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Canadian Law Schools: In Search of Excellence

What makes a law school sound? credible? even excellent? Surely many things: leadership potential, good faculty and good students, a solid public image and communication. Greatness comes from knowing our own strengths and weaknesses, our institutional purposes. In short, achievement flows from how we evaluate ourself and how others evaluate us.[1]

A law school must seek to satisfy many goals. Ideally, every legal institution should strive to excel as a facility of learning, as a bastion of intellectual fervor, as an instrument satisfying community needs. Yet each of these goals are themselves variable in kind. Teaching expertise in one legal community represents undesirable teaching standards in another institution. Scholarly contribution in one setting may well be construed as scholarly inertia elsewhere. Achievement and productivity are therefore relative values; for their substance depends on their capacity to satisfy identifiable needs, responding to institutional interests and community concerns.[2]

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1. On the ingredients that are required to foster an efficacious regime of legal education in Canada, see *inter alia:* Cohen, The Condition of Legal Education in Canada, (1950) 28 Can. Bar Rev. 267; Cohen, (1979) 4 Hearsay 9; Fridman, Legal Education in Canada, (1970) 120 New L.J. 901; Lederman, Canadian Legal Education in the Second Half of the Twentieth Century, (1971) 21 U.T.L.J. 141; Gibson, Legal Education: Past and Future, (1974) 6 Man. L.J. 211.

2. Perhaps the most traditional enquiry about legal education relates to the link between law and society. Is the law school the initiator of social change; or does society dictate, and forever control, the dynamics of legal education? See hereon, Wade, Legal Education and the Demands for Stability and Change through Law, (1963) 17 Vand. L.R. 155. For a forceful view on the role of legal education in the American context, see Griswold, Legal Education: 1879-1978 (1978) 64 A.B.A.L.J. 1051.

It should be noted that the "ideal" ingredients of a legal education include, *inter alia*, introducing the law student to the legal system, exposing him to the rules and principles of substantive law, preparing him for the practice of law, or simply, training him to "think like a lawyer" (whatever that may mean). In truth, legal education involves *all* these ingredients, and others still. The real goal of our law schools lies in determining that mix of educational purposes which best satisfies the

Accordingly, what we think of ourselves and what others think the role of the law school, its educational and societal function, should be, will likely flow from a compromise of valued judgements. Indeed, each response will vary from person to person, and from environment to environment as each cog in the organization considers worthwhile goals and meaningful purposes differently. What is written below is therefore premised on the understanding that others may well disagree with the author and so they should if educational advance is to be promoted in our law schools through debate, through the conciliation of divergent opinions and ultimately, through the innovation itself.

One inescapable level of achievement worthy of any Canadian law school is that of academic — teaching and scholarly — excellence. History has shown that law schools have produced "leaders" of society in the past and still need to be "leaders" of society in the future if they are to serve as training centres for leadership in community affairs. After all, our law schools help to contribute towards producing the judges and the legal scholars, the practitioners and the politicians who function at the very forefront of Canadian life. Our law schools therefore provide Canada with a heritage in education aimed at identifiable ends. As academic centres, they serve as bastions of legal and societal learning. They are geared to provide lessons in legal reasoning. They are oriented to foster an analysis of *the* law *stricto sensu,* and the law as enveloped within a juridical, a legislative and an administrative synthesis.[3]

No academic institution can realistically function unless it strives towards achievement as an institution of higher learning. Law schools need scholarly input. They need to develop academic activity among law students, among law faculties, and among the

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socio-cultural and political concerns of our Canadian society. Accordingly, the "ideal" role of the Canadian lawyer ultimately subserves to the dictates of community need.

3. Excellence — that higher ideal — is repeatedly emphasized in commentaries about Canadian legal education. Striving towards excellence in teaching and in scholarship are primary motivating forces in widening the parameters of legal education. Nor is the axiom of excellence defeated by the suggestion that excellence defies analysis; it is surely the striving towards excellence, whatever its precise definition, that encourages and facilitates innovation in law school programmes. See hereon, Read, Aims and Practices of University Education in the Faculty of Law at Dalhousie, (1964) 1 Can. Legal Studies 3; Fridman, Legal Education in Canada, (1970) 120 New L.J. 901; Veitch and Macdonald, Law Teachers and Their Jurisdiction, (1978) 56 Can. Bar Rev. 710, 715-6.

practicing bar. Research requires a generous financing of reading and writing activities. It means a willingness by the institution to set aside time in which faculty are given the opportunity, indeed the constant encouragement, to develop their academic pursuits in the form of reports, articles, books, and other manifestations of scholarship. Publication is a source of public image. Research is necessary to show that an institution is "alive" and "well", fostering legal skills and knowledge and holding such information available to judge and lawyer, student and teacher alike. While good scholarship does not necessarily mean good teaching ability, an informed teacher who spends time cultivating his own knowledge and reproducing that knowledge in written form does foster his own self-confidence in his subject areas and at the same time, he promotes respect for scholastic achievement.[4]

Yet academia requires considerable effort, daily toil and much frustration. Writing enterprises warrant encouragement for the efforts expended in the pursuit of learning. There is need for developing academic dialogue through debate and discussion as an ongoing process, demanding ever more exacting standards of performance from participants in their pursuit of learning. Awards for achievement are necessary as a reflection of self-respect and mutual respect, as a means of promoting role models in scholarship and in order to induce healthy competition among and within faculties of law. It is true that the "publish or perish" syndrome does not necessarily promote scholarship that is worthy, reflecting a high quality of learning and skill in writing. Yet to encourage writing through formal institutional channels and through informal dialogue is a step towards a worthy end. It is a necessary pathway along any route towards excellence.[5]

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4. No doubt we can criticize our Canadian law teachers for failing to attain that final plateau of academic excellence at which point originality of thought and clarity of vision abounds. See Arthurs, Paradoxes of Canadian Legal Education, (1977), 3 Dal. L.J. 639-662. But surely *that* level of attainment is only a final revelation, attained by few, but sought by many. Surely such excellence should be a guiding light, not a requisite for all, nor a chastisement to those who, despite effort, find such ultimate achievement beyond their toiling grasp. Is not our primary goal as a youthful system to encourage scholarship so as to render the vision of ultimate learning realistically accessible — rather than nostalgically inaccessible!

5. On the difficult role of the law teacher who is himself trained in a study of "the" law *stricto sensu*, yet who must function within an interdisciplinary environment, see Bergin, The Law Teacher: A Man Divided Against Himself, (1968) 54 Va. L.R. 637.

As regards the classroom, teaching ability is partly inherent, reflecting the personality and communication traits of the teacher, and partly acquired through environmental forces. Teachers can develop instinctively or be trained to develop teaching methodologies. However, few teaching techniques in law are formally taught in LL.B. and LL.M. programmes. Law teachers are trained rather in the substance of law than in its instruction.[6] A duty therefore rests upon each law school to foster its own teaching traditions within an indigenous yet comparative setting for the benefit of teachers and students alike. We need to conduct debate over the interrelationship between teaching and learning. We need to encourage dialogue over teaching techniques. Finally, we need a healthy environment in which law teachers can constantly strive to improve upon their skills as instructors with the realization that self-criticism and a willingness to accept constructive criticism from others can significantly enrich the teacher's skill in the classroom.[7]

Equally importantly, teaching methodology should be taught to those who themselves profess to teach. There is a need for teaching clinics available to law teachers, staffed by persons with expertise in legal education. Law teachers require an exposure to the methods of conveying information in the classroom. They need to learn how to ask and how to answer questions and how to develop an atmosphere of participation within their classes. Formal and informal symposia in law are required in which law teachers are exposed to novel teaching methodologies and to a critical assessment of the casebook, the Socratic and the lecture methods of teaching. The law teacher needs to be exposed to the proper use of classroom facilities, to the blackboard and to the diaz, to illustrative teaching and learning techniques, whether they be pictoral, graphic or diagramic in nature.[8]

6. See hereon the commentators in notes 1 and 3 *supra*.

7. It is significant to note that developments in this direction have already commenced, beginning with the "Banff Experience, 1979". In this symposium a steering committee of the Canadian Law Deans ran a Teaching Clinic with the explicit aim of exposing Canadian law teachers, primarily "new" teachers, to diverse teaching and learning techniques. Dialogue and demonstrations, aided by audio-visual facilities, were employed as a means of promoting self-and mutual criticism among participants. (Canadian Law Teachers Clinic, Banff, Alberta, June 1979). See further Draft Proposal for a Centre for Studies in Canadian Legal Education, submitted by Neil Gold and John McLaren (Nov. 1979); The Canadian Law Teaching Clinic (Banff Centre, May 1980).

8. For extensive bibliographies on the use of teaching techniques to enchance classroom performance see Trakman, Law Student Teachers: An Untapped Resource (1979) 30 J. Leg. Ed. 331 notes 11, 15, 31, and 35.

Ultimately, law teachers are both born and made. Exceptional teaching talent will often lie in the character of the teacher, in his human traits and in his intellectual perceptions. To that extent, the teacher may bring into the teaching profession his or her own innate communication skills. Yet by constructively evaluating barriers to communication the legal educator can help to *make* the teacher, enhancing the more productive aspects of law teaching, while undermining the less beneficial features. After all, the professor, as a teacher of law, should be trained in teaching techniques rather than be forced to acquire such refined skills by way of incidental osmosis.

How the teacher should actually teach law raises the most acute difficulties of all — indeed, introducing queries which go to the very root of the pragmatic tradition presently prevailing in North American Law Schools. For Canadian Law Schools face the dilemma of any hybrid legal tradition. While our legal system is principally English in its genesis, our educational tradition has grown increasingly American in its orientation. Thus English law provides us with the doctrines, the principles and the rules of law which are followed throughout Canada. The American legal system, in contrast, gives us the Langdellian tradition of teaching, the casebook and the Socratic methodology, the pragmatic and the functional approach towards legal analysis.[9] Our hybrid tradition is not, in and of itself, harmful. A divergence in the content of law and in the approach towards the teaching of law may well enlighten the educational tradition within Canadian Law Schools. The harm lies rather in our adopting the functional tradition of American law schools into our own law schools without very carefully evaluating the utility of the American conception of pragmatism within our Canadian social context and without very deliberately observing the potential clash between legal doctrine and legal functionalism within our Canadian institutions. Consequently, difficulties arise where law courses are taught in a piecemeal fashion, compartmentalized within a range of diverse course headings and tied together by very loose juridical strings. Indeed, the conceptualized foundation of the common law,[10] as our English forefathers have

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9. *Id.*, notes 9 and 11.

10. On the division between "formalism" and "pragmatism" in jurisprudence, see Hart, The Concept of Law (1961); Samek, The Legal Point of View (1974); Summers, The New Analytical Jurists (1966) 41 N.Y.U.L. Rev. 861; Bodenheimer, Modern Analytical Jurisprudence and the Limits of its Usefulness

shown, rebels in some considerable measure against an educational system in which law courses cover off every nook and cranny of substantive and adjectival law at the expense of the conceptualization of legal principle.

Surely we must seriously question developments in legal education in which the very rubric of legal concepts are allowed to recede into oblivion as legal functionalism takes hold of our common law system. Surely courses in law school should develop our students' appreciation of law as an integrated system, founded on logic and reason, rather than upon an unending range of overlapping topics of substantive law. Our aspiring lawyers require a foundation in a body of legal techniques, in a pattern of consistent reasoning which is capable of systematization. They need a solid foundation in juridical precepts, in that framework upon which our common law finds its very basis. The adoption of the American tradition of legal Realism[11] into our law school carries with it the

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(1956), 104 U.Pa. L. Rev. 1080; Simpson, The Analysis of Legal Concepts (1964), 80 L.Q.R. 535; Dworkin, The Model of Rules (1967), 35 U. Chi. L. Rev. 14; Hughes, Rules, Policy and Decision-Making (1968), 77 Yale L. J. 411; Weiler, Two Models of Judicial Decision-Making (1968), 46 Can. Bar Rev. 406; Weinreb, Law as Order (1978), 91 Harv. L. Rev. 909; James, Pragmatism, 50-9, 200-202 (1907); Wiener, Evolution and the Founders of Pragmatism (1949); Fuller, American Legal Realism (1934), 82 U. Pa. L. Rev. 429; Yntema, American Legal Realism in Retrospect (1961), 14 Vanderbilt L. Rev. 317.

11. See note 10 *supra* on the nature and content of American Realism. For the modern realist, law must be flexible so that rules of law are as variable as the circumstances demand. No fact should be absolute for all times. No rule should subsist for an eternity. Changing human sentiment, altered *mores* among mankind, should be investigated anew. Karl Llewellyn found these composite elements in "realism" "(a) A conception of law in flux; (b) a conception of law as a means to social ends; (c) a conception of society in flux; (d) a separation of the "is" from the "ought"; (e) a distrust of traditional legal rules and concepts; (f) a distrust of giving too much importance to prescriptive rules in the decisional process; (g) a belief in the value of grouping cases in narrow categories; (h) an insistence on evaluation by reference to consequences; (i) a belief in the results which would be achieved by programmed and sustained research projects investigating the facts." See Llewellyn, Some Realism about Realism, (1931), 44 Harv. L. Rev. 1222.

While there is considerable merit in such realist observations about the role of law as a functional system, it may well be questioned whether a law student — as yet untried in the rules and principles of law — can master such pragmatic realities before he has even grasped the roots of law as a study in legal substance. A superstructure of legal doctrine must surely be firmly instilled in our law students' minds *before* we, by information rather than by revelation, proceed to break down the less viable elements in that legal superstructure. See esp. hereon Patton, The Student, The Situation and Performance during the First Year of Law School (1968), 21 J. Leg. Ed. 10; Levy, Attitudes of the Most Likely to Succeed: A Survey of the First Year Class, Osgoode Hall Law School (1971); Kaufman,

risk that our students will be exposed to far too much detail, to fact upon fact, within an ever-increasing body of subject matter. Law school syllabi are threatened with a mass of diverse courses, lacking in appreciable systemization as we move hither and thither, seldom stopping to reconsider how the whole process of legal education fits together within a cogent framework. Within such a helter skelter tradition, the role of law in the minds of our law students is likely to remain as open-ended, as unsystematized in nature, as is the educational system itself.[12]

A structured educational framework must surely be instilled in some measure in the minds of our prospective lawyers. Students easily forget legal details over time. They seldom recall the facts of cases years later. However, by cultivating in their minds a legal foundation beyond mere detail the law school offers them its greatest contribution. It provides the student a "well-rounded" yet a thinking process of learning, a developed role as distinct from a superficial trade school mentality. Surely our central concern as educators should be purposeful, not the outgrowth of chance, nor the product of unchanneled experience. Surely to reflect "we teach thus" is simply to observe without illucidating upon why we teach "thus". Are we not bound to strive towards a higher goal: towards the systematization of legal education. Indeed, it is paradoxical that, while we often adhere to the rigours of the American casebook approach within our Canadian law schools, our American counterparts display increasing reluctance to use a case method that lacks in a defined purpose and are currently directing their attention towards a more refined casebook-problem solving methodology in law teaching.[13]

Yet the rejection of unbridled American realism as the governing model for Canadian legal education does *not* necessarily carry with it an automatic rejuvenation of legal formalism for formalism's own sake within our educational framework. If Canadian law schools fail to foster their own growth in recognition of the socio-economic and political structures surrounding Canadian law, they retard their central function in the liaison between legal theory and legal

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Advocacy as Craft — There is More to Law School Than a 'Paper Chase' (1974), 28 Sw.L. J. 495; Kennedy, How the Law School Fails: A Polemic, (1971), 1 Law & Soc. Action 71.

12. *Id.*

13. See Trakman, *supra* note 8 where reference is made to critical commentaries of the American casebook and Socratic methods of instruction. See especially therein notes 5, 8, and 11.

practice. The law school serves as the very fountainhead, the pivot, of the legal system. It acts as the father, just as the lawyer serves as the familial decendant. Law schools extract law students from the community. They inject them back into the community. In short, they fulfill a primary societal function, namely, the ordering of the community through the services of their graduates. This societal role demands that our law schools reflect, *inter alia,* the aspirations of the university community, the Bar and society at large in developing a framework for the effective systematization of legal education. A legal institution that grows in comparative isolation from the university sacrifices the interdisciplinary framework which surrounds legal studies. A system of legal education which evolves in disregard of the direction of social convention will surely give rise to the unreality of an aloof legal science, promoting a legal logic which is ill-attuned to the world of reality and ill adapted to social demands. A formalist system that is stultifying in it rigidity and confining in its sphere of application, inhibits our educators from advancing the very real link between legal theory and legal practice.[14] A rigid sense of formalism prevents legal education, legal practice and legal reform from finding their natural meeting point within the institutional centre of legal learning, the law school itself.

In the final analysis, the image of our legal institution is coloured by the image which we project of ourselves to the public at large. Our teachers are drawn from the public. Our students emanate from the community domain. Within the community at large, our reputation is won or lost, developed or retarded; for it is the taxpayer, the government and the legal community who determine our fate though their perception of the lawyer as a functioning entity within the social milieu. Achieving a positive public image is not beyond the control of our law schools. Through conscious planning and through constant communication between legal and social institutions, our Canadian law schools are able to cultivate their roles as productive institutions responding to indigenous community

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14. Dean John Cribbett of Illinois Law School aptly described the link between legal theory and legal practice in this way: ". . . it [The Law School] faces in two directions; inward toward the University, with its interst in the intellectual life and its concern for the transmission and development of knowledge through research and teaching, and outward toward the law in action as opposed to the law in books." *In* Cribbett, Report to the Chancellor for 1977-78, College of Law, University of Illinois at Champaign-Urbana, at 2.

dictates. Necessity itself dictates that our law students must be educated with a view to their community functions, with a view to their actual and their potential roles in the work force. Society needs to be educated as to the salient roles — the utility — of lawyers as functionaries within the social fabric, working towards community ends. The public represents our central link to government. The public is the source of our goodwill, our funding and our repute at large. We cannot ignore our responsibility to them if we are to serve and, in turn, be served by them.[15]

CONCLUSION

Educational excellence is constantly sought for, but seldom attained. Nor should it be otherwise. An easy victory is unlikely to be a lasting one. Limited effort surely means limited achievement, whilst unbridled striving surely infers productivity.

From an academic perspective, our education in law is at the crossroads between formalism and functionalism. In more recent years a functional legal education has come to prevail in our Canadian law schools. Thus there now arises a demand for an integrated approach towards legal education, for a link between legal theory and legal practice, for a blend between legal rules, legal reasoning and analytical legal skills. Law teachers cannot be robots, denied of their individuality in approach. Yet neither can legal programmes prevail without deliberate planning and coordination of effort. While teachers in law cannot be marshalled into a straight jacket lacking in individual features, coordination of functions in our Canadian law schools is imperative if we are truly to advance as centres of legal learning, ever progressing in our socio-legal stature.

The established tradition of our Canadian law schools demonstrates the past direction of our legal education within an adapted

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It is surely in this context, namely, in the link between legal theory and legal practice, that clinical law has its primary value as a course of study within our Canadian law schools. For a bibliography on clinical law programmes in North American Law Schools, see Trakman *supra* note 8 at notes 35-6.

15. See in general Cecil Wright, Law As a University Discipline (1962), 14 U.T.L.J. 253; Parker, The Politics of Legal Education (1974), 4 U. Tas. L.R. 276; McKay, Legal Education: Law, Lawyers and Ethics (1974), 23 De Paul L. Rev. 641; Thomforde, Public Opinion of the Legal Profession: A Necessary Response by the Bar and the Law School (1974), 41 Tenn. L. Rev. 503; Allen, Causes of Popular Dissatisfaction with Legal Education (1976), 62 A.B.A.J. 447; Arthurs, Paradoxes of Canadian Legal Education (1977), 3 Dal. L.J. 639. See too *supra* notes 1 and 2.

Anglo-American legal model. Our prior orientation in education shows a potential pathway to the future. Yet how successfully we educate in the present day in our Canadian law schools will hinge upon our capacity to translate a borrowed legal heritage into a Canadian future through the employment of our own energies in the present.