Here There Be Dragons: Exploring the Uncharted Waters of Hidden Curricula in Legal Adult Education

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Over the course of his career, Knowles, one of the pre-eminent contributors to the field of adult education (Whelan, 1988), moved from defining andragogy in oppositional terms to paedagogy to considering the two as complementary methods, both of which could have benefits for students of all ages. As such, his term andragogy has become almost synonymous with self-directed learning. Yet it is clear from the course readings that many adult educators are uncomfortable with allowing or encouraging self-directed learning. Students have many and varied purposes for engaging in education beyond the compulsory years of primary and secondary school. Insofar as educators question or theorize about the purpose of adult education as a singular entity – "the" purpose, not "a" purpose – it is clear that they are not accepting of student-directed education.

A further question regarding how self-directed learning can be is that of whether or not students are informed of the intended outcomes of the course of education prior to undertaking whatever lessons. The Supreme Court of Canada has regularly held that a person cannot make self-directed choices unless they have freely been given full information regarding the probable outcomes of that choice (*ABB Inc. v. Domtar Inc.*, 2007) (*R. v. Mellenthin*, 1992). Or, as then Chief Justice Lamer defined it: "Coercion, it should be noted, means the denial of free and informed consent" (*R. v. Jones*, 1994). Coerced learning would stand, by any measure, as a clear opposite of self-directed learning

When Jackson[1] developed the concept of a "hidden curriculum" (1968/1990, p. 35), he was writing specifically about public schools. His hidden curriculum was composed of "institutional expectations" (1968/1990, p. 35) for certain attitudes and behaviour, and the institution's reinforcement of behaviour that fulfilled its expectations. Adult educational institutions may not spend as much time giving gold stars for neat handwriting or praise for working quietly, yet it is worth questioning whether that means they do not have hidden curricula, or whether it merely indicates that the curriculum has moved on beyond the basics required to produce conforming young adults.

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[1] Thanks to Professor Gibb for bringing this work to my attention.

Legal education, specifically the education of future lawyers and paralegals, fits within the general category of adult education insofar as admission requirements usually ensure that paralegal students are at least 18-years old, while law students are at least 20. Spencer considers four lenses for analysing adult education and some of the main purposes that underlie each (2006). This paper will first give some background regarding legal education, and then use three of those lenses: education for employment, transformation and diversity to examine legal education and map areas where the curriculum is either naturally invisible or intentionally concealed.

Legal Education – an Introduction

The two forms of legal education to be discussed have significantly different histories and evolutions although both came about through an externally mandated regulation of a pre-existing profession. That regulation, under the auspices of the Law Society of Upper Canada (LSUC), has resulted in a legal education system that has struggled, and sometimes failed, to serve the interests of students rather than the interests of legal firms or LSUC itself.

Law Schools

LSUC was created in 1797, and, by 1857, had complete control over the admission of students to LSUC, the terms under which their membership continued, and the eventual examination and accreditation of those students as barristers and solicitors (Wright, 1950). Initially "students" were expected to pay admission, membership, and bar examination fees; however at first no formal education was provided by LSUC (Wright, 1950). Students were apprenticed as articling clerks for three years if they had a recognized undergraduate degree, or five years if they had no post-secondary education (Wright, 1950). Students gradually began to agitate to be provided with legal education, and LSUC established a part-time education program designed to allow students to fulfil their duties as articling clerks while providing lectures on various topics (Wright, 1950). Both the courses and the extended articling clerkship were unique to LSUC, as other provinces' law societies allowed students to write the bar exam based on apprenticeship or attendance at a recognized law school (Wright, 1950).

In 1949 the relationship between instructors at Osgoode Hall (the LSUC school), and the Benchers who run LSUC broke down over questions of academic freedom, control of curriculum, and whether Osgoode Hall was to function as a liberal arts based educational institution or as a trade-school (Wright, 1949) (Law Society of Upper Canada, 2013). The rift was public, and lead to questions regarding whether it served the legal profession for LSUC to exert an effective monopoly on legal education by ensuring that students who attended Canadian university law schools were treated no differently than those with any other university degree (Wright, 1950). Finally, in 1957, LSUC agreed to recognize university-based law schools and accept their graduates on par with those who had taken the courses provided by Osgoode Hall (Arnup, 1982) (Walters, 2007). With minor changes – the term of articling clerkship has been reduced to ten months, and LSUC has switched from offering a four month bar admissions course to providing students with self-study materials – the educational requirements for becoming a lawyer remain those set out in 1957.

Paralegal Education

Since 2007, Ontario paralegals have been mandated by the *Law Society Act* (2006) to become licensed by LSUC or cease to provide legal services. To qualify to sit the LSUC licensing exam, a paralegal candidate must successfully complete an accredited paralegal program that includes a professional responsibility or ethics course, and a minimum of 120 hours of field placement (Law Society of Upper Canada, 2011). Programs are offered both by colleges and by private academies that must also have been accredited by the Ministry of Education (Law Society of Upper Canada, 2011c).

As yet, requirements for entry into these program have not been standardized beyond requiring the prospective student to be a high school graduate or a mature student (at least 19 years old and not still in school). However, in 2012, when the Ministry of the Attorney General mandated a five-year evaluation of the new licensing process, one of the major criticisms was the "[a]bsence of prerequisite education, work and life experience, and/or demonstrated aptitude (i.e. an equivalent to an LSAT) for acceptance to the accredited … programs" (Morris, 2012, p. 16). The evaluation further suggests that students who enter a paralegal education program directly from high school may not have

sufficient maturity to deal with the responsibility inherent in the profession, and that students and educators may be focusing unduly on the licensing exam to the detriment of developing other needed legal skills (Morris, 2012). It is interesting to note that the response of LSUC seems to be limited to adding more topics to the licensing exam and, perhaps, making it harder, rather than suggesting that paralegal programs limit enrolment to more qualified students (Law Society of Upper Canada, 2012).

Education for Employment

As stated in an earlier paper, "Paralegal education is determinedly vocational, or oriented towards academic learning of legal concepts and procedures with the intention of credentialing (Selman et al, 1998, as found in Spencer, 2006, pp. 1-2)" (Vespry, 2012).

Unlike paralegal programs, law schools teach very little that is directly vocationally relevant. While a student may carefully pick courses in topics that feature on the bar exams, law school teaches legal theory, not practice, leading many law students to feel they are victims of a bait and switch. The practice of law is only taught, if it is taught at all, during the articling process. Unfortunately, despite the Ontario legal establishment's faith in the articling process, it is deeply flawed. The only oversight exercised by LSUC is requiring the firm that offers the position to sign off that the student completed the required hours and requiring the articling students to self-report on whether their articles are covering suitable topics, without in any way suggesting that if a student reports a sub-optimal articling experience they will be protected from dismissal, or offered a position at a different firm. Given the difficulty of acquiring an articling position, students see nothing to gain, and everything to lose, in being honest about deficiencies.

While the current economy has, perhaps, made it more difficult for all students to find articling positions, Wright suggests that as early as 1923 instructors at Osgoode Hall recognized that:

> … all students could not possibly obtain the same general experience, and that many students were unable to obtain offices at all, either because they had no business or professional connections with a Toronto firm or because of certain prejudices of race or creed which might give an office pause in light of the clientele which the office served. (1949, p. 179)

The issue of prejudice has, unfortunately, not disappeared in the years since 1923. Nor has the educational importance of finding an articling position where the principal is willing, interested and able to instruct their articling student(s) in the practice of law. In an article describing the LSUC discipline hearing against Selwyn McSween, McSween's lawyer is quoted as saying: "His articling work included carrying bags and picking up laundry but didn't include any real estate experience…" (Sebesta, 2012).

McSween was initially disbarred for real estate fraud, then, on appeal, allowed to resign on the basis that he did not knowingly commit the fraud, but rather was a dupe of an unscrupulous associate (*Law Society of Upper Canada v. Selwyn Milan McSween,* 2012). Two of the five members of the appeal panel suggest that panel members should take into account systemic racism in the legal profession, and in particular:

> [68] … that students from racialized communities have fewer opportunities to secure articling positions and first jobs. They do not benefit from the same articling experience as their non-racialized colleagues who are introduced to clients, assist more senior lawyers on important cases, and who conduct research on a broader range of files. There is no evidence to suggest that circumstances have changed for the better; in particular, articling opportunities have diminished. *(Law Society of Upper Canada v. Selwyn Milan McSween,* 2012).

Essentially, the introduction and gradual expansion of theory-based liberal arts law faculties was not the solution to the exclusionary nature of the apprenticeship model. It merely deferred the issue, such that instead of discovering early on that proper practical training would be denied, minority students often complete their law degrees and only then discover – as McSween did – that despite good grades and other education or experience they would not be able to obtain the learning they need (McSween had a B.A (Hons), and an M.A. (Gold Medal) from the University of Manitoba, as well as having been employed by the Ontario Human Rights Commission, the Pay Equity Commission of Ontario and several other civil service positions (*Law Society of Upper Canada v. Selwyn Milan McSween,* 2012, para. 5)).

It might be uncharitable to suggest that LSUC had no intention of changing the articling process until the economic downturn in 2010-2011 tightened the job market to the point where even non-minority law school graduates were having a hard time finding

articling positions. Whatever their reason, LSUC convened a task force charged with suggesting ways to improve the articling process. That task force reported late in 2012, with the majority of members suggesting – and LSUC agreeing to proceed with – a new system whereby law school graduates are to be given a choice between the usual ten-month (paid) apprenticeship and a new Law Practice Program that would include approximately four months of study and four months in a (unpaid) co-operative work placement (Articling Task Force, 2012) (Law Soceity of Upper Canada, 2012). Since LSUC has no way of guaranteeing enough articling positions for students who wish them, it is clear that the "choice" alluded to will be in the hands of the law firms who have positions to offer, and who have consistently shown a willingness to pick students on the basis of the firm's prejudices. Neither LSUC nor the Articling Task Force have explained where co-op placements will be found, or on what basis they will be allocated to students. None of this is uncertainty is disclosed to potential students contemplating entry into law school.

Education for Transformation

The discussion of the transformative value of adult education tends to begin, as Spencer does, by suggesting that the term transformation refers only to specific kinds of change (2006). His list includes "social change, social action, social movements, community development, and participatory democracy" (2006, p. 53), while Scott suggests that transformation involves "social vision" (1998, p. 178). These authors appear to be presuming that anything 'social' or 'democratic' is automatically liberal and – according to their standards – good. Yet transformation, if it is to mean anything at all, must acknowledge the possibility of unintended consequences following social or personal changes that can be good and/or bad for the societies or people involved. The social ideas developed by Marx and Engels created social action and social movements, some of which were peaceful, others of which lead to regimes that have collectively killed many millions of their own people. Transformation happens. What follows is often independent of the intentions of the transformer, or the transformed.

Not only do adult educators not seem to consider the possibility of unintended consequences, they also seem to base education theory on the idea that human reactions

are uniform and predictable. Spencer mentions that Mezirow recognizes the "traumatic effect of an individual 'disorienting dilemma' that often accompanies a new perspective (Mezirow and associates as cited in Spencer, 2006, p. 55.). As yet, however, there is no way to measure individual students' levels of resilience or vulnerability, and it is those qualities that determine whether a specific traumatic stimulus will cause the individual to engage, withdraw, or acquire long-term psychological damage such as post-traumatic stress disorder (Ahmed, 2007).

If a program of education proposes to transform participants those participants should be informed regarding the proposed transformation(s) prior to enrollment. Yet what should students be told if the outcome is uncertain? A group of students can participate, for instance, in the same discussion on diversity and come away with significantly different reactions: one more conscious of acting in an anti-oppressive manner, one feeling paralyzed with guilt, one satisfied that prejudice is justified, and one triggered by comments of other students that bring back memories of physical and verbal abuse. Perhaps this is a situation in which educators – especially those like Mezirow that espouse personal transformation – need to follow in the footsteps of medical practitioners and give advance warning of potential side effects.

In the context of legal education, there are more and less obvious transformative influences. Some students see acquiring a legal education as an opportunity to transform themselves from frogs of little influence to financial or political royalty. While it is true that some lawyers are rich and many politicians start in the legal profession, it is also true that those lacking connections are significantly less likely to be able to leverage professional accreditation to such heights. Others approach legal education as a resource for transformative change in the model Spencer and Scott would approve of. In a personal statement regarding her reasons to wish to attend law school, one student wrote:

> … the career I seek lies in the field of social justice. I consider the study of law as a study of the bones that structure and the sinews that hold together our society. With this model come several motivations for my undertaking legal studies: the chiropractic, the martial and the artistic.
>
> The chiropractic motivation comes from my experience of the social structure as being in need of regular adjustment. …

> Studying law will enable me to be a better resource person for those who are working as social chiropractors, to be a stronger defender for those under attack, and finally, to be a more clear-sighted artist, reporter or translator for the communities to which I owe allegiance. (Vespry, 1995)

Both social climbers and social activists are drawn to the obvious transformative power of legal studies.

Unfortunately legal education can also result in other forms of transformation. Armstrong states that "the mission of law school is to teach students to 'think like lawyers'" but suggests that students may be able to resist or reject the suggestion that 'like a lawyer' must mean like an upper-middle class Victorian man (1996, p. 968). While she may be correct that such resistance will gradually transform legal education and the legal profession she does not discuss the personal cost to those who are engaged in that process. One such cost is perhaps evident in the number of students who graduate from law school with severe depression, anxiety or other mental disorders that they did not have when they enrolled. In a Canadian study, Seto suggests that it is largely in learning to 'think like lawyers' that law students slide into depression (Seto, 2012). In a review of American literature, McKinney discusses several empirical studies showing heightened rates of mental disorders following law school (Roach, C. A. as cited in McKinney, 2003, p. 229.).

One such empirical study is that by Guinier, Fine, Balin, Bartow, & Stachel, who found significant differences between the experiences of male and female law students, with women often reporting feeling alienated both from the school culture and from their pre-school selves (1994). In particular the authors state "[a] disproportionate number of the women we studied enter law school with commitments to public interest law, ready to fight for social justice. But their third-year female counterparts leave law school with corporate ambitions and some indications of mental health distress" (1994, p. 3)

Students who enter law school with hopes of a transformation to higher status may also be disappointed. The United States has seen a recent trend of law students suing law schools that use misleading statistics to advertise the income and employability of graduates (Trachtenberg, 2013). So far Courts have held that the misleading advertising

had not quite reached the level of consumer fraud necessary to find the schools liable, but Judges have not been stinting in their criticism of the schools advertising practices.

Both misleading advertising regarding transformational success and hidden or unreported negative transformational side-effects deny students agency in making educational choices.

Education for Diversity

Most law schools offer a variety of courses that engage students in critical legal and social theory. Those courses are not mandatory, and they are not part of the material examinable on the bar exams so some students may choose not to take them. In this, at least, law students may engage in some degree of self-directed learning.

The practical focus of paralegal education puts human rights issues on the curriculum, but only in practical contexts such as how to make applications to the Ontario Human Rights Tribunal for clients, or how the Ontario *Human Rights Code* influences legal relationships between landlords and tenants. Theoretical discussion of feminist, anti-racist or other anti-oppressive philosophies or practices may happen, but only at the discretion of an instructor who is willing and able to bring in real world contexts for the otherwise abstract information students are to learn.

Although LSUC spends considerable time and money on a variety of diversity initiatives within the profession, its influence on paralegal education is more pernicious. All instructors must be licenced by LSUC. This originally meant they were all lawyers, though a few paralegals are now joining paralegal teaching faculties. LSUC states that this is required because the instructors are to "role model professionalism" (Miles & Ryan, 2010), presumably for the students to observe and copy.

This creates a considerable conflict for instructors. Court-styled civility and professionalism requires quiet non-emotional speech patterns, recitations of fact without opinion, standing or sitting with limited movement, and punctiliously repressed manners. Reproduced in the classroom, this would be a completely un-engaging teaching style. Students, even with the best will in the world, would find it taxing to pay even minimal attention and would learn neither the behaviour being modelled nor the substantive course material. Yet at the same time instructors are aware that students who graduate

from the paralegal program without having acquired the ability to assume the guise of the 'gentleman' licensee, will encounter both prejudice and possibly professional censure or discipline for their lack of 'civility'.

There can, thus, be competing hidden curricula contained within one classroom or struggling to be effected by one instructor. An instructor may face attempting to balance following the LSUC initiatives and promoting diversity, encouraging in-class discussion of anti-oppression work and social justice issues, and at the same time working to 'lawyerize' students without being "sensitive to the white, male, middle-class, Eurocentric nature of the social construction of [lawyer]" (Spencer, 2006, p. 71). In an ideal world, both 'Canadianizing' immigrants and 'lawyerizing' paralegal students would be unnecessary as the idea of Canadian or legal professional would be broad enough to include a diverse population. Working towards that ideal is commendable; however it is not ethical to suggest to students that the ideal is already here.

One option, perhaps the most ethical, could return a measure of agency for transformation to students. Code-switching, linguistically or culturally, can be taught as a performative skill. For this to be a real choice, however, students would have to be told in advance of the transformative agenda in the paralegal program and what it entails, with enough detail that they can give informed consent to undertaking it. They need to know that they will be expected to speak and move differently, they will be expected to show respect in situations in which they feel none; they will be expected to cut ties with family or acquaintances who are 'well-known to the police'; they will be expected to act like gentlemen whether or not they happen to fit the physical or sociological profile.

Unfortunately educators may not, themselves, have enough information on the potential ramifications of code switching be able to fully inform students. The African-American community is divided on the issue of linguistic code-switching. It is recognized that linguistic code-switching from their own Vernacular English to Business English is a practical tool for achieving socio-economic success, but concerns remain that those who learn it may eventually lose touch and forget how to switch back to their own community's norms.

There is even less understanding about the effects of cultural code-switching. For immigrants it may be seen a way of bridging two cultures indefinitely, but most often it

turns out to be a transitional strategy. One generation or two at the most can code-switch; after that the family is Canadian with some traditions and special vocabulary that link to a half-mythical ‘old country’.

In the absence of research on the long-term effects of cultural code-switching, would consent be truly informed? In an unpublished paper, Morton discusses the psychological and emotional damage that can result from cultural code-switching undertaken without conscious reflection, and suggests avenues for further research (Morton, 2012). Unsurprisingly, the damage she describes is similar to the alienation described by Guinier *et al* when female legal students learn to be ‘gentlemen’ (1994).

Conclusion

Although they are both subcategories of legal education, the paralegal and lawyer education systems are sufficiently different that they do not share hidden curricula. That said, there are partially overlapping hidden – or ignored – areas on the curriculum map for both professions. Using the lenses of education for employment, transformation and diversity allows for comparing and contrasting the two. Under the lens of education for employment, paralegal programs are uncontroversial, while law schools and LSUC jointly enable prejudice within the profession to deprive some students of practical education. Education for transformation spotlights what may be either unintended consequences or well hidden side effects of the transformation from student to lawyer. It is interesting to note that while paralegal education does not have the same effects, were LSUC to better define the professionalism requirement in the paralegal curriculum it is possible that paralegals would start to suffer educational side effects similar to those affecting law school graduates. Since that requirement for professionalization is itself not part of the written paralegal curriculum, it only surfaces when we view the program through the lens of education for diversity. The one strong advantage that law schools have over paralegal programs is in the teaching of diversity issues and critical theory.

Yet even if law schools offer more choice of courses, neither program meets the objective of offering adult students meaningful informed choice throughout their studies. Students looking for honest and open self-directed learning may want to steer clear of both types of legal education, for here there be dragons.

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