization, something of “law” remains. Specialization thus has the effect of breaking the profession’s monopoly over legal knowledge. Perhaps in contrast to the tenor of Arthurs’ comments, the authors hold that this development is long overdue. The tendency to collapse legal knowledge with legal practice has cut off dialogue with other disciplines and slowed developments in legal methodology. What interdisciplinary or methodological initiatives do exist are confined to the margins of legal scholarship, and more importantly, the academy at large offers no real *locus* for formal study in these areas. To take an example, it would not be easy to pursue studies in the “sociology of law” since neither discipline, sociology or law, has a sophisticated grasp of the other’s sphere of knowledge. The same could be said in regards to legal history, law and religion, law and political theory, law and medicine, law and literature, and so on. Furthermore, to reflect on the character and development of law without recourse to the other humanities is to wind up with a field of study condemned to a two-dimensional self-awareness, with only its own points of reference against which to gauge itself.

Those who oppose the introduction of interdisciplinary influence in the law curricula have failed to appreciate the growing positivistic nature of legal knowledge. Modern law finds itself having to broker a variety of interests and the merits of its decisions lie less often in some latent moral imperative than realizing a social consensus on a given issue. While such concerns may lie beyond the practice of the average lawyer—and Arthurs argues that even this may not be so¹⁰—it would hardly be fair to say that they lie beyond the purview of legal knowledge.

Furthermore, it is misleading to characterize legal practice solely in terms of the adversarial process. Even within the traditional lawyering context, only a very small portion of legal work is resolved through judicial disposition. Sound legal drafting, negotiat-

¹⁰ Arthurs acknowledges, *supra* note 1 at 9, that some lawyers may feel that such concerns are beyond the scope of the profession, but he counters by stating:

All true, to a degree. But many lawyers do advise clients on just such matters, Charter litigation being the prime case in point; lots of lawyers do become civil servants, academics, editorial writers, politicians . . . and as a profession, we collectively pontificate on precisely the issues about which we profess individual ignorance and no need to know.

ing skills, and legal planning, are more commonly the tools most lawyers need to acquire. Nevertheless, the profession persists in promoting the image of the lawyer as hired gun. The narrowness of this perspective may perhaps explain the growing use of arbitrators and mediators. Today, clients often seek a timely and inexpensive resolution to disputes, recognizing that both sides have interests to protect and welcoming any mediation which can best accomplish that result. The advantages of this approach over recourse to litigation are obvious.

Alternative dispute resolution, we suspect, marks only the tip of the iceberg. As law expands its influence in everyday life, it is likely that the people will seek out means of resolution other than through expensive legal counsel.

2. Access

Once it is recognized that legal knowledge serves more than one master, that its scope and relevance exceed the confines of the profession, that it no longer serves to identify a community of professionals or practitioners or academics, the rationale that has so long sustained the professional monopoly over the management and dissemination of this knowledge falls to the wayside. Debate and reform over access to legal education is certainly nothing new, but more often than not lobbying for greater access has primarily targeted the profession's tendency to privilege certain socio-economic groups as well as exclude other groups. Access to legal education has thus been equated with access to the profession. We are by no means questioning the value of these debates. Far from it. The diversification of legal knowledge, however, challenges the very premise that entrance into the profession serve as the criterion for access to legal education. In a word, diversification is not accommodated by expanding the club membership, it is answered by turning the club into a university.

Our position is that a student accepted to university should have no more difficulty entering a program in the study of law than a student wishing to enter into the study of chemistry or English literature. Perhaps there has never been any moral authority for the distinction drawn between law school admission and general admission to the universities housing those schools. The justification that has traditionally been put forth, however, has relied on the premise that knowledge of the law is the sole purview of the profes-

sionals who practice law. Their unique knowledge equips them better than anyone else to determine the knowledge requirements and standards of practice applied to their own ranks. Consequently, such professionals are vested, as Arthurs puts it, with "the sole right to determine on what terms that knowledge will be made available."¹¹

Diversification undermines both the rationale of excluding the general university population access to legal knowledge and the characterization of the study of law as an activity solely devoted to the production of lawyers. Specialization in legal knowledge answers to the needs of the profession and at the same time redefines professional knowledge as a subset of the much broader project of the study of law.

3. Practical Proposals

Our position that specialization and wider access to legal knowledge are complementary, and not mutually exclusive goals, raises interesting questions about how such ideas might be brought into practice. This comment is not the place for elaborating the practical details of bringing about what we have argued is a much needed (and desired) reform. Such limits have nevertheless not prevented us from considering certain options.

i. Law School

We have no fixed proposal for a reorganization of the law curriculum which would accommodate both the specialist and non-specialist study of law. Some options were considered and debated. For example, we considered a two-tiered program consisting of an undergraduate and graduate component. Any university student would be eligible to enroll in undergraduate law courses. At the undergraduate level, students would combine two years of regular undergraduate study with two years of an undergraduate law curriculum. Those wishing to specialize could continue their education at the more competitive graduate level. The graduate program would primarily attract those interested in legal practice and those interested in advanced studies.

The same ends might just as easily be met by simply "deregulating" the law school altogether. A curriculum offering

¹¹ *Supra* note 1 at 3.

structured programs is perhaps more easily navigated by the diverse variety of interests seeking legal education. Increased cross-listing of courses from other disciplines would also enhance the range of interdisciplinary studies.

ii. The Practicum

As far as we know, there is no other professional program which leaves the access to the required *practicum* in the hands of the private sector to the extent that it is in law. There is no question that the articling process, as it now stands, is failing to achieve its objective. Few would argue that there is any sense in spending thousands of public and private dollars training law students for three years only to deny their entry into the profession on account of the unavailability of articling positions. The failure of both the bar societies and the private law firms who benefit from the articling program to address the breakdown of this system forces us to consider whether these bodies are the right ones to play such a decisive role in the management of this critical element of the law program. Once a student has been accepted into the law program, the right to certification upon completion should be guaranteed upon demonstration of competence. Whether the market place can support them in practice or not should be their prerogative to discover. To deny them this right, after accepting their tuition and extending them loans, is certainly wasteful and perhaps irresponsible.

If the specialization of legal knowledge is ever to become a reality in legal education it will be necessary to bring about significant changes to the current articling process. The fact that a significant number of articling positions arise in the area of corporate law has created something of a stranglehold on the future of law students interested in other areas of practice. A system needs to be devised, preferably with the cooperation of law firms and the bar societies, whereby a broader range of practice is available at the articling stage. The dominance of articling opportunities in the corporate sector has produced the swelling of students pursuing business law courses in the curriculum even when it is not their intention to practice in this area. The problems associated with such an imbalance have already been noted.

Postscript

Law is everywhere. It seems both impolitic and impractical that knowledge of it be vested only in the hands of those whose interest in law is narrowly confined to its professional use. Expanding the access to legal knowledge beyond the world of lawyers will not undermine the legal profession; the emergence of specialization illustrates that the need for lawyers has become even more precisely delineated. But if our society is genuinely concerned with the equitable distribution of justice, it might consider furthering that project with a more equitable distribution of legal knowledge.