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Law at Western: 1968-1982

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I.

How to assess a decade or more at a law school? Bare facts - the numbers of students and professors, growth in budgets, courses added and dropped, etc. - have the advantage of objectivity (colleagues cannot disagree even were the facts uncongenial), but will leave some important things unsaid. For example, what have been "environmental" advantages and disadvantages, and how has the School responded to them? And what has been the change in the quality of the School's endeavours; especially, has the Faculty become *better*? These questions - and particularly the second - are not easy to address.

A law school's environment is created by the interaction of several distinct and important constituencies. The main ones are likely these (I list them in no particular order): (1) students (including applicants to the school); (2) the legal profession, formally (Bar Association) and informally; (3) courts and judges; (4) the local, national and international communities of legal scholars; (5) the local, national and international general communities of scholars, particularly those in disciplines related to law; (6) branches of government concerned with educational policy; and (7) local University management. The aims and ambitions of these constituencies overlap to some extent, but in part are contradictory and competitive. And over any but the shortest period of time, the objectives of these constituencies will change as they in turn respond to incentives and constraints from the outside. The result is a very complex and problematic context for a law Faculty.

The seven interests I mention can broadly be grouped into three sets - what, for want of better terminology, might be termed *professional* interests, *academic* interests, and *managerial* interests. Professional interests are those which regard the function of law schools as primarily, if not exclusively, training future lawyers; students, courts and judges, and the profession itself belong to this set. Academic interests are those which see the law school mission as pure and objective inquiry, and production and dissemination of theoretical

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knowledge (which may incidentally benefit legal practitioners); the various communities of scholars other than legal scholars largely comprise this interest. Managerial interests are those concerned as much with cost and efficiency as with mission; government and university management are at least sometimes to be found here. Three observations should be made about this crude taxonomy. First, to repeat, there is overlap. Second, it is very difficult to place the various communities of legal scholars securely in either the professional or academic grouping. That difficulty captures much of the character of legal education in the 1970's. Thirdly, the public interest is nowhere to be found. No doubt there is, or should be, very strong public interest in law schools, but no vehicle yet exists for the expression of that interest.

One would expect some correlation between ascendant interests and dominant forms of legal scholarship. Richard Posner has recently referred to three principal types of legal scholarship: clarification of legal doctrine (doctrinal analysis), positive analysis of law by the methods of social science, and normative analysis of law based sometimes on the social sciences and sometimes on moral and political philosophy.¹ It seems likely that, for example, there would be a move from doctrinal analysis to the other two forms of legal scholarship if academic interests gained in strength perhaps at the expense of professional interests. Which moves cause others, and how exactly to describe the intricate network of relationships are highly complex questions, well beyond the scope of this short note.

What of quality? First of all, the quality question must be kept separate from the matter of mission. Academic interests sometimes say of professionally-oriented legal education that it is poor (because it is not academic enough), and so on. Statements of this sort confuse issues, but are, nonetheless, common. The consequence in changing times is contradictory appraisals. A law school widely regarded as excellent when the dominant interest is professional may be described as mediocre if the ethos becomes academic. Perhaps this problem can only be resolved at this juncture with the undramatic conclusion that a law school should incorporate both a professional and an academic mission.

That gives us our first quality benchmark. The good law school is at least two-dimensional (the burden this imposes on the school is considerable). But how to assess the worth of a faculty's professional

1. Richard A. Posner, "The Present Situation in Legal Scholarship" (1981) 90 *Yale Law Journal* 1113

and academic activities? On the research and publication side one begins by considering simply the level of activity: *is work being done?* If it is, the usual questions can then be asked - what do the book reviews say, what grants have been received, and so on. Of course, this approach merely refers the quality question to other people employing standards that may be open to criticism. As for teaching, that is notoriously difficult to evaluate, and almost impossible to compare as between law schools. One is forced to fall back on very doubtful measures. What do graduates say? What is the general teaching "reputation" of the school? Etc. And all this still leaves the ineffable. Is there a sense of purpose and excitement about the school?

Within the space given me I cannot fully either explore these themes or relate them to more than a decade at the Western law school; these introductory remarks are only contextual in a general way. But the brief description of law at Western that follows does, I think, suggest the following. The 1970's began with an overwhelming dominance of the professional interest with all the consequences of such dominance, but witnessed very strong growth of the academic. Most recently, as a result of financial pressures, the managerial is increasingly coming to the fore. Until this recent invasion of the managerial, and to some extent still, the interplay of the professional and the academic has produced a rich and creative programme and atmosphere. Objective measures canvassed in my conclusion suggest considerable and growing quality - much has been published, many grants have been received, applications to the school have lately been the highest per place in Ontario. Finally, I would contend that the Western law school has about it an air of purpose and excitement.

II.

In 1968 the Western Law Faculty increased the size of its entering class by two-thirds (from 84 to 140), doubled its physical plant,² and began the move towards increasing substantially the size of its teaching staff.³ The next five years or so were in good part taken up with

2. It is interesting to recall some of the origins of the expansion of Ontario legal education of about fifteen years ago. On December 4, 1964, the Deans of the then five Ontario law schools met with the Treasurer of the Law Society of Upper Canada, who expressed the view that a very large increase in law school accommodation was required and urged the law schools to expand as fast as they could.

3. Number of full-time members
of Faculty since 1968

1968-69 16	1973-74 24	1978-79 33	
1969-70 18	1974-75 27	1979-80 33	

adapting to this radical change in circumstances, and there were inevitably serious stresses and strains, exacerbated by financial stringency.

One bright spot during this period was the initiation of clinical legal education. In 1972 Faculty Council agreed to implement the recommendations of a Faculty Committee on Student Legal Aid and Clinical Training; the most important of these recommendations was establishment of a ten hour clinic-based programme involving in the main the provision of legal services to clients who might otherwise not be able to obtain such services. The Committee's report set forth as the objectives of the proposed programme the development of legal skills, increasing knowledge about legal and governmental systems, increasing understanding of a lawyer's professional responsibility, increasing the self-knowledge of students, and increasing understanding of, and capacity for, human relations. Final Faculty Council and University Senate approval for what became the London Legal Clinic was given in 1973, and the programme began in the second semester of the academic year 1973-74. In its first year about twenty students, supervised by a professor as Clinic Director (Al Bryant) and a full-time staff lawyer, dealt with about 450 files of considerable variety. The London Legal Clinic (with Professor Greg Dickinson as Director from 1975 to 1982) and associated clinical programmes have flourished and grown into a very important part of the Western programme.

The difficult period of regrouping and consolidation finished in about 1974, when David Johnston joined the Faculty as Dean.⁴ The themes that marked the rest of the decade were emerging. Inter-disciplinary activity was to be important, in both scholarship and teaching.⁵ New courses were to reflect a broader view of legal educa-

1970-71 21	1975-76 27	1980-81 34
1971-72 21	1976-77 30	1981-82 33
1972-73 23	1977-78 30	

4. Law Deans at Western:

1959-64 Ivan C. Rand

1964-68 A.W.R. Carrothers

1969-73 R. S. Mackay

1973-74 E. E. Palmer (Acting)

1974-79 David L. Johnston

1979- Philip Slayton

5. In an interview with the law student newspaper, *Res Ipsa Loquitur*, in April 1975, Dean Johnston observed that "we should be taking a particular interest in inter-disciplinary work in four or five different areas. I hope that we can do this gradually over the next three or four years." Inter-disciplinary work had been urged since the beginning of the Faculty. For example, the 1964 "Prospectus for the Faculty of Law" said: "There is need... for field or operations research... to observe law in action and to study it critically. This

tion; new courses in 1975-76 included Environmental Law, International Institutions, International Tax, International Business Transactions, Problems in Canadian Federalism, Advanced Torts and Advanced Family Law; in 1976-77 the courses offered for the first time included Comparative Federalism, Comparative Constitutional Law, Tax Policy, Accident Compensation Schemes, Trade Regulation, and the Legal Profession. New emphasis was to be placed on the teaching function; the academic year 1975-76 witnessed introduction of a small group instruction programme which gave every first year student the opportunity to take a course in a group of about fifteen students. Curriculum reform was in the air; in 1976 the curriculum was given added cohesion with the introduction of the core curriculum, which required all students to take eight specified subjects after first year (six subjects now comprise the core curriculum - Commercial Law, Trusts, Evidence, Company Law, Administrative Law, and Income Taxation). Finally, very considerable stress was to be placed on research and publication.

In 1976 two major developments captured a number of these trends: the joint LL.B./M.B.A. programme was established, and the Canada-United States Law Institute was created in conjunction with the Faculty of Law of Case Western Reserve University of Cleveland. Dean Johnston had earlier said this about the then proposed LL.B./M.B.A. programme:

[...]one of the areas of greatest need in Canada at the present time is for people who have some broad exposure to economic policy matters and the administration of institutions, as well as substantial knowledge of law. There are numbers of areas of government policy at the present time in which we are poorly served with advisors or experts; areas like foreign investment review, securities regulation, tax policy, regional development programs, international trade. We are poorly served in my view because insufficient attention is given within the universities in bringing together people of various disciplines who can provide some broad answers to problems in these areas and educating people to staff the agencies. It would be my hope that over the years a joint LL.B./M.B.A. program would help solve these problems....⁶

The programme enables students to receive both degrees in four years. The first two years consist of the regular first-year programmes of each of the two schools, with the sequence at the student's option.

kind of research program is calculated to bring the researcher into touch with other disciplines in the social sciences. It seems wise, therefore, to plan a program of interdisciplinary research at the faculty level."

6. *Id.*

The third and fourth years are devoted to a mix of required and elective courses in both schools.⁷

The Canada-United States Law Institute was intended to promote student and faculty exchanges between the two law school partners, and encourage research, particularly on legal problems involving the two jurisdictions; the research programme was to include conferences and a new "Canada-United States Law Journal". The main initial funding was \$100,000 secured by the Western Faculty from the Ivey Foundation of London, and \$95,000 obtained by Case-Western from the United States Donner Foundation. The most important funding subsequently obtained by the Western branch of the Institute was approximately \$250,000 pledged in 1981 by the University of Western Ontario Second Century Fund. The Canadian Directors of the Institute have been successively Professors Jack Roberts (a founding Director), Philip Slayton and John Quinn.

Since its creation, the Institute has organized a number of conferences;⁸ has published annually (from Case Western) the *Canada-United States Law Journal* (in which most of the papers presented at the various conferences appear); has sponsored several small research projects by individual professors at Western and Case Western; and has operated a modest student and faculty exchange programme. The Western branch of the Institute now devotes most of its energies to large-scale research projects, and it seems clear that at Western the Institute is now a prime vehicle for organizing and funding such endeavours. The 1980 study of non-tariff barriers to trade after the GATT Tokyo Round, with a budget of about \$30,000, brought together a distinguished research team from several universities in Canada and the United States; the resulting papers were published in 1982 by the Institute for Research on Public Policy. The

7. LL.B./M.B.A. cumulative enrolment

1977-78 1

1978-79 6

1979-80 9

1980-8113

1981-8214

8. Extraterritorial Application of U.S. Antitrust Laws (Western, 1977); Dispute Settlement (Ottawa, 1977); Taxation of Transnational Operations (Case Western, 1978); Steel Dumping into Canada and the United States (Western, 1978); Comparison of the Role of the Supreme Court in Canada and the United States (Case Western, 1979); Non-tariff Barriers and the Tokyo Round (Western, 1980); Taxation of Transnational Operations (Case Western, 1980); Comparative Executive Leadership: The Prime Minister and the President (Ottawa, 1980); Transnational Implications of Acid Rain (Case Western, 1981); Canadian Economic Union (Western, 1981); Are There Too Many Lawyers? (Western, 1981)

similarly organized Canadian Economic Union study, with a budget of almost \$100,000, was co-sponsored by the Ontario Economic Council; the results of that project will be published in 1983 by the University of Toronto Press.⁹

The Canadian Economic Union project of the Canada-United States Law Institute included economists from the University of Western Ontario's Economics Department, reflecting the Faculty's growing interest in inter-disciplinary work. The Western Faculty reached out to another sister discipline in 1977, when Faculty Council (and subsequently the University Senate) approved both a Ph.D. in Philosophy and an LL.B./M.A. Programme in Law and Philosophy. The Ph.D. permits doctoral candidates in philosophy to take the first year of the LL.B. programme with the exception of Civil Procedure; the LL.B./M.A. requires a student to take six semester hours of philosophy in the second and third years of the LL.B., and then allows him to obtain the M.A. with one further year of study in the Philosophy Department.¹⁰

More recently there has been even greater inter-disciplinary activity. For some years Western law professors have taught in several other faculties on campus. In 1981-82 the other part of the picture was put in place; professors from the Departments of Philosophy, Psychology and the Westminster Institute for Ethics and Human Values were cross-appointed to the Law Faculty, joining History Professor David Flaherty who had been cross-appointed in 1979. Workshops on law and economics, and law and philosophy have flourished.¹¹ In June 1982 the Faculty offered an intensive week-long residential seminar on legal philosophy (directed by Professor Bruce Chapman) for twenty-five law professors from across North America, and plans in 1983 to offer this seminar again together with a similar one in legal history. A modest but successful student and faculty exchange with the Faculty of Law at Laval, that began in 1979, has now blossomed at Western into "Law with French Option" that is intended, by exposing students to French language courses and requiring them to take part of their programme at Laval, to produce bilingual common lawyers.

9. This recent and growing interest in and success of large-scale well-financed institutional research provided impetus for the Western Law Faculty Tax Centre, established in 1982 with Professors Brian Arnold and Keith McNair as Co-Directors. The Centre has ambitious research plans, and has received initial funding of about \$250,000 (to be paid over several years) from the University of Western Ontario Second Century Fund.

10. In 1981-82 there was one student in each programme.

11. See "Law and Economics at Western Ontario" (1981-82), 5 *Lexecon* (No. 2) 1.

A backdrop to all these activities has been continued emphasis on teaching improvement. Nine professors have attended the Canadian Law Teaching Clinic, and one participated in a similar programme in the United States. The faculty has taken a variety of internal initiatives to improve teaching; for example, on February 1, 1982, classes were cancelled so that professors could attend a one day teaching workshop led by professors Neil Gold and Lawrie Fisher of the Canadian Law Teaching Clinic. Considerable effort was recently devoted to improving our student evaluation questionnaire, so that it might better be both a diagnostic and evaluative tool.

Attention has also been given to continuing education. In 1980 the Faculty instituted a continuing legal education programme for the Ontario bar, under the direction of Associate Dean Richard McLaren. In 1980-81 and 1981-82 a total of five one-day workshops were held, with all but one attracting well over 100 participants. The summer two-week long "Short Course in Law for Journalists", an initiative of Professor Rob Martin, began in 1979, with initial funding from the Donner Foundation (it is now supported by the Max Bell Foundation); the course has attracted about fifteen (twenty in 1982) working journalists each year. The Law Faculty has collaborated with Western's Faculty of Part-time and Continuing Education on a number of smaller projects.

One final development merits attention. The University of Western Ontario Law Association - an alumni association - was created at Western's 1981 Homecoming, after almost two years of planning and discussion with law school alumni, with the Hon. Ron Atkey as founding President. The Association has already provided great support for the Faculty, most notably by launching a \$200,000 fundraising campaign to create new and highly attractive entrance scholarships.

III.

This brief account shows, among other things, the growth over a decade of what I have called the academic, and the creation thereby of a second dimension of law teaching and legal scholarship at Western. Similar developments have taken place at some other Canadian law schools. Why has this happened? Several factors have contributed to events; I would single out as most important the influence of young law professors fresh from the best graduate schools in the United States, the growing relationship between Canadian law professors and the best international legal scholars (particularly from the United States), the heightened interest in the law on

the part of economists, philosophers, historians and others (almost forcing some reciprocity), and (in the case of Western, at least) a University administration and community anxious to have a law school that is not isolated, but fully shares the intellectual life of the campus. These influences have been potent, perhaps, because other and fundamentally more powerful influences have permitted them potency. Throughout most of the 1970's the legal profession's attitude towards law schools, and the attitude of other professional interests, seemed a mixture of disinterest and benevolence from a distance; for at least some of that period relatively well-financed government and universities showed no inclination to interfere; students passed trouble-free through their studies and into appropriate employment. The academic aspect of law teaching and legal scholarship was free to flourish.

It need hardly be said that things are now different. In face of an economic recession, the legal profession seeks a reduction in the number of law school graduates¹² (and seems, in a vaguely related exercise, to be taking a renewed interest in what is taught in law schools); government and universities desperately search everywhere for ways to save money; students desire no adventure that might reduce their eventual kit-bag of traditional legal skills. As professional and managerial muscles are flexed, so the impetus of the academic may diminish and die.

I mentioned earlier the very considerable difficulty of quality assessment. Inevitably one falls back on objective measures, which tell us something at any rate, although it is uncertain what. In 1974 an external appraiser of the Western law school, dean of another law faculty, observed in his report that "the Faculty is not involved in any significant amount of research". Five years later, in the academic year 1979-80, thirteen books and twenty-nine articles were published by Western law professors.¹³ In the academic year 1981-82 in excess of \$600,000 in outside grants came to the corporate Law Faculty (this figure does not include grants directed to individual professors), almost exactly double the figure for 1977-78.¹⁴ One final statistic of interest: since 1979-80 Western has received more applications per

12. For a thorough canvass of the so-called "numbers" issue, see the papers presented at the November 1981 Canada-United States Law Institute conference "Are There Too Many Lawyers?" (1982), 6 *Canada-United States Law Journal*.

13. In 1978-79, five books and eighteen articles were published; in 1980-81, eight books and twenty-six articles.

14. The major donors were the University of Western Ontario Second Century Fund (\$202,000) for the Canada-United States Law Institute and the Tax Centre; the Ontario Legal Aid Plan and the Attorney-General of Ontario (\$203,000) for the London Legal

place than any other Ontario law Faculty¹⁵ (although the absolute number has - in common with every other Ontario law faculty - decreased since the peak year of 1977-78).

I conclude that the Western law school has, since 1968, become a law school of considerable stature. Few opportunities have been missed, and many made. There is now some threat to progress, of the kind I have described. The future is uncertain, but we will make of it what we can.

Clinic and the Student Legal Aid Society; the Ontario Law Foundation (\$132,000) for research and library; and various smaller grants from the Max Bell Foundation, The Ontario Ministry of Colleges and Universities, the Ontario Economic Council, the Osgoode Society, the University of Western Ontario Academic Development Fund, and the Social Sciences and Humanities Research Council.

15. For entry in 1981 Western received 1,858 applications for 150 places. Toronto received 1,838.