

## Commentary

# THE LAW SCHOOL, THE PROFESSION, AND ARTHURS' HUMANE PROFESSIONALISM<sup>©</sup>

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Julian Webb has done us all a service with his sympathetic reconstruction of Harry Arthurs' celebrated 1983 report on legal education, *Law and Learning/Le droit et le savoir*.<sup>1</sup> Read again today, the report has all the character of its principal author: it is humane, generous, and rational; ambitious in aim though modest in tone; and acerbically direct in its diagnosis of what is wrong with legal education and what needs to be put right. It took aim at what was then the almost exclusive, and remains the dominant, occupation of the law schools, teaching doctrinal black-letter law. Indeed one of its principal and most subversive critiques is that the black-letter curriculum is not very "practical," except in the sense it that provides some intellectual discipline; that only in clinics do students confront problems as a whole, as lawyers would confront them; and that if schools were serious about preparing students for practice, they would do it very differently.<sup>2</sup> One can readily see why many law teachers responded to the report with what Constance Backhouse recalls as "overwhelming ... negativity," calling it "idiocy" and "poppycock."<sup>3</sup>

As Webb points out, Arthurs' main strategy for making legal education more humane was to integrate it with interdisciplinary

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<sup>1</sup> Social Sciences and Humanities Research Council of Canada, *Law and Learning / Le droit et le savoir: Report of the Consultative Group on Research and Education in Law* (Ottawa: The Council, 1983) [*Law and Learning*].

<sup>2</sup> *Ibid.* at 50-51.

<sup>3</sup> Constance Backhouse, "Revisiting the Arthurs Report Twenty Years Later" (2003) 18 C.J.L.S. 33 at 33.

academic study and research. Academic studies, especially empirical research in social science, were the “chosen vehicle” of humane professionalism.<sup>4</sup> It is not immediately obvious that this would be the vehicle that would take you where you wanted to go. For many years before 1983, critics of the academy had been complaining that its scholarship was becoming more narrow, specialized, and desiccated, disconnected from any large intellectual conceptions or social visions. Consider analytic philosophy, neo-classical economics, rational-choice theory in political economy, positivist behaviourism in sociology, post-modernist-post-structuralist theory in literary and cultural studies—were these likely to be the cavalry riding to the rescue of law or among the enemies of its promise?

Yet Arthurs seems to have been at least partly right. The interdisciplinary turn has been the means for irrigating and refreshing legal studies, reclaiming them from the black-letter wasteland. This has been good for integrating the law schools with the rest of the university. To be sure, much of Arthurs’ vision remains unrealized. Roderick MacDonald argues that doctrine is still at the centre of legal studies, and that even interdisciplinary work remains excessively focused on courts, cases, and the official law of the state rather than other normative orders.<sup>5</sup> Yet the law reviews and even the casebooks of today have come a long way from 1983, and mostly for the better.

Arthurs aimed to do much more, however, than to enrich legal scholarship. The ultimate purpose of more academic study and research on law was to nurture humane, critical, and reformist professionals, who would be attentive to the actual effects of current laws and practices, concerned with reforming them to make them serve their purposes more efficiently and justly. The infusion of legal studies with an academic perspective would help lawyers become such professionals, by enabling them to stand at some distance from conventional wisdom, to venture beyond the repertoire of conventional framing of or conventional responses to legal problems, to adjust to changes in law,

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<sup>4</sup> Julian Webb, “The ‘Ambitious Modesty’ of Harry Arthurs’ Humane Professionalism” (2006) 44 *Osgoode Hall L.J.* 119 at 139.

<sup>5</sup> Roderick A. MacDonald, “Still ‘Law’ and Still ‘Learning’/Quel ‘droit’ et quel ‘savoir’” (2003) 18 *C.J.L.S.* 5 at 10-12.

help lead efforts at reform, and provide clients with imaginative solutions.<sup>6</sup>

This vision of legal education has a long pedigree. In the Anglo-American tradition, it is first and most brilliantly developed in the eighteenth-century Scottish school of Jurisprudence, Moral Philosophy, and Political Economy of Adam Smith, David Hume, and their colleagues—where it's called the Science of the Legislator, or Science of Legislation. Recall that Smith's *Wealth of Nations* started out as a section in his *Lectures on Jurisprudence* on the policies to be pursued in the exercise of state police power. Law, to this school, was part of an aggressively reformist interdisciplinary enterprise of "improvement"—a blend of moral philosophy, political economy, and the comparative historical sociology of legal practices and institutions—designed to purge the existing legal regime of its obsolescent features and reconfigure it to the needs and ethical values of a modern commercial society. This very broad form of legal education evidently anticipates an important social role for lawyers, or rather—since many of the people exposed to it will probably do something other than practice law—for people thus educated. Clearly they are expected to be active shapers of law and architects of legal policy: lawyer-statesmen.

In the nineteenth-century United States, and to a large extent in nineteenth-century Upper Canada as well,<sup>7</sup> legal elites adopted some version of this ambitious vision of the lawyer's social functions, combining the roles of lawyer and legislator. This set of public functions would seem to call for an education on the Scottish model; indeed, leading lawyers of the early American republic usually recommended such an education. For them the ideal image of the lawyer combined the Scottish scientific legislator with the older liberal-humanist ideal of the Ciceronian orator-statesman, the fearlessly independent spokesman for republican liberty.<sup>8</sup> Jefferson's notes on teaching law at Virginia, for example, proposed a curriculum of the "common and statute law, that of the chancery, the laws feudal, civil, mercatorial, maritime and of nature

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<sup>6</sup> See *Law and Learning*, *supra* note 1 at 49-50.

<sup>7</sup> G. Blaine Baker, "Legal Education in Upper Canada, 1785-1889: The Law Society as Educator" in David H. Flaherty, ed., *Essays in the History of Canadian Law* (Toronto: University of Toronto Press, 1981) 49 at 55.

<sup>8</sup> See Stephen Botein, "Cicero as Role Model for Early American Lawyers: A Case Study in Classical 'Influence'" (1978) 73 *Classical J.* 313.

and nations; and also the principles of government and political economy.”<sup>9</sup>

Education in the principles of legislation—including moral philosophy, political economy, and comparative history—remained a general aspiration of the elite bar until the end of the nineteenth century. All the conditions favourable to such an education were present but one: student demand for it. Repeated attempts to institutionalize it in schools fell flat, even where some kind of university-connected legal education was implemented. Columbia’s experience was typical: its original 1857 plan for a Jurisprudence curriculum included Modern History, Political Economy, Natural and International Law, and Civil and Common Law. By the following year it was clear that in order to attract any students they would have to prune back the course to “those branches of Municipal Law, usually and appropriately pursued for obtaining a license to practice.” It was hoped that occasional lectures in the “kindred subjects” or “superadded Studies” might be offered as an extra sweetener once the students had been drawn in.<sup>10</sup>

The elite American profession was indeed, just as it claimed to be, the preferred route of access to the elite class of elected and appointed public servants, and—both in private practice and public office—guardians and reformers of basic procedural and substantive rights and norms. The problem was, however, that there was a very thin market for the type of liberal education that the elite thought appropriate training for the functions they actually exercised. Most young men wanted a more immediately practical training for legal careers, which until the end of the nineteenth century was something combining apprenticeship and black-letter models—form-books plus Blackstone’s (or the Americanized Blackstone, Kent’s) *Commentaries*.

Clearly, the viability of the Adam Smith-Harry Arthurs project—the likelihood that it will be adopted, imitated, survive, and flourish—will depend on whether conditions of the wider professional-social-ideological environment are favourable to the performance of those law-jobs or social roles. To put this another way, in order to survive, a mode of legal training must have jobs and careers and institutional niches or

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<sup>9</sup> Richard Hofstadter & Wilson Smith, eds., *American Higher Education: A Documentary History* (Chicago: University of Chicago Press, 1961) at 230-31.

<sup>10</sup> Julius Goebel *et al.*, *A History of the School of Law, Columbia University* (New York: Columbia University Press, 1955) at 27-28.

movements to attach itself to, to which it is (or at least is perceived to be) relevant. While writing his report, Arthurs was acutely conscious of this problem.<sup>11</sup> He obviously hoped the broader education he proposed would be useful to the practicing bar as a whole. But he suggested that the lawyers best positioned to take advantage of it might be a small specialized subset of the profession, an “academic wing” of law reform organizations.<sup>12</sup>

It is not enough, however, for an educational program to have real jobs for graduates to fill at the end of the line. It must also resonate, or at least not be acutely disharmonious, with the class, economic, and status interests of the legal profession (or of powerful state actors) and of lawyers’ principal clienteles and constituencies.

We have already seen that although leading nineteenth-century American lawyers in fact lived out the careers of liberal-minded lawyer-statesmen, they never managed to institutionalize a liberal legal education. Similarly English lawyers and judges of the nineteenth-century were certainly active in the construction of the British state: they served in Parliament; as judges they read and often expressly applied snippets of political economy, alluding to considerations of public policy in their arguments and decisions; as utilitarian public intellectuals, law reformers and social reformers, they drastically revised and simplified the procedural law and built the agencies of the new administrative state; as administrators of England’s empire they practiced the Science of Legislation in the field on a grand scale as drafters of comprehensive codes of law and administration. Notwithstanding all these public engagements, the professional culture of the English bar strenuously resisted any deliberate or systematic instruction in the policy or philosophic bases of common law or legislation. It was more interested in protecting its autonomy as a narrow, insular, craft-based profession than in broadening its educational ambitions to turn out more of its conspicuous public exemplars. The founders of modern English law schools such as Oxford had to struggle against an insular, ingrown, intellectually conservative profession of judges and lawyers who put no value on a scientific, or as we would now call it, theoretical, training in law. As my readers well know, the bar’s domination of legal training in

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<sup>11</sup> See “The Professional Nexus” in *Law and Learning*, *supra* note 1 at 136-40.

<sup>12</sup> *Ibid.*

Ontario led to a very similar situation there, until the academic reformers led by “Caesar” Wright effectively wrested control of education from the Law Society to vest it in the law schools.<sup>13</sup> It has taken another fifty years since then for the reforms that Arthurs called for in 1983 to begin to take hold and the law schools to begin to make themselves at home in the universities.

In the United States, conditions for escaping the apprenticeship model into a broader model of legal education were much more favourable, precisely because the organized profession was much weaker. Democratic hostility to guilds and guild privileges in early America had almost destroyed early bar associations and formal requirements for admission to the bar. The new American law faculties, beginning with Dean C.C. Langdell’s Harvard in 1870, were thus able to innovate free of guild or state controls: they set their own admissions policies, eventually requiring undergraduate college degrees as a prerequisite to admission; they gave their own examinations to their students and thus were broadly free to teach what they pleased; and—a very significant innovation—they hired full-time law teachers, not partly dependent on practice incomes for their support.

But there were limits to their boldness, also conditioned by their political and social milieu. They taught an exclusively private-law science, turned their backs on public-law theory, and rejected the role of training lawyer-statesmen. Part of this caution was intellectual narrowness, part prudential. They thought only case law, not legislation or administration, could be truly “scientific.” The great issues of public law such as Southern reconstruction, the regulation of business combinations, or labour-capital conflict were too dangerous to be touched: in social science departments, professors were fired for taking positions that trustees or state funders or alumni thought too liberal.

In the United States, the longstanding ambition to amplify law training into a broad-based, interdisciplinary education for statecraft began at last to be realized with the arrival of the New Deal expansion of government in the 1930s. The New Deal seemed to help answer the question of what lawyers could do with a broad interdisciplinary policy training. It provided both permanent and transient careers in the federal

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<sup>13</sup> This story is told in C. Ian Kyer & Jerome E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923-1957* (Toronto: The Osgoode Society, 1987).

bureaucracy for a large number of lawyers. By 1939 there were 5368 lawyers in federal government service—and thus many more lawyers needed to represent the companies they regulated. In the 1940s and 1950's a flood of articles pointed this out, and pointed out as well the private lawyer's role as a practical statesman in the architecture of private ordering structures that had to serve clients' long-run purposes and comply with regulatory statutes. The law schools, the authors argued, needed to prepare people to master the substantive regulatory fields, the administrative processes of their new craft and to assess long-run social effects. To put this another way, the New Deal made the case that competent lawyers needed to acquire a new form of social capital, one that went beyond knowledge of court decisions and the capacity to analyze private-law doctrine.

Thus Legal Realism and the New Deal brought policy studies, policy analysis, and social science into legal research and teaching. To be sure, most of this was what one might call policy as supplemental snippets, rather than policy as an object of systematic study: "policy" as the arguments one resorts to when the black-letter runs out. It was a curriculum that in many ways fitted well with the role of law graduates of the elite schools in the postwar world. In this world, lawyers in private practice (which is what the great majority of graduates still went into) argued before judges—many of whom themselves practiced a modest form of legal-realist policy analysis—and increasingly before administrative agencies. Lawyers often began their careers with service in a federal agency and continued to move in and out of government. As advisors to corporations, many of them saw their job as counselling clients to comply with the basic policies and purposes of the regulatory framework. The method the law schools taught, "thinking like a lawyer" with some policy analysis added on, did not seem to incorporate any particular substantive or policy commitments. It was a bundle of discourses and reasoning modes that could be turned, or so it seemed, to virtually any kind of lawyer's use in any situation. It turned out adaptable, smart, generalist legal-social engineers, and that was adequate for the conditions of the time.

The New Deal began the process of generating the conditions for teaching law as an interdisciplinary enterprise in practical statesmanship. The Rights Revolution—the broad legal initiatives and social movements pioneered by the U.S. Supreme Court in the 1950s and continued by social movements and public-interest groups through the 1960s and 1970s—vastly expanded those conditions. Like the New

Deal, the Rights Revolution opened many new jobs and roles to lawyers: as architects of litigation strategies; lobbyists for and drafters of legislation; designers and implementers of administrative policies; intervenors (on behalf of public-interest groups) before administrative agencies; legal advocates for social movements such as the civil rights, women's, welfare rights, and environmental movements; and new government and foundation-sponsored lawyers for the poor. In the law schools, positions for new poverty and public interest law clinical teachers opened up. The social movements to bring hitherto marginalized and excluded groups into full citizenship found allies at the very apex of the state and legal system—the federal courts, a series of liberal Congresses, and the federal executive from 1960 to 1980, under Presidents Kennedy, Johnson, Carter, and even Nixon.

At the same time, both the New Deal policies and postwar liberalism were generating a scholarly reaction, at first in the form of outsider-observer and critical positions, that was to greatly enrich the study of law as a theoretical and interdisciplinary policy science and branch of practical statesmanship. This was of course Law and Economics, especially in its conservative neo-classical schools developed at the University of Chicago. Chicago Law and Economics is all the more impressive a legal-academic achievement because for years it had to be carried on in a sort of political and intellectual isolation from the main currents both of legal-academic life and public policy-making. In 1980, with the election of Reagan, that changed. Neo-liberal Law and Economics, and conservative constitutional law (which spawned several new interdisciplinary enterprises such as “originalist” historical studies of the Constitution) were now allied to policy-making power. Conservative law professors became judges and appointed officials; their students joined the Federalist Society and found in its networks convenient corridors to influence and office. The conservative movement's forging of links between theory and interdisciplinary study in the law schools, and its application to policy-making in the state and legal system, has achieved an alliance of intellect and power as impressive as, if not more so than, that of Progressive-Realist thought and the New Deal.

My (undoubtedly superficial) impression is that in Canada, similar developments in the wider society and legal culture have helped to stimulate legal-academic studies. Litigation under the *Charter of Rights and Freedoms* necessarily requires lawyers to engage in broad philosophic reflection about the normative bases of legal policy. These

cannot simply be pushed out of the domain of “law” into the black box of the legislature. The legal strategies of all the social movements for legal equality of marginalized, suppressed, or excluded groups require lawyers to master domains of social fact and policy that used to be off limits. Legal history, which scarcely existed in Canada in 1983, has become a vibrant growth enterprise, in law schools as well as history departments. As in the United States, but so far to a lesser extent, economics has found a place in the legal academy—the University of Toronto’s law school an especially warm and ample place—and in the work of regulators and the lawyers who represent clients before them. Economics has in fact probably become the social-science discipline most successfully and thoroughly integrated with law. (I cannot help but wonder how Arthurs feels about this particular stepchild of his liberalizing reforms.)

All I have said would seem to indicate that the Smith-Arthurs program for reforming legal education to produce humane professionals, to raise lawyers’ eyes from the insular worlds of normal craft practices, to see their work as parts of—and ideally conducted in the service of—a wider whole and broader ends, has made significant progress in North America. And so it has. But the program has run up against some serious new obstacles.

One is that interdisciplinary commitments tend to divide legal scholars and balkanize legal studies rather than uniting them. In practice, education for statecraft tends to take one of two major forms—liberal-humanist or economic. The brilliant Scottish combination of the two is rarely achieved. In present-day U.S. law schools, for example, those who aspire to broad learning as the basis for an education for legal statesmanship tend either to draw on the humanist disciplines of history, philosophy, and cultural studies; or, alternatively, on economics and its affiliated disciplines (political science public choice theory, positivist-behaviourist social science). There are faint signs of a possible rapprochement between these two intellectual cultures in subfields such as the study of social norms. Mostly, however, their devotees work on different problems: lawyer-humanists on issues of equality and identity, race and gender; lawyer-economists on business law and the organization of the economy. Each rarely cites the other’s work.

The other obstacle is more fundamental. As I said before, there are probably more branches and niches of professional practice—among others, consulting on policy formation, constitutional law, or cause lawyering—that demand a broad humanistic and social-science training

than there have ever been. But in the precincts of ordinary law practice, tolerance for anything but the most bread-and-butter instrumental approaches to practice is at what may be a historic low. Especially in corporate practice, the stresses of competition and around-the-clock client demands, and the extreme pressures to produce profits and billable hours, have created a very hostile climate for self-critical reformist lawyers committed to reflection on the broader contexts and objectives of practice and the long term. The problem of how to remake professional environments such as law firms into more hospitable environments for constructive “lawyer-statesmen” should be high on the profession’s agenda, including the legal academy’s. There will not be much point to the law schools turning out broad-based and reflective humane professionals if all their humane instincts are going to be squashed once they get into practice.<sup>14</sup>

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<sup>14</sup> Arthurs has thought more than most people about these problems. See *e.g.* Harry W. Arthurs, “Poor Canadian Legal Education: So Near to Wall Street, So Far From God” (2000) 38 Osgoode Hall L.J. 381.