

The "Ambitious Modesty" of Harry Arthurs' Humane Professionalism

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The "Ambitious Modesty" of Harry Arthurs' Humane Professionalism

Abstract

This article revisits *Law and Learning*, the 1983 Report of the Consultative Committee on Research and Education in Law, chaired by Harry Arthurs. The Arthurs Report set an ambitious agenda which sought, through the reform of legal education and scholarship, the cultivation of a "humane professionalism." That it met with limited success reflects a number of systemic problems with legal education, and the Report's own failure to address some critical issues, notably legal pedagogy. Nevertheless, the article argues that in the context of today's increasingly complex, pluralistic, and globalized environment, the law schools need humane professionalism more than ever. It thus concludes with a set of normative assumptions and "ecological" design principles by which law schools could develop a pedagogy more consistent with that vision.

Keywords

Law--Study and teaching

THE “AMBITIOUS MODESTY” OF HARRY ARTHURS’ HUMANE PROFESSIONALISM[©]

JULIAN WEBB*

This article revisits *Law and Learning*, the 1983 Report of the Consultative Committee on Research and Education in Law, chaired by Harry Arthurs. The *Arthurs Report* set an ambitious agenda which sought, through the reform of legal education and scholarship, the cultivation of a “humane professionalism.” That it met with limited success reflects a number of systemic problems with legal education, and the Report’s own failure to address some critical issues, notably legal pedagogy. Nevertheless, the article argues that in the context of today’s increasingly complex, pluralistic, and globalized environment, the law schools need humane professionalism more than ever. It thus concludes with a set of normative assumptions and “ecological” design principles by which law schools could develop a pedagogy more consistent with that vision.

Ce document jette un nouveau regard sur *Law and Learning (La loi et l'apprentissage)*, rapport publié en 1983 par la Commission consultative de recherche et d'enseignement du droit, présidée par Harry Arthurs. L'ambitieux Rapport Arthurs avait pour objet de cultiver le « professionnalisme humain » par le biais d'une réforme de l'enseignement du droit et des bourses d'études. La réussite du Rapport fut mitigée, ce qui met en relief un certain nombre de problèmes systémiques en matière d'enseignement du droit, et le fait qu'on ait omis d'aborder des problèmes plus importants, notamment la pédagogie du droit. Néanmoins, le document fait valoir qu'au sein d'un environnement mondialisé, pluraliste et de plus en plus complexe, les facultés de droit ont plus que jamais besoin de professionnalisme humain. En conclusion, on présente une série d'hypothèses normatives et de principes « écologiques » à partir desquels les facultés de droit pourraient élaborer une pédagogie plus compatible avec cette vision.

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© 2006, J. Webb. This phrase is gratefully borrowed from the title of Michael King and Anton Schütz's “The Ambitious Modesty of Niklas Luhmann” (1994) 21 J. L. & Soc’y 261.

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I. INTRODUCTION

One of Harry Arthurs' many distinctions is that he has been an important part of that small group of legal scholars who have taken legal education sufficiently seriously to have both written about its theory and practice, and been in a position to shape its policy and future. In this article I hope both to pay homage to his significant contribution to legal education, and to consider how some of the themes in Arthurs' work might be taken forward in the context of on-going challenges to legal education in the Common Law world.

In doing so, I will focus primarily on the notion of humane professionalism advanced in *Law and Learning*, the influential report of the Consultative Group on Research and Education in Law, chaired by Professor Arthurs, and still widely referred to as the *Arthurs Report*.¹ I begin by exploring the concept of humane professionalism as developed in the *Arthurs Report*, before looking at the changing context of legal education. I consider why humane professionalism as an ideal is even more important to us today, and offer a sense of how humane professionalism might inform the pedagogy, not just the scholarship, of the twenty-first century law school.

II. HUMANE PROFESSIONALISM IN THE *ARTHURS REPORT*

The Consultative Group on Research and Education in Law was appointed in 1980 to examine the state (and implicitly the status) of legal research and scholarship in Canada. The report can be seen as an

¹ 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) [*Arthurs Report*]. As a matter of personal history too, the *Arthurs Report* represents the beginning of my own connection with Harry Arthurs' work, and was the impetus for our first meeting. A year or so after publication of the *Arthurs Report* I was in my first academic job in London, and heard Harry speak at a seminar on the report, organized by David Sugarman at Middlesex University.

important part of a prolonged period of navel-gazing on the nature of legal education and scholarship that has taken place in most major common law jurisdictions.² These jurisdictions had seen significant growth in the size and number of law schools during the 1960s and 1970s; law teaching had become increasingly professionalized, and yet remained strikingly conformist.³ There was a pervading sense that all was not well within the discipline. To take Canada as an example, the 1975 *Report of the Commission on Canadian Studies* had been critical of the quality of Canadian legal scholarship and education;⁴ tensions between the academic and practising professions were perceived to be growing, as were tensions within the legal academy between traditional doctrinalism and the newer interdisciplinary scholarship.⁵ In this context, both the Committee of Canadian Law Deans and the Canadian Association of Law Teachers also saw a need for a thorough review that might act as an engine of change.⁶

The *Arthurs Report* responded to this need enthusiastically, with a raft—fifty-six in all—of mostly broad recommendations, inviting a range of initiatives to improve the intellectual coherence and rigour of legal education; to increase the quality and volume of legal scholarship; to broaden its intellectual boundaries and the variety of both subjects and pedagogies to which students were exposed; to narrow the (scholarly) gap between academics and practitioners of law; and to promote wider access to legal education and research.

² This was reflected in numerous official reports, aside from the *Arthurs Report*, including the Ormrod (1972), Marre (1988) and ACLEC (1996) Reports in England, the Pearce Report (1987) in Australia, and the McCrate Report (1992) in the United States. A number of these are touched on below. For more or less contemporary examples of navel-gazing, see e.g. Mark Tushnet, "Legal Scholarship: Its Causes and Cure" (1981) 90 Yale L.J. 1205; and *Symposium: American Legal Scholarship: Directions and Dilemmas* (1983) 33 J.L. Educ. 403-58. The gloomier prognostications in the United Kingdom included Geoffrey Wilson, "English Legal Scholarship" (1987) 50 Mod. L. Rev. 818; Patrick McAuslan, "The Coming Crisis in Legal Education" (1989) 16 J. L. & Soc'y 310. Some of these criticisms were by no means new: see L.C.B. Gower's famous attack on the "complacent apathy" and narrow doctrinalism of legal education, "English Legal Training: A Critical Survey" (1950) 13 Mod. L. Rev. 137.

³ Robert Stevens, "American Legal Education: Reflections in the Light of Ormrod" (1972) 35 Mod. L. Rev. 242 at 243, 250ff.

⁴ T.H.B. Symons, *To Know Ourselves: The Report of the Commission on Canadian Studies* (Ottawa: Association of Universities and Colleges of Canada, 1975) at 213-17.

⁵ Phillip Slayton, "Law and Learning," Book Review of the *Arthurs Report* (1983) 33 U.T.L.J. 348 at 349.

⁶ *Ibid.* at 348.

The *Arthurs Report* set out an ambitious agenda of reform. Was it successful? Well, yes and no. In Canada, perhaps inevitably given the contentiousness of many of the issues involved, it received a mixed initial response from its constituencies and other commentators.⁷ Nevertheless, it must be credited with some notable successes. By granting greater legitimacy to socio-legal work and through its part in the founding of the Canadian Law and Society Association, the report undoubtedly did much to open up a discipline traditionally renowned for its insularity. It also provided a boost (albeit somewhat qualified) to clinical legal education and to the teaching of law outside of the law faculties. But many of its specific recommendations have been lost in the mists of time. The discernible impact of the report has been more limited than its authors and supporters might have hoped.⁸

The influence of the *Arthurs Report*, however, was not limited to Canada. It is likely no coincidence that academic reviewers outside Canada were, overall, kinder than the locals; perhaps they could simply afford to be less partisan.⁹ In England in particular, the report generated considerable interest. It provided welcome international support for the growing socio-legal movement,¹⁰ and it enjoyed something of a

⁷ See Johann W. Mohr, "Law and Learning Revisited: Discourse, Theory and Research" (1987) 25 Osgoode Hall L.J. 671. See also the review articles and reviews published at the time, including Mark Weisberg "On the Relationship of *Law and Learning* to *Law and Learning*" (1983) 29 McGill L.J. 155; Leon E. Trakman "Law and Learning" (1983) 21 Osgoode Hall L.J. 554; R.P. Saunders, Book Review of *Law and Learning* (1984) 16 Ottawa L. Rev. 218; Slayton, *supra* note 5, and the Osgoode Hall Law Journal Symposium, "After Arthurs—A Symposium on Canadian Legal Scholarship" (1985) 23 Osgoode Hall L.J. 395-542.

⁸ This has been discussed elsewhere at length, notably in Roderick A. Macdonald, "Still 'Law' and Still 'Learning'? Quel 'droit' et quel 'savoir'?" (2003) 18:1 C.J.L.S. 5 and Constance Backhouse, "Revisiting the Arthurs Report Twenty Years Later" (2003) 18:1 C.J.L.S. 33. Arthurs himself has attributed much of the report's relative lack of long term impact to its (perhaps unsurprising) failure to anticipate the changing political economy of legal education—see Harry Arthurs, "The Political Economy of Canadian Legal Education" (1998) 25 J. L. & Soc'y 14—as well as its underestimation of the autonomous tendencies of law and legal education, discussed later in this section [Arthurs, "Political Economy"]. Personal e-mail from Harry Arthurs (3 June 2005) [on file with the author].

⁹ See e.g. John Henry Schlegel, "Langdell's Legacy Or, The Case of the Empty Envelope" (1984) 36 Stan. L. Rev. 1517; Ian Fletcher, Book Review of the *Arthurs Report* (1984) 4 L. Stud. 349 at 350.

¹⁰ The focus on teaching law "in context" had begun to emerge in a number of English law schools in the 1960s. It was given greater legitimacy by the Ormrod Committee's assertion that it was an "essential" that the law degree provide "an understanding of the relationship of law to the social and economic environment in which it operates." (U.K., House of Commons, "Report of the Committee on Legal Education", Cmnd 4595 in *Sessional Papers* (1970-1971) 1157 at para. 101)

renaissance when it became a keystone of the 1996 Lord Chancellor's Advisory Committee (ACLEC) Report into legal education and training.¹¹ This was probably the first report on English legal education to grapple seriously with the idea of creating a set of objectives for the whole continuum of legal education and training.¹² ACLEC was particularly notable for its call to strengthen the "moral core" of both academic and professional legal studies. In academic studies this was to be achieved both by interdisciplinary study and by a greater emphasis on subjects and pedagogies that would enable lawyers to "internalise from the earliest stages of their education" an appropriate set of personal and professional values and standards.¹³

ACLEC too enjoyed a mixed reception. It was praised by those who saw it as a way of enhancing the agenda of liberal education¹⁴ or the development of the largely non-existent ethical dimension of English legal education.¹⁵ But it was also criticised by some who foresaw the consequences of the report's failure to take its socio-economic, academic, and professional contexts sufficiently seriously,¹⁶ and challenged by others who feared that it opened the door wider to a

and by the subsequent founding of the Centre for Socio-Legal Studies at Wolfson College, Oxford. But the developments remained gradual and somewhat piecemeal: a nascent "Law and Society Group" emerged in the late 1970s, but did not formally re-constitute itself into the Socio-Legal Studies Association until its 1990 Conference. In other words, socio-legal studies remained and essentially saw itself as a minority and oppositional discourse in England until at least the mid-1980s. See C.M. Campbell & Paul Wiles, "The Study of Law and Society in Britain" (1976) 10 *Law & Soc'y Rev.* 547; Philip A. Thomas, "Socio-Legal Studies: The Case of Disappearing Fleas and Bustards" in Philip A. Thomas, ed., *Socio-Legal Studies* (Aldershot: Dartmouth, 1997) 1; and Anthony Bradney, "Law as a Parasitic Discipline" (1998) 25 *J. L. & Soc'y* 71.

¹¹ Lord Chancellor's Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training* (London: ACLEC, 1996) [ACLEC]. Professor Arthurs had been a keynote speaker at ACLEC's Second Consultative Conference in London in 1994.

¹² It is arguable that this was also the original intention of the Ormrod Committee. See Bob Hepple, "The Renewal of the Liberal Law Degree" (1996) 55 *Cambridge L.J.* 470 at 477-78.

¹³ ACLEC, *supra* note 11 at 20-21.

¹⁴ See e.g. Anthony Bradney, "Raising the Drawbridge: Defending University Law Schools" (1995) 1 *Web J.C.L.I.*, online: <<http://webjcli.ncl.ac.uk/articles1/bradney1.html>>; Hepple, *supra* note 12.

¹⁵ See e.g. Julian Webb, "Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education" (1998) 25 *J. L. & Soc'y* 134; Kim Economides, "Learning the Law of Lawyering" (1999) 52 *Curr. Legal Probs.* 392.

¹⁶ H.W. Arthurs, "Half a League Onward: The Report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct" (1997) 31 *L. Teacher* 1 [Arthurs, "Half a League Onward"].

creeping vocationalism in academic legal education.¹⁷ In the end many of its proposals for the academic stage were quietly ignored by much of the academy, and those for the vocational stage rather more vigorously rejected by the profession.¹⁸

Regardless of the ultimate fate of the *Arthurs* and ACLEC Reports, what generated the interest of many commentators was the insistence on a unifying concept at the heart of the enterprise: what the *Arthurs Report* called “humane professionalism.” This was summarised as an approach which “avoid[s] narrow vocationalism ... [and intensifies] present efforts to transmit liberal and humane intellectual values, encourage[s] interdisciplinary study, and ensure[s] some exposure to legal theory and legal research.”¹⁹

The *Arthurs Report* represented the case for humane professionalism as building on what the law schools already professed their mission to be:

Canadian law schools imagine themselves to be offering a legal education that is humane and professional, rather than narrowly vocational. They generally identify three elements as characteristic of this type of legal education:

Learning legal rules (what we will call “doctrine,” recognizing the somewhat different common law and civil law connotations of the term) and developing the ability to use the rules;

Learning legal skills (such as interviewing, advocacy and negotiation);

Developing a humane perspective on law, and a deeper understanding of law as a social phenomenon and an intellectual discipline.²⁰

But this was not the reality that *Arthurs* found. Canadian legal education had, according to the *Arthurs Report*, remained resolutely vocational in its orientation: “the humane elements ... do not

¹⁷Bradney, *supra* note 14.

¹⁸Note that following its initial rejection by the professional bodies, the ACLEC philosophy, if not necessarily the detail, seems to have been resurrected in an on-going—and highly contentious—Training Framework Review by which the Law Society (of England and Wales) is seeking to create a set of training outcomes governing the whole process of training from admission to law school to “day one” qualification as a solicitor. See further Julian Webb & Amanda Fancourt, “The Law Society’s Training Framework Review: On the Straight and Narrow or the Long and Winding Road?” (2004) 38 L. Teacher 293.

¹⁹*Arthurs Report*, *supra* note 1 at 155.

²⁰*Ibid.* at 47.

predominate”²¹ the report observed; and even more pithily, “even if it were magnificent, it is not academic.”²² The research and teaching of the law schools were still dominated by a narrow, “black letter” analytical perspective, despite (as the report saw it) legal education’s espoused theory of its “humane” and “liberal” function. The remedy was, of course, a fundamental reform of legal scholarship.

The *Arthurs Report*, therefore, was a hugely ambitious enterprise: it sought nothing less than the transformation of the intellectual *milieu* of the law school. As Leon Trakman has observed, the report clearly adopted a “distinct ideological position.”²³ It located legal education as a site of personal and professional formation (not just training) shaped fundamentally by a wider “humane” intellectual tradition of *research*. It was research and scholarship, not teaching or practice that would equip the academy to fulfil its role as the purveyor of humane professionalism.

Perhaps the report was even more ambitious than that. On re-reading the *Arthurs Report* I found myself wondering: why humane *professionalism*? Much of the report patently emphasizes the humane over the professional. Indeed, the professional is defined almost entirely by implication, often (though not always) in relatively negative terms: the professional agenda is narrowly practical and career-oriented;²⁴ it is less broad and less critical about law than the humane agenda;²⁵ its “analytical perspective” is juxtaposed unfavourably with the “reflective and interdisciplinary” perspectives and values of other scholars.²⁶ So why does the *Arthurs Report* maintain humane professionalism as its aim for legal education, rather than the “mere” humanism it sees at the heart of the enterprise of liberal education. Is humane professionalism in fact a *non sequitur*, a contradiction in terms? Or is it a deliberately paradoxical conjunction of the kind that lawyers love—rather like neutral partisanship—in which the tension between concepts itself has the capacity to create new meanings and practices? Or is Arthurs too

²¹ *Ibid.* at 54.

²² *Ibid.* at 55.

²³ Trakman, *supra* note 7 at 555.

²⁴ *Arthurs Report*, *supra* note 1 at 136.

²⁵ *Ibid.* at 48.

²⁶ *Ibid.* at 137.

cannily pragmatic to dump professionalism? To convey the nuances, it is worth quoting at length from what I take to be two key passages of the report, passages that set up powerful, albeit largely a priori, justifications for humane professionalism:

[W]hile the cultivated ability to stand at a distance from conventional wisdom, to view it critically, must be defended on its intrinsic merits as being the essence of education, it also has at least three important “practical” benefits. It enables lawyers to adapt to changes when they occur, to assist in bringing about such changes through law reform and other public activities, and to accomplish change themselves in the limited context of serving individual clients whose interests do not coincide with accepted solutions. From the student’s perspective, having to deal with both the intellectual and the practical at once generates a dialectic which, if it does not necessarily improve the end product, at least contributes to the student’s tough-mindedness. This may help to explain why law schools in their humane intellectual activities, may make a contribution to preparation for professional practice that is both vitally important and easily overlooked.²⁷

A profession that lacks a scientific base cannot properly serve either its clientele or an increasingly complex society, cannot maintain a credible claim to its privileges and powers, cannot attract to itself the best minds or employ those minds to best effect. Nor, for specific historical and cultural reasons can such a scientific base for law flourish at too great a distance from the project of law as it has been understood by practising lawyers. After all, in large part it is their formal literature, institutions culture and behaviour that provide a focus for scientific study [T]he scholarly enterprise of law can flourish neither divorced from the profession, nor in its close embrace, nor in hand-to-hand combat with it. Its best prospect for growth and development is therefore to take up a position within the law faculties as a distinct and separate endeavour, with its own goals, standards and basis of legitimacy. Only such a stance will at once stimulate energies, promote sensible interdisciplinary cooperation and provide a free and equal basis for exchange between scholars and practitioners.²⁸

The report thus seems to answer both of my latter questions in the affirmative;²⁹ the juxtaposition is justified intellectually and pragmatically, and these levels of justification are themselves closely interwoven. Aside from the simple fact that in Canada, as in most jurisdictions, the legal profession provides the primary employment market for law graduates,³⁰ and so for that very pragmatic reason, the law schools cannot ignore the needs of the profession, there is perceived to be a deeper symbiotic relationship between the academy and the

²⁷ *Ibid.* at 49-50.

²⁸ *Ibid.* at 137-38, 140.

²⁹ The language remains notably tentative: these are more suppositions than firm conclusions.

³⁰ In fact, in the United Kingdom now, only about half of the students graduating with law degrees actually enter the profession.

profession. As the report argues in these sections, the humane base of the discipline itself helps to legitimate the professional project of lawyers, and equips students with the skills and capacities that, today, are often associated with the ideal of the “reflective practitioner”;³¹ at the same time the practice of law also provides a vital cultural, literary, and institutional context for academic study.

But I believe the ambition of the *Arthurs Report* went well beyond a narrow legitimation of or symbiosis between the professional and academic projects of law. Rather, it is through the humanising power of education that the report ultimately seeks the redemption of (legal) professionalism itself. Professionalism as a concept has a chequered history. Indeed, as Zacharias observes, “[n]o term in the legal lexicon has been more abused than professionalism.”³² As the history and sociology of the professions shows, professionalism stands both for narrow self-interest, cynicism, and social remoteness, as well as for the more noble commitments to justice, integrity, and altruism.³³ There is, in short, something almost schizophrenic about professionalism. The idea of lawyering as a public good has, in truth, always been ambiguous. In the eyes of the public, legal professionalism is “tainted” both by its association with the criminal underclass—reflected in the classical question: “how can you defend people like that”—and its sometimes blinkered advancement of corporate interests.³⁴ Yet the popular image of “lawyer as hero” also remains strong, particularly in media portrayals. As Freidson observes:

³¹ See notably Donald A. Schön, *Educating the Reflective Practitioner* (San Francisco: Jossey-Bass, 1987) and “Educating the Reflective Legal Practitioner” (1995) 2 *Clinical L. Rev.* 231. See also Julian Webb, “Where the Action Is: Developing Artistry in Legal Education” (1995) 2 *Int’l J. L. Profession* 187 [Webb, “Where the Action Is”].

³² Fred C. Zacharias, “Reconciling Professionalism and Client Interest” (1995) 36 *Wm. & Mary L. Rev.* 1303 at 1307.

³³ During the nineteenth and twentieth centuries, Harold Perkin argued that the “Achilles’ heel” of the professions was their “individual arrogance, collective condescension to the laity and mutual disdain [for each other].” *The Rise of Professional Society* (London: Routledge, 1989) at 390. See also e.g. Richard L. Abel, “The Decline of Professionalism?” (1986) 49 *Mod. L. Rev.* 1 and “The Politics of Professionalism: The Transformation of English Lawyers at the End of the Twentieth Century” (1999) 2 *Legal Ethics* 131; A.A. Paterson, “Professionalism and the Legal Services Market” (1996) 3 *Int’l J. L. Profession* 137.

³⁴ The references here could run to pages, but see e.g. Robert F. Cochran Jr., “Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue” (2000) 14 *Notre Dame J.L. Ethics & Pub. Pol’y* 305; Robert W. Gordon, “Professionalisms Old and New, Good and Bad” (2005) 8:1 *Legal Ethics* 23.

For well over a century in the iconography of popular media it is professionals who are the “crusaders” seeking Justice, Health, Truth, and Salvation. While it is common to see physicians and lawyers, scientists and professors, and sometimes journalists and politicians in that principled role one does not see bankers, stockbrokers, or business executives. There is, then, still some popular foundation for the professional’s claim of license to balance the public good against the needs and demands of the immediate clients or employers. Transcendent values add moral substance to the technical content of disciplines.³⁵

However, in late modernity, it is increasingly the negative side of professionalism that has come to dominate the public perception. Professionalism has become not just the Shavian “conspiracy against the laity” but something darker. Rooted historically in the enormous breach of trust, the perverted professionalism of those lawyers, doctors, judges, and scientists who gave up their humanity before the “great madness of the Third Reich,”³⁶ the world has become increasingly sceptical of professional expertise, and those who claim it.³⁷ It is in this context, then, that the very conjunction of “humane professionalism” can be seen as part of an attempt to restore the balance, to re-assert that moral virtue which should attach to professionalism, but which “professionalism,” without more, cannot sustain.

So why do I still suggest that the *Arthurs Report* was in fact caught in the tensions of an ambitious modesty? Part of the answer lies in the presentation. For all its vision and ambition, the *Arthurs Report* was in some regards tentative (a word, I know, that cannot often be associated with Harry Arthurs). It sought to emphasise the exploratory and preliminary nature of its inquiry: it was clearly intended as the beginning, not the end of a process of dialogue about the purposes of legal education, and many of its recommendations were broadly drawn indications of policy rather than specific actions. But its modesty also goes beyond that.

The report—rightly, I suggest—saw the dominance of what it called “eclecticism” in curriculum design as a problem.³⁸ This again was

³⁵ Eliot Freidson, *Professionalism: The Third Logic* (London: Polity Press, 2001) at 221-22.

³⁶ Alain Finkielkraut, *In the Name of Humanity* (London: Pimlico, 2001) at 2. See also Zygmunt Bauman, *Modernity and the Holocaust* (Cambridge: Polity Press, 1989).

³⁷ A. Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990); Piotr Sztompka, “Trust, Distrust and Two Paradoxes of Democracy” (1998) 1 Eur. J. Soc. Theory 19. This is not to ignore the late twentieth century “backlash against professional society” launched in the name of the free market and public interest: see Perkin, *supra* note 33 at c. 10.

³⁸ *Supra* note 1 at 56-58.

not an experience unique to Canada. In the United States, for example, the relaxation of close professional control allowed law schools to experiment with the introduction of new course offerings. Electives and seminars proliferated, new pedagogies emerged, and yet, as John Henry Schlegel succinctly put it in 1984, “students on both sides of the [U.S.] border, though offered an incredible smorgasboard of choices, choose the same narrow collection of bar exam basics and hate them.”³⁹ The vagaries of student-led demand and faculty-led supply, within a context still shaped strongly by doctrinalism, effectively marginalized many attempts to open up the curriculum in particularly innovative or, perhaps, threatening ways.

Arthurs’ response to this phenomenon was to invoke a notion of pluralism: “a genuine choice of identifiable alternatives,”⁴⁰ which might involve either the re-packaging and refocusing of a law school’s activities, or enabling students to make a rational choice between “academic” and “professional” curricula. In effect, this was a precursor to the more modern notion of modular pathways. This seemingly simple idea proved highly optimistic in its expectation that the Canadian system of legal education (or any similar one) might evolve into a kind of planned economy. Here the report seems to have underestimated the modesty of law school ambitions. Relatively few law schools have sought to take the game of market differentiation seriously. Moreover, the report also underestimated the conservatism of both faculty and prospective students and their continuing deference to the professional curriculum. As one law school dean has recently observed, “the primary goal of the great majority of ... students is still to receive a legal training that is broad and well-rounded enough to enable them to compete for jobs in the legal profession not just locally, but nationally and, increasingly, internationally.”⁴¹

To suggest that the emphasis on pluralism was a weakness may seem somewhat counter-intuitive, and indeed the report’s intention to move from an “eclectic” to a “pluralist” system of legal education was undoubtedly intended as progressive. But it also allowed the Consultative Group to substitute what was really an “ideal type” for a

³⁹ Schlegel, *supra* note 9 at 1528.

⁴⁰ *Arthurs Report*, *supra* note 1 at 56.

⁴¹ Joost Blom, “Introduction: Looking Ahead in Canadian Law School Education” (1999) 33 U.B.C. L. Rev. 7 at 16.

solution. In retrospect, the report did not sufficiently address the practical question of what it would take to embed “humane professionalism” as a long-term process of cultural transformation.

In particular, the *Arthurs Report* insufficiently addressed the need to embed humane professionalism in pedagogy, not just content. The report says relatively little about teaching⁴² and even less about pedagogy in any deep sense of that term.⁴³ Its conclusions focus primarily on content and the appropriate scholarly approach to substantive law. In this respect, it is part—and by no means the worst example—of an overwhelming pattern not just of content-dominated reviews of legal education across the common law world, but of scholarly indifference to the theory of legal education itself.⁴⁴ Yet such theorizing is critical. We should not ignore the extent to which the medium really does influence the message, all the way down to the deep ontological structures of law and lawyering.⁴⁵ To this extent, though the Report has been critical in advancing the case for an interdisciplinary legal scholarship, its modesty finally overstepped its ambition. It signally failed to identify how humane professionalism, if taken sufficiently

⁴² It did recommend an expansion of clinical education, and the greater development of research and writing skills through the production of student research papers, but these were hardly ground-breaking, even in 1983.

⁴³ I am not the first to suggest that the report did not take teaching sufficiently seriously. See Graham Parker, “Legal Scholarship and Legal Education” (1985) 23 *Osgoode Hall L.J.* 653; Diana Majury, “Teaching is Part of Legal Education” (2003) 18:1 *C.J.L.S.* 51.

⁴⁴ See Fiona Cownie, “The Importance of Theory in Law Teaching” (2000) 7 *Int’l J. L. Profession* 225, and Julian Webb, “Why Theory Matters” in Julian Webb & Caroline Maughan, eds., *Teaching Lawyers’ Skills* (London: Butterworths, 1996) 23. Majury’s concern, *ibid.*, that teaching is actually of diminishing importance in Canadian legal education is also reflected to some degree in the United Kingdom where a “publish or perish” approach to career progression has been increasingly fostered by the culture of research assessment. This was not helped by concerns that legal education research was possibly marginalized in the earlier research assessment exercises, nor by the fact that quite a lot of legal education research has, quite simply, not been of good quality. But the picture is not entirely gloomy. My sense is that legal education research and scholarship is becoming increasingly robust and even mainstream in the United Kingdom, with papers appearing in established peer-reviewed journals and supported by a growing number of journals that have legal education as the whole, or an explicit part, of their focus. See the *Law Teacher* (first published in 1966); the *International Journal of the Legal Profession* (1994); *Web Journal of Current Legal Issues* (1995); *Legal Ethics* (1998); *Journal of Commonwealth Law and Legal Education* (2001) and the *European Journal of Legal Education* (2003). This proliferation of journals is itself largely a product of the growing research (audit) culture. See also A. Bradney, “The Rise and Rise of Legal Education” [1997] 4 *Web J.C.L.I.*, online: <<http://webjcli.ncl.ac.uk/1997/issue4/bradney4.html>>.

⁴⁵ See further Part IV of this article.

seriously, could change our perception not only of *what* law should be taught, but *how* it should be taught, and indeed, of how pedagogy might contribute, in turn, to the idea of humane professionalism itself.

This criticism may seem to cast doubt on the capacity of “humane professionalism” to act as the rallying call for the re-energization of the academy. But that is not the direction I intend to pursue. Indeed quite the reverse: it is the argument of this article that we need humane professionalism now more than ever. In the following pages I will explore why humane professionalism is still important to us today, and consider what a pedagogy built on humane professionalism might involve.

III. THE UNCERTAIN FUTURE(S) OF LEGAL EDUCATION

If we are to take humane professionalism seriously we first need to take the context of legal education seriously. That context has changed substantially since 1981. In Canada, Britain, and elsewhere, legal education operates within a complex, densely pluralistic, and increasingly globalized environment, shaped both by changes in higher education policy and the market for legal services. Arthurs himself has recently observed:

It is not possible to think usefully about legal education without thinking about law itself ... about its complexity and polycentricity, its political and economic functions in the larger society, its social origins and cultural significance, its epistemology and deontology. Nor is it possible to think about the architects, theorists, practitioners, critics, clienteles, benefactors, and beneficiaries of legal education without recalling that they are also embedded in the larger polity, society, economy, culture, professional ethos, and higher education system—all dynamic and conflicted systems. Nor finally, can we ignore the fact that the relationships amongst these actors constitute an internal political economy, which does much to define the character and strategies of the legal academy.⁴⁶

This complex interplay of forces has undoubtedly had some positive consequences for legal education and scholarship. Few would disagree that the majority of law schools are more intellectually interesting, more multi-cultural, and less insular places than they were

⁴⁶ Harry W. Arthurs, “Poor Canadian Legal Education: So Near to Wall Street, So Far From God” (2000) 38 Osgoode Hall L.J. 381 at 402-03 [Arthurs, “Poor Canadian Legal Education”].

twenty or thirty years ago.⁴⁷ Expectations of research, hiring parameters, and the career trajectories of academic lawyers have become more like the university norm. But at the same time, changes to both the political economy and intellectual environment of higher education have added to a pervading sense of uncertainty about the future direction or even possibility of our endeavour.

The causes of this uncertainty are too well known on both sides of the Atlantic to require detailed discussion. Functional complexity and uncertainty is increasingly shaping the terrain of lawyering itself.⁴⁸ The lawyers and legal academics of the twenty-first century are operating in a transitional environment that is re-shaping (and perhaps recursively being re-shaped by) the profession and perceptions of professionalism. National legal professions are becoming more fragmented by the growing divergences between global, national, and local legal practice; the emergence of new forms of lawyering; the changing inter- and intra-professional division of labour and pressures for de-professionalization (for example the challenge from forensic accountancy, and the expanding roles of in-house lawyers and paralegals);⁴⁹ and continuing deregulation.⁵⁰ Among the potential casualties of this environment are the notions that there is a common core of professional knowledge, and that a common professional training may be maintained. As Deborah Rhode has observed in the U.S. context:

⁴⁸ J. Webb, "Turf Wars and Market Control: Competition and Complexity in the Market for Legal Services" (2004) 11 Int. J. L. Profession 81 [Webb, "Turf Wars"].

⁴⁹ These issues are explored in the Canadian context, *inter alia*, by H.W. Arthurs "Lawyering in Canada in the 21st Century" (1996) 15 Windsor Y.B. Access Just. 202; Harry W. Arthurs & Robert Kreklewich, "Law, Legal Institutions, and the Legal Profession in the New Economy" (1996) 34 Osgoode Hall L.J. 1; and W. Wesley Pue, "Foxes, Henhouses, Unfathomable Mysteries, and the Sufferance of the People: A Review of Regulating Professions and Occupations" (1996) 24 Man. L.J. 283. In the English context, see notably Richard L. Abel, *English Lawyers Between Market and State* (Oxford: Oxford University Press, 2003), and the symposium thereon published in (2004) 11 Int'l J. L. Profession 3-156.

⁵⁰ A prime example is the recent Clementi Review of the Anglo-Welsh market for legal services. Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales Final Report*, online: <www.legal-services-review.org.uk>. However it should be noted that regulatory form is on the agenda across the European Union (EU), under the influence of EU competition policy. R. Parnham, "Lawyers poised on brink of brave new world" 47 European Lawyer (April 2005) 20.

It is time to reconsider whether an occupation as large and varied as the American bar is well served by a unified regulatory structure. The profession needs to recognize in form what is true in fact. Lawyers with diverse backgrounds and practice contexts need different preparation and sources of guidance. Our current one-size-fits-all model of legal education and professional education badly needs revision.⁵¹

In light of this changing professional culture, there is growing recognition that education needs to look beyond legal knowledge as we have conventionally defined it. If as Friedson suggests, “transcendent values” do indeed “add moral substance to the technical content of disciplines,”⁵² we cannot afford (assuming we ever could) to treat learning law as just about substantive knowledge and skills. We need to carefully consider our part in the development of students’ attitudes and values.⁵³ In fact, I would argue that this goes beyond simply enhancing the profession’s professionalism. The very process of participating in the articulation and choice of values is integral to constituting the academy itself as a moral community. But let us also be aware of the kind of conundrum that is involved here.

Discourse about “values” has been one of the defining features of modernity, and yet “values” is nevertheless a problematic and slippery concept. We often use it to capture a yearning for a “possible world that we try to make more actual in our conduct,”⁵⁴ a reaching towards an imagined future. But the language of values can also carry

⁵¹ “The Professionalism Problem” (1998) 39 *Wm. & Mary L. Rev.* 283 at 317; the recent and controversial proposals by the English Law Society to create more flexible pathways to qualification would seem consistent with this same post-Fordist logic. See Webb & Fancourt, *supra* note 18.

⁵² Friedson, *supra* note 35.

⁵³ See e.g. the McCrate Report, *Legal Education and Professional Development – An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Chicago: American Bar Association, 1992) (statement of lawyering values); the (English) Law Society’s *Second Consultation on a New Training Framework for Solicitors* (London: The Law Society, 2003) (including “the values, behaviours, attitudes and ethical requirements of a solicitor” as part of its “high-level definition” of the competences expected of a newly-qualified solicitor); and the report of the Canadian Bar Association Joint Multi-disciplinary Committee on Legal Education, *Attitudes, Skills, Knowledge: Recommendations for Changes to Legal Education to Assist in Implementing Multi-option Civil Justice Systems in the 21st Century* (Ottawa: Canadian Bar Association, 2000) at ii notes, *inter alia*, that the move to alternative dispute resolution “will require a more reflective and self-conscious stance on the part of lawyers in considering their personal responsibility for affecting the process of settlement.”

⁵⁴ Neil MacCormick, “The Ideal and the Actual of Law and Society” in J. Tasioulas, ed., *Law, Values and Social Practices* (Aldershot: Dartmouth, 1997) 15 at 30.

with it an attachment to a past, real or imagined,⁵⁵ a view of the world in which, as Nietzsche observed, all value has already been created. Values-talk can thus spin off in many directions—to be both revolutionary and reactionary, personal and political, to define collective responsibilities and somebody else's problem.

And this is perhaps the crux of *our* problem: in an increasingly individualistic, secularized, and multi-cultural Western world, meaningful values-talk has become, if anything, more difficult to sustain. In general, we enjoy freedom of choice (as we choose to define it!) on a hitherto unimagined scale, and yet with that freedom has come the burden of greater moral ambiguity and uncertainty. It is perhaps one of the great, though surely not unexpected, ironies of modernity that in obtaining our freedom from an existence shaped by pre-ordained, universal values, and taking on our own shoulders the responsibility for choosing the values we live by, our collective uncertainty about what those values should be has only grown. As Hans Jonas has observed, "we need wisdom most when we believe in it least."⁵⁶ Indeed, the paradox is that while humankind has developed the power to impact the world on a truly global scale, each of us operates within a lifeworld that seems to give us *less* power not just over external events, but even over our own lives and moral choices. These lives have become more fragmented, more dominated by a dislocating sense of change, more dispensible. We are indeed players of many parts, yet "none of the roles seems to take hold of our 'whole selves.'"⁵⁷

How should law schools respond to this complex environment that seems to be both simultaneously value-laden and value-free? Assuming that we should be making the discussion of values (more) explicit in the curriculum, with whose values should we be (most) concerned: our students', the academy's, the profession's, the legal system's, or society's? What kinds of values should we be addressing: the personal and moral values (honesty, integrity, et cetera) of individual actors; their economic or even aesthetic values, the values that constitute the "being-with" of a moral community; the "organizational"

⁵⁵ One may find such an example in political calls for a return to "family values" or the equally problematic notion of "community values."

⁵⁶ *Philosophical Essays. From Ancient Creed to Technological Man* (Englewood Cliffs, NJ: Prentice Hall, 1974) at 178.

⁵⁷ Zygmunt Bauman, *Postmodern Ethics* (Oxford: Blackwell, 1993) at 19.

values of institutional players? What about the interplay between values and professional ethics? How should we respond, in an increasingly bureaucratized world, to the pervading sense that our responsibility is no longer ours to own? That it is merely the responsibility of the role we occupy, for as long as we occupy it. It is a responsibility that is increasingly defined and delimited by standards, rules, and codes of conduct, rather than the product of our own moral reflection. And the danger of such codified moral responsibility is that it appears to be everywhere and yet adheres nowhere.⁵⁸ These are all substantial and contentious questions which few of the formal reviews of legal education have ever sought to address in any depth.⁵⁹

These questions are made perhaps even more pressing by the extent to which legal education is becoming co-opted to what Arthurs has called the “globalization of the mind”: a special form of globalization in which knowledge workers seek to participate in a transnational discourse, shaped by the institutions and structures of global capital.⁶⁰ In this context we need to recall that the political economy of higher education as a whole, and legal education in particular, has changed radically over the course of the last two decades,⁶¹ induced by an increasing marketization and corporatization of higher education. I will limit myself to three main observations to illustrate the point.

First, in the United Kingdom, Australia, New Zealand, and to a lesser extent, Canada, legal education is exposed to the public gaze of the “audit society,” and subject to (quasi-)market forces to a degree that

⁵⁸ Bauman thus talks of responsibility that “floats among the players.” See *ibid.*, and *Alone Again: Ethics After Certainty* (London: Demos, 1994). See also David Luban, Alan Strudler & David Wasserman, “Moral Responsibility in the Age of Bureaucracy” (1992) 90 Mich. L. Rev. 2348.

⁵⁹ As noted in *supra* note 53, the U.S. McCrate Report did attempt to construct a set of lawyering values, though this resulted in a list of predictably general statements exhorting the values of providing competent representation, striving to promote justice, maintaining and improving the profession, and professional self-development. But see generally the critique of McCrate by Carrie Menkel-Meadow, “Narrowing the Gap by Narrowing the Field: What’s Missing from the McCrate Report – Of Skills, Legal Science and Being a Human Being” (1994) 69 Wash. L. Rev. 593.

⁶⁰ H. W. Arthurs, “Globalization of the Mind: Canadian Elites and the Restructuring of the Legal Field” (1998) 12:2 C.J.L.S. 219.

⁶¹ For Arthurs’ own contributions to this literature, see notably Arthurs, *supra* notes 8 and 49; Arthurs & Krekewich, *supra* note 49; and “The World Turned Upside Down: Are Changes in Political Economy and Legal Practice Transforming Legal Education and Scholarship, or Vice Versa?” (2001) 8 Int’l J. L. Profession 11.

is unparalleled in recent history. Law school rankings, and formal or informal assessments of teaching and research quality, increasingly inform both our own and public perceptions of the academy. All this is happening, too, in a context where the state-financed unit of resource has steadily declined in real terms. Reliance on private funding through tuition fees, full-cost courses, endowments, and gifts, has become increasingly normalized,⁶² albeit more so in Canada than the United Kingdom.

Legal education, perhaps more obviously in the United Kingdom and Australia than in Canada, has become part of a mass education system.⁶³ Law has maintained exceptional popularity. The number of law schools has expanded, most notably in Australia, where the number of schools more than doubled in a decade, but also in the United Kingdom.⁶⁴ In the United Kingdom particularly, student numbers have increased exponentially, and generally at a significantly higher rate than faculty hiring. Class sizes in the United Kingdom have also grown and, in some instances, individual class-contact hours reduced, creating concerns about the maintenance of teaching quality, though these are often left publicly unspoken (not least because we are very conscious of the increasingly consumerist expectations of students and funding bodies).

The sustained popularity of law has been a double-edged sword for the law schools. It has enabled the majority of them to expand on the back of a pool of well-qualified applicants and insulated them from the threats of “downsizing” or closure that have afflicted other departments. But this very popularity has been widely exploited by university managers, to increase numbers and turn law schools into cash cows that can be used to cross-subsidise less economically viable parts of the enterprise. At the same time, the range of educational “products” has also expanded to tap more lucrative graduate and international markets.

⁶² C. Backhouse, “The Changing Landscape of Canadian Legal Education” (2001) 20 Windsor Y.B. Access Just. 25.

⁶³ See e.g. Julian Webb, “Post-Fordism and the Reformation of Liberal Legal Education” in Fiona Cownie, ed., *The Law School: Local Issues, Global Questions* (Aldershot: Dartmouth, 1999) 228 [Webb, “Post-Fordism”].

⁶⁴ The number of law schools in the United Kingdom increased from 48 in 1975 to 85 in 2000 according to A. Bradney & F. Cownie, “British University Law Schools in the Twenty-First Century” in David J. Hayton, ed., *Law’s Future(s): British Legal Developments in the 21st Century* (Oxford: Hart Publishing, 2000) 1 at 1-2.

In an increasing number of schools, anecdotal evidence suggests that delivering the LL.B. is no longer the core activity. Increasingly taught by part-time lecturers, graduate teaching assistants, and the “research inactive,” it has been pushed aside by the perceived need for (or desire of) more experienced and senior members of faculty to deliver higher value graduate programmes, supervise Ph.D.’s and pursue funded research.⁶⁵

The growing internationalization of legal education also presents us with a range of opportunities and threats.⁶⁶ There is an important—and under-explored—nexus between the increasing internationalization of legal business and the internationalization of legal education. The centralization of cross-border legal work in the major global (notably New York, London, Tokyo, Hong Kong) and regional cities (for example Brussels, Sydney, and Toronto) has interesting consequences for the law schools. It influences the hiring practices of the global elite law firms affect the national and international standing of the top schools, shapes what students perceive to be (practically) important or exciting areas of law, and affects demand-led curriculum priorities and hiring practices of the law schools themselves.⁶⁷

The growing significance of regional trading blocs, the expansion of cross-border trade, and the accompanying development of principles of international economic law have supported a significant re-centring of the legal curriculum around corporate law and international trade, often at the expense of more welfare-oriented fields that are significant in underpinning local citizens’ access to justice. There is also a question over how far the perceived international elite law schools will use their status, resources, and technology to extend their reach in the global market for education. Concerns are already being voiced in Canada and the United Kingdom, for example, that some of the elite U.S. universities have the size and capacity to develop joint ventures,

⁶⁵ This is also a phenomenon in Australia. See J.H. Wade, “Legal Education in Australia—Anomie, Angst, and Excellence” (1989) 39 *J. Legal Educ.* 189 at 198.

⁶⁶ See generally John Flood, “Legal Education, Globalization and the New Imperialism” in Cownie, “The Law School,” *supra* note 63; Arthurs, “Poor Canadian Legal Education,” *supra* note 46; and W. Wesley Pue, “Globalization and Legal Education: Views from the Outside-In” (2001) 8 *Int’l J. L. Profession* 87.

⁶⁷ See M. Thornton, “Among the Ruins: Law in the Neo-Liberal Academy” (2001) 20 *Windsor Y.B. Access Just.* 3.

offshore campuses, and distance education projects in a way that local providers cannot. The possibility, under initiatives such as the General Agreement on Trade in Services (GATS)⁶⁸ and the Bologna accord,⁶⁹ of a highly deregulated international market in education also raises concerns about the preservation of local (legal) cultures and values.

We cannot leave this area without also considering what Arthurs himself has referred to as the “politics of knowledge.”⁷⁰ Law is constituted for and of itself by a range of partly complementary and partly competing discourses which are battling for its “soul.” It is also caught between its growing self-confidence as a discipline and its continuing sense of dependency on a fragmenting profession that seems increasingly uncertain about its own knowledge needs, yet highly suspicious that the academy has lost sight of the “basics.”⁷¹

The growth in legal research and scholarship has undoubtedly resulted in new forms of legal knowledge evolving away from the traditional institutions that have shaped legal knowledge construction—government, the appellate courts, and legal practice—though these sites of course still exercise a strong pull for socio-legal as well as doctrinal scholarship. What has changed is the extent to which legal scholarship is itself taking place within a contested intellectual and policy context.

⁶⁸ However, the threat of major liberalization under GATS has temporarily receded, see Jane Knight, “Trade in Higher Education Services: The Implications of GATS” and “GATS, Trade and Higher Education: Perspective 2003—Where Are We?” in *The Observatory on Borderless Higher Education, Mapping Borderless Higher Education: Policy, Markets and Competition* (London: Association of Commonwealth Universities, 2004). On the wider significance for the production and circulation of knowledge of globalizing regulatory trends such as GATS and Trade-Related Aspects of Intellectual Property Rights, see *e.g.* John Frow, “Public Domain and the New World Order in Knowledge” (2000) 10 *Social Semiotics* 173.

⁶⁹ Marijk Van der Wende “The Bologna Declaration: Enhancing the Transparency and Competitiveness of European Higher Education” (2000) XXV:3 *Higher Ed. Europe* 305; John Hodgson, “Bologna—How Far Have We Got?” (2004) 38 *Law Teacher* 341. See also more generally Julian Webb, “Academic Legal Education in Europe: Convergence and Diversity” (2002) 9 *Int. J. Legal Profession* 139.

⁷⁰ Arthurs, “Political Economy,” *supra* note 8 at 26-28.

⁷¹ See *e.g.* Judge Harry T. Edwards’ famous polemic against modern U.S. legal scholarship, “The Growing Disjunction Between Legal Education and the Legal Profession” (1992) 91 *Mich. L. Rev.* 34, and Robert W. Gordon’s well-targeted response, “Lawyers, Scholars and the ‘Middle Ground’” (1992) 91 *Mich. L. Rev.* 2075. In the Canadian context, see Justice Michel Bastarache, “The Role of Academics and Legal Theory in Judicial Decision-Making” (1999) 37 *Alta. L. Rev.* 739 and Allan C. Hutchinson, “The Role of Judges in Legal Theory and the Role of Legal Theorists in Judging (or ‘Don’t Let the Bastaraches Grind You Down’)” (2001) 39 *Alta. L. Rev.* 657. See also A. Rochette & W. Wesley Pue “‘Back to Basics’? University Legal Education and 21st Century Professionalism” (2001) 20 *Windsor Y.B. Access Just.* 167.

These tensions particularly emerge between the (strong) rearguard action mounted by black-letter scholarship and the newer interdisciplinary approaches.⁷² As Allan Hutchinson has observed, “the ability of mainstream scholarship to absorb and neutralize new insights and fresh perspectives on the study of law is truly staggering.”⁷³ The apparent dominance of the mainstream is perhaps reinforced by the absence of any single, potentially equivalent, counterweight. Interdisciplinary scholars are to a degree divided amongst themselves: between the more positivistic empirical social science or “law and policy” approaches and more “theoretically” grounded insights of critical (race) theory, feminism, queer theory, postmodernism, and so on.⁷⁴ In most law schools, the interdisciplinary in its multiplicity of forms is still not so imbricated in the structure of degree courses as to supplant this (modified) black-letterism as the unspoken default position.⁷⁵

There is another agenda, increasingly driven by government and industry which potentially cuts across these more traditional debates, focused on the performativity and commodification of knowledge.⁷⁶ The growing curricular emphasis on competence and the development of transferable skills is the most obvious illustration of this trend, but the emphasis on knowledge transfer, the prescription of sectoral research priorities, the act of external research assessment, and the ranking of

⁷² See e.g. Ian Duncanson, “Degrees of Law: Interdisciplinarity in the Law Discipline” (1996) 5 Griffith L.R. 77; Douglas W. Vick, “Interdisciplinarity and the Discipline of Law” (2004) 31 J. L. & Soc’y 163.

⁷³ *Supra* note 71 at 660. Fiona Cownie’s research in the United Kingdom seems to support this idea of absorption; many of the academics she interviewed adopted a modified black-letterism, leavening doctrine with contextual insights and policy analysis. See F. Cownie, *Legal Academics: Culture and Identities* (Oxford: Hart Publishing, 2003).

⁷⁴ My intention here is not to suggest that empirical socio-legal research is inherently atheoretical or theoretically naive—though some of it is, in the same way that some of the apparently theoretically informed work actually displays a poor grasp of underlying social theory or philosophy. As Gordon observes, we should be concerned both that there is a vacuity and pretentiousness in some “post-something-or-other” scholarship (my phrase not Gordon’s) and that empirical research is often “underdone and undervalued” in the law school. See Gordon, *supra* note 71 at 2111.

⁷⁵ See e.g. Macdonald, *supra* note 8. This concern applies both to conventional curriculum content and to issues such as research training at both LL.B. and postgraduate (LL.M./Ph.D.) levels. In the United Kingdom the Nuffield Foundation has recently funded an inquiry into the future capacity of the academy to undertake socio-legal research, given the perceived paucity of socio-legal research training in law schools.

⁷⁶ See J.-F. Lyotard, *Political Writings*, trans. by Bill Readings & Kevin Paul Geiman (London: UCL Press, 1993) at 6, 50-53. See also Webb, “Post-Fordism,” *supra* note 63.

law schools can all be seen as consistent with this process of commodification. As I have argued in a forthcoming paper,⁷⁷ this is of considerable practical and epistemological significance to our conception of the university as a site of disciplinary knowledge, as we traditionally understand it, and to the construction of disciplines themselves as specific sites of knowledge and educational praxis. While not precluding the possibility of pure and abstract disciplinary work, the academy itself is tending to treat knowledge more as an unstable, expansive, and decentralised phenomenon.⁷⁸

Moreover, research council and governmental policy initiatives are demanding applied problem-solving in the production of new knowledge over and above any need for “blue skies” thinking. Michael Gibbons *et al* characterise this process as a move from “mode 1” to “mode 2” knowledge production in the pure and social sciences. They define mode 1 research as academic, mono-disciplinary and homogeneous. Mode 2, by contrast, operates in a transdisciplinary context, delivering applied and contextualized knowledge through collaborative (multi- or genuinely trans-disciplinary) work, in which multiple actors bring greater heterogeneity to the research process.⁷⁹ This move is not posited in conventional terms of a discrete paradigm shift; mode 1 has not simply been displaced by mode 2. Rather, mode 2 is presented as an emergent property of the modern research system.

Clearly, this shift to mode 2 offers both opportunities and threats. Legal scholarship, as yet, remains relatively sheltered from these debates, though pressures to engage in policy research and “knowledge transfer” certainly bring some socio-legal research much closer to mode 2. However, the move toward mode 2 type of thinking is already having a more general impact on how we construe what counts as (useful) knowledge both within the university and beyond. There are also risks in the potential for the underlying performative and often utilitarian

⁷⁷ “When ‘Law and Sociology’ Is Not Enough: Transdisciplinarity and the Problem of Complexity” in Michael D.A. Freeman, ed., *Law and Sociology* (Oxford: Oxford University Press, forthcoming) [Webb, “Transdisciplinarity”].

⁷⁸ See variously Merle Jacob & Thomas Hellström, *The Future of Knowledge Production in the Academy* (Buckingham: Open University Press, 2000); Michael Gibbons *et al.* *The New Production of Knowledge: The Dynamics of Science and Research in Contemporary Societies* (London: Sage, 1994); and Mattei Dogan & Robert Pahre, *Creative Marginality: Innovation at the Intersections of Social Sciences* (Boulder, CO: Westview Press, 1990).

⁷⁹ Gibbons *et al.*, *ibid.*

agendas of the universities, the research funding bodies, and the state, to use mode 2 to tie learning more generally to “a narrow, technocratic, and scientific means-end rationality.”⁸⁰

There are growing doubts about what constitutes the core knowledge of our discipline. Greater flexibility—or even fragmentation—in provision and pathways could reduce the content-based coherence of any educational regime; if we want epistemological coherence, we may need to look deeper to find it: to the skills, methods, ethics and underlying philosophy of law. Those same doubts may create a greater distance between academic and practical law. They may also further reduce the professional hold over the academic curriculum, perhaps encouraging the profession (as in England and Wales, possibly) to find new strategies by which to maintain or even reinforce its control over legal education.

And yet in the midst of all this change, a surprising number of our educational practices, and most of the core debates around legal education, have changed little since the early 1980s.⁸¹ Despite the growth in interdisciplinarity, and despite the greater emphasis on skills and ethics (in some jurisdictions at least), the student experience is still dominated by an ethos that often trivializes both (substantive) knowledge and skills. It “treats ‘knowledge,’” in Rochette and Pue’s words, “instrumentally and precisely, as being more a matter of specific content rather than processes of learning and ways of knowing.”⁸² And it trivializes skills when it treats the development of skilled behaviours atomistically, from a perspective of a crude educational behaviourism, with insufficient regard for either their cognitive content, or ethical context.⁸³ However, the problem is not (as Rochette and Pue suggest) the assumption of a false dichotomy between the “academic” and the “professional” it is more the construction of a false symmetry between

⁸⁰ Webb, “Transdisciplinarity,” *supra* note 77.

⁸¹ This, of course, is not a novel assertion: see *e.g.* Rochette & Pue, *supra* note 71 at 169.

⁸² *Ibid.* at 186.

⁸³ Note Andy Boon’s observation that “[e]ven in more enlightened programmes, the curriculum is dominated by a cycle of demonstration and rehearsal whereby performance and assessment is monitored against checklists.” “History is Past Politics: A Critique of the Legal Skills Movement in England and Wales” (1998) 25 *J. L. & Soc’y* 151 at 164. Note also Julie Macfarlane, “The Legal Skills Movement Ten Years On: Triumph or Compromise?” Book Review of *Teaching Lawyers’ Skills*, J. Webb & C. Maughan, ed. (1997) 24 *J. L. & Soc’y* 440.

them.⁸⁴ It is this argument that pulls us back to a future shaped by the ideal of humane professionalism.

IV. HUMANE PROFESSIONALISM: A (RE-)VISION

Debates about pedagogy in law rarely aspire to the heights of grand theory, which always seems a pity. I say this not simply because I like theory and think everyone should have one, but because theory can throw light into some of the darker spaces left after one has ploughed (again) a well-dug furrow of pragmatic *realpolitik*. But since neither theory nor pragmatics is of itself entirely satisfying, I would like to attempt a middle path, albeit one that I can perforce only begin to flesh out in this paper.⁸⁵ This builds on the following (hopefully contentious) assumptions.

Pragmatically, we can answer the problem of the relationship between legal education and practice largely as a matter of functional differentiation. The academy and legal practice must be viewed as significantly differentiated sites of knowledge construction and use.⁸⁶ In legal education we set out primarily to communicate *our* map of the territory of law; we do not (realistically cannot) communicate the map(s) of legal practice,⁸⁷ nor the territory of law itself. Like all attempts at mapping, ours inevitably contains generalizations, deletions, and

⁸⁴ This is not to suggest that we cannot, or should not build bridges between them; it is to suggest that the success of any bridge-building enterprise depends on our ability to be reasonably clear-eyed about the differences.

⁸⁵ This paper thus forms, in part, an *entrée* into a larger project that I am embarking on, under the working title "Toward an Ecology of the Legal Mind." The allusion to Gregory Bateson's work (see *infra* note 89) in that title is deliberate.

⁸⁶ Implicit in this statement is a pluralist stance which assumes that the worlds of education and practice are, at least, semi-autonomous fields of discourse and practice. A more "extreme" cybernetic or fully autopoietic perspective would go so far as to treat them as self-organizing systems of signification and communication. See *e.g.* Niklas Luhmann, *Law as a Social System*, Fatima Kastner, ed., trans. by Klaus A. Ziegert (Oxford: Oxford University Press, 2004) at 341.

⁸⁷ The fragmentation and differentiation of legal practice make it less likely that we can even talk sensibly about practice as a single field or "map"; See *e.g.* Webb, "Turf Wars," *supra* note 48 and sources cited there. For a sophisticated application of the mapping metaphor to law, see B. De Sousa Santos, *Toward A New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed. (London: Butterworths, 2002) c. 8: "The central argument of this chapter is that laws are literally maps. Maps are ruled distortions of reality, organized misreadings of territories that create credible illusions of correspondence. By imagining the unreality of real illusions we convert illusory correspondences into pragmatic orientation, making true William James's dictum that 'the important thing is to be guided'" (*ibid.* at 419).

distortions; if it did not it would be indistinguishable from the territory it seeks to represent.⁸⁸ Indeed, to paraphrase Gregory Bateson, the territory never gets a look-in, and never will; all there can be in education is representation.⁸⁹

Traditional legal scholarship looks increasingly out-moded, both as a way of thinking about law and as a mode of learning. It embodies, in the classical black-letter approach to scholarship, a narrow, formalist, epistemology which leans heavily towards *Wissen* (“knowledge as science”) rather than *Erkenntnis* (“knowledge as a cognitive⁹⁰ system”). Having long ago substituted *Wissen* for practice-based knowledge, Western society now treats practice separately as a mere process—the application of scientific knowledge in an applied field.⁹¹ Paradoxically, it may seem, I suggest we also need to re-capture practice as part of a more complex way of knowing that involves multiple sites and processes of learning and the individual capacity to use multiple “intelligences.”⁹²

The continuing tensions between theory and practice, between new and traditional forms of legal scholarship, particularly in the current context where knowledge itself seems to be “falling apart,”⁹³ potentially leave the academy caught in an epistemic trap of its own making, “oscillating between positions of cognitive autonomy and heteronomy.”⁹⁴

⁸⁸ To continue the mapping metaphor it would then operate on the same scale and projection as “the law,” which it clearly does not.

⁸⁹ This is why I would suggest logically that the representations of legal practice are also just that, and not the territory: “The territory is *Ding an sich* and you can’t do anything with it. Always the process of representation will filter it out so that the mental world is only maps of maps of maps, ad infinitum.” Gregory Bateson, *Steps to an Ecology of Mind* (Chicago, University of Chicago Press, 2000) at 461-62.

⁹⁰ I use the term cognitive widely here in the sense that we construct ways of knowing as what might be called a social or cultural epistemology.

⁹¹ See e.g. Karl Mackie, “A Strategy for Legal Education Research” (1990) 24 *Law Teacher* 130 at 140-41.

⁹² Theories of learning are increasingly cognisant of the importance of both environment and personal elements beyond the cognitive domain, including affect and so-called “emotional intelligence.” See e.g. Joe Cullen et al., *Review of Current Pedagogic Research and Practice in the Fields of Post-Compulsory Education and Lifelong Learning* (London: Tavistock Institute, 2002), online: Tavistock Institute < <http://www.tavistock.org/getdoc.php?id=22>>.

⁹³ Mary Douglas, *Risk and Blame: Essays in Cultural Theory* (London: Routledge, 1992) at 32.

⁹⁴ Gunther Teubner, “How the Law Thinks: Towards a Constructivist Epistemology of Law (1989) 23 *L. & Soc’y Rev.* 727 at 730.

In functional terms, this conflict can be resolved by viewing legal education as a cognitively heteronomous and normatively autonomous process. Creating the nexus between the humane and the professional lies in asking the normative question, what is it that law schools *ought to do*. Treating this as a question of substantive curriculum content is not enough. Understanding what lawyers actually do, or asking the various stakeholders in the academy what they want from legal education are, *so far as they go* (and I suggest they go less far than the profession in particular would like), legitimate questions when seeking to define the mission of the modern law school. But they too are not enough; they do not supplant the need for the academy to reflect on its normative function, as an autonomous moral and (in the widest sense) political institution.

Moving on to the relationship between the education system and individual learners, we do not live in a world in which our representations and understandings of law are wholly divorced from the other constructs that make up our lifeworld, yet legal education largely proceeds as if they were. The law, though it objectively exists, cannot readily be understood simply as an abstract noumenal entity. We experience it as a culturally-laden, value-oriented subject, and while there is undoubted value in trying to seek out and understand that noumenal reality, we need also to acknowledge the law as lived experience. As Georg Simmel observed, contrary to our societies' normative beliefs, objectified cultural forms (of technics, science, philosophy, religion, and so on) serve only a limited function in human development. So objectified, however, these forms become the "oppressive master of subjectivity," deprived of their meaning for the life of individuals.⁹⁵ Humane professionalism needs to find new ways to make law "live."

My final normative assumption: if this learning environment is to be treated as meaningfully complex, it would benefit from what I describe here as a shift towards an "ecological" concept of knowing.⁹⁶

⁹⁵ Georg Simmel, "The Conflict of Modern Culture" in P. Lawrence, ed., *Georg Simmel: Sociologist and European* (New York: Barnes & Noble, 1976) at 223-42.

⁹⁶ I approach this from a position of phenomenological realism. That is, a position defined by a subjectivist/constructivist epistemology and a realist (as opposed to subjectivist) ontology. A subjectivist epistemology acknowledges the extent to which we are both constituted by and engaged in the interpretive understanding of the world, and that any account of "reality" is mediated by language, culture, and tradition. A realist ontology nevertheless asserts, that whatever our problems

Each “mind” that engages with “the law” does so within the framework of a whole “ecology of ideas”⁹⁷—and more. Indeed, if we are to take an ecology of mind seriously in education, then conventional distinctions between mind/body, reason/emotion, and even internal/ external representations of mind are all potentially brought into question in the process of learning.⁹⁸

What does this framework add to our existing ideas of humane professionalism? I suggest it has the capacity to re-centre humane professionalism around the *process* of education rather than just its content. It leads us to the real question for legal education, rather than legal scholarship: how do we bridge the gap between the syllabus and the students who are looking for a “humane connection to a world that’s overwhelming them.”⁹⁹

In the West, we have become wrapped up in law as the conjunction of the rule of law and the law as rules. This is difficult to unpack in the conventional classroom. Law as rules is a strong part of most of our students’ prior culture and understanding of law. Similarly, rule of law thinking, though important, can also serve to justify uncritically legalistic approaches to problem-solving. Doctrinalism fits comfortably with that world view; it reinforces and does not challenge it. Critical and interdisciplinary work may—and should—challenge it at an intellectual level, but if left as an intellectual idea, it can do no more, and in the eclectic curriculum is likely to be marginalised rather than internalised because there is an alternative, more comfortable, world view to fall back on.¹⁰⁰

in describing that reality, there are nevertheless noumenal real objects which constitute the world “out there” as a thing-in-itself.

⁹⁷ Bateson, *supra* note 89 at 467, drawing on Geoffrey Vickers, “The Ecology of Ideas” in *Value Systems and Social Process* (New York: Basic Books, 1968).

⁹⁸ For example, Mark Johnson, *The Body in the Mind: The Bodily Basis of Meaning, Imagination and Reason* (Chicago: University of Chicago Press, 1987) develops a strong philosophical argument, drawing on cognitive science, in favour of an “embodied” rationality. On education itself as an embodied process, see *e.g.* Erica McWilliam & Peter G. Taylor, eds., *Pedagogy, Technology and the Body* (New York: Peter Lang, 1996); and D. Beckett, “Disembodied Learning: How Flexible Delivery Shoots higher Education in the Foot, Well Sort of” (1998) 3:3 *Electronic J. Sociology*, online: <<http://www.sociology.org/content/vol003.003/beckett.html>>.

⁹⁹ Lisa Ruddick, “The Near Enemy of the Humanities Is Professionalism” 48:13 *Chronicle Higher Education* (23 November 2001) B7.

¹⁰⁰ Schlegel makes the point that “critical” approaches do not just challenge these pre-conceptions, they challenge a nascent professional identity (at least for those students who think

In this context, a humane education is one that seeks to connect students to their own and others' humanity. As Arthurs has argued, it "sensitizes prospective lawyers to issues of ethics, public policy or business realities" and to the "great debates about law and its relationship to culture, society, the state and individual freedom and well-being."¹⁰¹ This, I would argue, leads to a more "authentic" professionalism.¹⁰²

It is not enough to engage with these questions just as abstract debates: education and "authentic" professionalism need so far as possible to become lived experience. Too often, law school seeks to dismiss the situatedness of law in human existence. This, I suggest, explains at least some of the sense of *anomie* that commonly characterises the law school experience.¹⁰³ This perspective is of particular significance in terms of understanding the relationship between individual learning and action. It can be said that our lived experience of a phenomenon exists in a reflexive relationship with our technical knowledge of it. As Marková observed:

Knowledge is originally directly interwoven with practical activity; only then it detaches itself and forms itself into a special cognitive "activity." It is not correct to oppose action and knowledge and treat them as external to each other.¹⁰⁴

they may become practising lawyers) that wants to see legal education as the key to the kingdom: a world of specialist professional knowledge unique to the lawyer. *Supra* note 9 at 1532.

¹⁰¹ Arthurs, "Half a League Onward," *supra* note 16 at 11.

¹⁰² I have considered the importance of authenticity in constructing the professional self at greater length in "Being a Lawyer/Being a Human Being" (2002) 5 *Legal Ethics* 130 ["Webb, 'Being a Lawyer'"]; see also Susan Kupfer, "Authentic Legal Practices" (1996) 10 *Geo. J. Legal Ethics* 34. I came to use the term authenticity only after some considerable thought—really more of a struggle between my own personal and professional self—for fear of (the latter) being thought either a throwback to a naive existentialism or an exponent of an equally naive "New Age-ism". In the end I used it because there was no other word I could find that quite captured that sense of self I was after. I still worry that I compromised my "self" insofar as much of the passion I felt for the position I was trying to articulate was lost to the more professional academic voice in which I articulated it. Ruddick, *supra* note 99, encapsulates the problem well in discussing her experience of teaching a graduate humanities seminar on authenticity: "'Authenticity,' like the concept of 'humanity' was raw and inappropriate and had to be properly cooked in order to be discussed."

¹⁰³ See *e.g.* Lawrence S. Krieger, "Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence" (2002) 52 *J. Legal Ed.* 112.

¹⁰⁴ Ivana Marková, *Paradigms, Thought and Language* (Chichester: Wiley, 1982) at 175.

Yet this is precisely what legal and other forms of higher education do most of the time. If a humane professionalism is to have any impact in the real world, it needs to bridge that gap.

V. CONSTRUCTING THE “SMART” LAW SCHOOL

The spark that ignited my thinking about a new context for humane professionalism was American educationalist David Perkins' idea that we need to create “smart schools.”¹⁰⁵ Perkin developed his ideas in the context of secondary as opposed to higher education, so my use of his work is fairly broad brush and metaphorical, nevertheless, what I wish to propose is nothing less than a new ideal type: the construction of a “smart” law school.

According to Perkins, smart schools exhibit three characteristics. First, they are *informed*, in that staff are knowledgeable about thinking and learning processes. Second, they are *energetic* in that they seek to create a physical and cultural environment which nurtures the positive energies which we associate with a “good” learning process. Third, they are *thoughtful* places. Not surprisingly, this seems to be the key component for Perkins, and it is the element I will focus on most in presenting this necessarily brief *prolegomenon* for an ecological legal education. Smart schools, Perkins says, are thoughtful both in the sense that they enable learners to “think about and think with what they are learning” and in the sense that they *care*—in Dewey’s terms, I would say they have learnt the importance of “prizing the person.”

Let me now use this idea to identify four key principles for ecological instructional design.

A. *Learning is multi-dimensional*

A move towards whole curriculum “ecological” learning, by definition needs to address a range of cognitive, metacognitive and affective capacities. It is helpful in this endeavour to think about how we can meaningfully re-frame these to make curriculum design more comprehensible to all concerned. I propose, therefore, that we think in terms of four key dimensions (the labels are not my own; they are mostly

¹⁰⁵ David Perkins, *Smart Schools: Better Thinking and Learning for Every Child* (New York: The Free Press, 1995).

well-known and commonly used to describe aspects of the learning process).

Know-what. This describes the core of the cognitive domain: the knowledge and understanding of a substantive area, or of the steps required to complete a particular task. It also includes some extremely subtle cognitive mapping, for example, of what Paul Churchland has called “the high dimensional background of social space”¹⁰⁶—the practices of a group or community, their structure, flows, pathologies, and prohibitions.

Know-how. This encompasses a range of skills and attributes from the simple to the complex. It includes the higher cognitive skills of analysis, synthesis, and evaluation. It also includes a range of metacognitive functions—which largely constitute our ability to perceive, manipulate, and organize sensory information—and the capacity for reflection. It could also include a range of psycho-motor skills, though these tend to be of limited direct relevance to what we assess in higher education, except that their absence may impact on students’ ability to display other skills or knowledge (for example where the psycho-motor skills associated with voice production and modulation are under-developed).

Know-why. This is also largely cognitive terrain, but it usefully distinguishes the extent to which, in higher education, we attempt to move beyond basic know-what levels of understanding. To know why something is so, we need to possess a deep understanding of the systems and structures involved, and the contexts in which they operate. Know-why is particularly relevant to developing the capacity for complex problem solving.

Care-why. This is probably the most neglected of the quartet. It draws on the interplay between cognitive, affective, and metacognitive domains insofar as they all shape our feelings, motivations, and values. This dimension encompasses the sort of motivational “juice” that converts, for example, a moral thought into a consistent moral action. This dimension is also fundamental to the idea of a *thoughtful* education because it creates much of the capacity for deep learning, largely because things which demand a “care-why” response tend to touch us most personally. In legal education, where we spend so much

¹⁰⁶ Paul M. Churchland, “The Neurobiology of the Moral Virtues” in João Branquinho, ed., *The Foundations of Cognitive Science* (Oxford: Clarendon Press, 2001) 77 at 86.

time encouraging students to objectify their learning, we seem to lose much of that potential:

Introspection is rarely required of students. We are constantly conditioned to write in certain ways to please examiners, to answer questions succinctly, omitting any irrelevant information, and preferably to do all of this in an articulate manner! Questioning one's own thoughts feelings, motivations, and so on seems far more unsettling than questioning the work or theories of other people.¹⁰⁷

It is also the part that empowers students to make decisions for themselves that are “ecological”—to make choices about courses and to engage in learning processes that are consistent with who and what they are.

It follows from this first principle that we need to consider what kinds of learning processes are likely to help us achieve this range and depth of experiences. This objective underpins my remaining principles.

B. *Learning should be strongly experiential*

The place to start thinking about learning is with the learner, not with the knowledge. It is hard to talk of meaningful learning without first asking, “What does this learner know?” If we do not have at least some such context, we cannot readily construct situations that are likely to stretch the individual both cognitively and emotionally. This is not easy if one is operating in the context of a relatively high-volume, one-size-fits-all teaching machine.

However, the constructivist notion of “negotiated meaning” suggests that this may not be quite as hard to achieve as we might suspect. Constructivism¹⁰⁸ emphasizes that we actively invent concepts

¹⁰⁷ Citing the words of a first year LL.B. student in E. Cassell, “Why Students Choose to Study Law: Student Perceptions of the Law Degree” paper presented to “Value vs Values in Legal Education,” the 3d Annual Learning in Law Initiative Conference University of Warwick, January 2001, online: <www.ukcle.ac.uk/lili/2001/cassell.html>.

¹⁰⁸ An aside, but a necessary one: I am aware that reliance on constructivist thinking is potentially a double-edged sword. “Mode 2,” as discussed above, has the capacity to co-opt the constructivist re-thinking of learning processes to tie the education system more closely into the production of the new capitalism—a movement away from education as a process of “improving the mind” as traditionally understood, and towards the development of people who can work together to “produce results and add value through distributed knowledge and understanding.” James Paul Gee *et al.*, *The New Work Order. Behind the Language of the New Capitalism* (Boulder, CO: Westview Press, 1996) at 59. The capacity of capitalisms, new or old, to co-opt counter-hegemonic discourses and strategies is not novel. Constructivism is still, I hope to show, a game worth playing,

and models to “make sense” of our experiences. In constructivist philosophy, cognition is not so much about making sense of a “real” world, but about making something “right” in the sense that it works cognitively (again in the wide sense of that term), that is, it fits together and can account for new cases and new situations.¹⁰⁹ This kind of knowledge is not made up simply of abstract facts and rules, but constitutes a personal competence or capacity for action which is inscribed in each situation: that is, it is grounded in experience.¹¹⁰

The essence of such learning experiences is an act of comparison, or, as Bateson puts it, a responsiveness to difference.¹¹¹ In designing such experiences, then, the learning will depend on our ability to construct a comprehensible difference that will make a difference. In teaching law, we already do this to an extent: the change in material facts that makes the precedent arguable; the shift in logical premise; the opening for a new policy argument—these are all familiar. The real potential of difference lies in a *humane* professionalism’s interest in *humanity*, not as an abstract idea, but in the lived experience of a “plurality of persons and their otherness.”¹¹² It is in the idea of relationship that we will find the “real” difference that makes a difference. If modern professionalism is not to de-humanise, we need to take seriously the power of the ethical imagination: the capacity for empathy, the need for moral commitments, and the sense of personal obligation that flows from understanding the very otherness of the

but we need to do so mindful of the need to create spaces and communities of practice to engage critically with the values and objectives of this—and other—educational discourses.

¹⁰⁹ See generally Nelson Goodman, *Of Mind and Other Matters* (Cambridge, Mass.: Harvard University Press, 1984).

¹¹⁰ I hope it will be apparent in what follows that what I suggest here is a significant broadening of the domain of experiential learning. Conventionally experiential learning is most closely associated with clinical or other forms of (professional) skills-based learning. This is unduly narrow: experiential learning as I wish to define it is also central to the development of a whole range of scholarly capacities, including what William Twining calls the “intellectual skills” involved in undertaking independent legal research, reasoning and writing. See *e.g.* William Twining, “Intellectual Skills at the Academic Stage: Twelve Theses” in Peter B.H. Birks, ed., *Examining the Law Syllabus: Beyond the Core* (Oxford: Oxford University Press, 1993).

¹¹¹ *Supra* note 89 at 315.

¹¹² Paul Ricœur, *Oneself as Another*, trans. by Kathleen Blamey (Chicago: University of Chicago Press, 1992) at 227.

Other.¹¹³ Indeed, it is through this appreciation of humanity in its intersubjectivity, in our recognition of others as ends-in-themselves, that we become not just more sensitive to the potential for violence in law's construction of power-over another, but also more fully constituted as "selves."¹¹⁴

To achieve these more holistic outcomes, we need to move beyond the current, somewhat atomistic approach to experiential learning. What I have in mind is something akin to the problem-based learning model that has operated at Maastricht Law School and elsewhere.¹¹⁵ This builds on assumptions that learning is a constructive, and highly co-operative, participatory process in which students "generate knowledge and skills by actively engaging in a dialogue with the outside world."¹¹⁶ So, how does experience itself become a difference that makes a difference?

Experience can transform dry propositional knowledge through its use—it actively changes that knowledge from something that is "out there" into something far more real and personal to each user. Biggs uses the term "functional knowledge" to describe what we create for ourselves by using propositional knowledge and cognitive skills in the process of solving problems.¹¹⁷

Furthermore, experience is valuable in helping us to reflect on how we learn—particularly on how, as learners, we experience the interplay between cognition and metacognition. This is crucially important in shaping the effectiveness of learning and in influencing students' motivations to learn.¹¹⁸

¹¹³ See e.g. Finkelkraut, *supra* note 36 at 21-23; Emmanuel Levinas, *Totality and Infinity*, trans. by Alfonso Lingis (Pittsburgh, Pa.: Duquesne University Press, 1969). See also Donald Nicolson & Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford: Oxford University Press, 1999) at 46.

¹¹⁴ See Ricœur, *supra* note 112 at 220-21 and *The Just*, trans. by David Pellauer (Chicago: University of Chicago Press, 2000) at xvi-xviii.

¹¹⁵ Jos Moust, "The Problem-Based Education Approach at the Maastricht Law School" (1998) 32 *Law Teacher* 5; on PBL more generally, see also David Cruickshank, "Problem-Based Learning in Legal Education" in Webb & Maughan, eds. *supra* note 44, 187.

¹¹⁶ Moust, *ibid.* at 29.

¹¹⁷ John B. Biggs, *Teaching for Quality Learning at University* (Buckingham: Open University Press, 2003) at 40-41.

¹¹⁸ See generally Franz E. Weinert, "Metacognition and Motivation as Determinants of Effective Learning and Understanding" in Franz E. Weinert & Rainer H. Kluwe, eds., *Metacognition, Motivation and Understanding* (Hillsdale, NJ: L. Erlbaum Associates, 1987).

Finally, experience can be invaluable in enabling students to confront the ethical and human dimensions of law, because it builds up a “felt acquaintance”¹¹⁹ with a situation (and the person in that situation). It enables students to get inside that situation and to recognise the human “messiness” and value conflict—the very “beingness” of being a lawyer.¹²⁰ In this way experience becomes both an antidote to a lack of perspective, and a powerful tool for learning in its own right.

C. *Good learning environments are “contextually rich and emotionally engaged”¹²¹*

Not all experiences are necessarily good learning experiences. Good learning environments tend to be realistically complex, and sufficiently messy to create an element of confusion.¹²² Confusion (provided it is not overwhelming) can provide the critical emotional sparks that generate learning. The kind of purposive learning that such messy situations demand actively changes the learning process into a more meaningful, lasting, and transformative experience. Creating learning experiences that are positive and intrinsically motivating will similarly support more powerful learning. Enabling students to extrapolate their prior understanding and identify ways in which that understanding has changed *for themselves* in the process of learning also increases the contextual richness of the learning experience.

D. *Don't forget the humanistic dimension*

Experience can also open our eyes more fully to the “humanistic” and “aesthetic” dimensions of our subject. As Thomas Nagel points out, “[o]ur own experience provides the basic material for

¹¹⁹ John Heron, *Group Facilitation: Theories and Models for Practice* (London: Kogan Page, 1993) at 71.

¹²⁰ See Webb, “Being a Lawyer,” *supra* note 102.

¹²¹ This phrase is taken from Alan M. Lerner, “Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices (2004) 23 Quinipiac L. Rev. 643 at 689.

¹²² Donald Schön’s reflective practice model, *supra* note 31, recognized this in its contrast between the “high ground” of technical-rational knowledge and the “swamp” of practice.

our imagination.”¹²³ To expand the horizons of our students’ experiences is to expand the horizons of their (legal) imagination. This leads to my last point.

Much of law’s structure and power resides in what Goodrich calls its “masks”—its language, “theatre,” and history.¹²⁴ Through these elements we create, in our role as teachers, a “discourse of authority”¹²⁵ that serves to construct a particular reality. The dark side of both academic and legal professionalism is its capacity to de-humanize, both by denting some of the student/lawyers own humanity and sense of self-worth, and by neglecting the more human dimensions and aspirations of law: “You lose some of your personality doing a law degree [I]t disciplines you.”¹²⁶ This is why the conjunction of the humane and the professional matters.

A constant theme of this paper has been that if we are to progress the liberal and ethical claims of legal education in this increasingly globalized and culturally diverse environment, we need to foster a commitment to a more humanistic and historical understanding of the place of law in human culture. The study of film, literature, and history all have an important part to play in developing this more humanistic perspective on law, but we also have opportunities to make our students’ personal narratives—their own experiences of law, and of studying law—more directly relevant to their learning and our own. This may open a debate on a whole range of cultural and contextual assumptions about law, and may help us overcome the assumption, exhibited by students and teachers alike, that prior learning is irrelevant. It is not. It can fundamentally shape both what and how students learn. A first step in unlocking prior knowledge and learning is to create learning processes which show that such prior learning is *valued*.

¹²³ Thomas Nagel, “What Is It Like to Be a Bat?” (1974) 83 *Phil. Rev.* 435 at 439.

¹²⁴ Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicolson, 1990).

¹²⁵ Pierre Bourdieu, *Language and Symbolic Power* (Oxford: Polity Press/Blackwell, 1990) at 22.

¹²⁶ Spoken by a final year LL.B. student in 1993, quoted in Webb, “Where the Action Is,” *supra* note 31 at 193. Compare also Peter Goodrich’s description of the law school experience as an “institutionally managed trauma [which] gives birth to a conforming or believing soul” in “Of Blackstone’s Tower: Metaphors of Distance and Histories of the English Law School” in Peter Birks, ed., *Pressing Problems in the Law, Vol. 2: What Are Law Schools For?* (Oxford: Oxford University Press, 1996).

Models of university teaching framed around the notion of reflective conversation may serve as a potential mechanism for enabling this plurality of voices to be heard, and in a way that fits with the kind of experiential framework I have already discussed. Creating opportunities for students to participate in the collaborative construction of knowledge is, as Paul Maharg has cogently argued, deeply important for learning and teaching:

[I]f social negotiation of meaning within disciplinary communities is important for the transfer of meaning, then students need to be inducted into what one might regard as the syntax of the community, its attitudes, logical forms, genres, procedures and belief systems, as well as what one might regard as its substantive content. Co-operation in learning thus becomes a powerful heuristic.¹²⁷

Such approaches view the learning process as one of continuing dialogue between teacher and students, and amongst students collaboratively, whereby they formulate shared goals and learning outcomes that lead them to construct a common language and tools for understanding. This is essential to the construction of the law school's identity as envisaged by the *Arthurs Report* as both an intellectual community in its own right, and as a foundation upon which a more meaningful sense of (legal) professionalism can be developed.

VI. CONCLUSION

The argument for a constructivist humane professionalism challenges us to be explicit about the values that fashion both the academic genre and the practice of law, the practice of law teaching, and indeed our conception of the law school as a community of learners.

The *Arthurs Report* reminds us to ask what is possible. At the same time, it provides us with a very real warning: whatever the importance of law itself, our world is insular and relatively marginal to all but ourselves and our current students. For most of the time it excites only limited interest in the practising profession and in government.¹²⁸ Perhaps it is this relative indifference that matters most of all; if we, the law teachers, don't care, who will? In this way the *Arthurs Report* still has the power to challenge us, to demand that we make choices about

¹²⁷ "Rogers, Constructivism and Jurisprudence: Educational Critique and the Legal Curriculum" (2000) 7 Int'l J. L. Profession 189 at 193-94.

¹²⁸ *Arthurs Report*, *supra* note 1 at 5-6.

our own professionalism as teachers and scholars of law. Are we willing to step beyond the detachment of traditional scholarship to engage in a real and ongoing exchange: the moral and political debate about what undermines and sustains us as a community?¹²⁹ The prize is the possibility of re-connecting with both our own and our students' humanity *and* professionalism.

¹²⁹ See Ruddick, *supra* note 99.

