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Law Schools under Attack

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We are in danger of losing the creative tension in Canadian legal education, a creative tension that has made the enterprise worthwhile. Let me explain this rather large claim.

The academic study of law has a long history of close association with universities of the western world. Law was a founding faculty at the University of Bologna and formed part of all the great early universities of mediaeval Europe. Despite the fact that many students in these universities today do go on to careers in law, the study of law remains an undergraduate liberal discipline for large numbers who do not contemplate practising the profession. In contrast, the law schools of North America were founded in recognition of the fact that apprenticeship was not adequate as the sole method of training lawyers. Thus university law faculties came into existence to fill a market need for professional education. Universities were, however, more than mere physical locations for law faculties interested only in teaching traditional lawyering skills. Gradually, within the great universities of the United States, their law schools began to be recognized as places of learning, of critical analysis, and of education for broader purposes than the private practice of law. In Canada, Dalhousie, McGill, and, later, Saskatchewan followed this model in aspiration, even if a lack of resources made it difficult to follow in substance. Only in recent decades have law faculties in the rest of the country adopted this approach. At present, law faculties aspire, and must aspire, to serve both goals — professional education and critical, scholarly study of law and its role in society.

It is my claim that the creative tension in these faculties is a unique and valuable asset when properly nurtured. Such centres of learning are much more important than the mass undergraduate law faculties of European universities, where legal training, which occurs in large lecture halls and is based on dry treatises, might just as well take place in their political science, history, or economics

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departments. The interaction of these faculties with, and their effects on, contemporary society are negligible. Even less important is the American proprietary law school, independent of university ties and concerned solely with qualifying students for the bar.

The claim to uniqueness for university law faculties extends further: we are unlike university faculties in other professional disciplines, such as medicine and engineering. It is true that the graduates of medical schools form a special elite in our society. They are selected from among the best and the brightest, their education is long and expensive, especially to the public purse, and the rewards to members of the profession are substantial; public health is a matter of prime importance. Nevertheless, medical education is highly technical and specialized — it would be difficult to claim for medical schools that they offer a broad university education. The demands made on medical students to learn their discipline leaves little time for broad questions of public policy as a major part of their curriculum. One never says, "Study medicine. It will broaden you and prepare you for other careers." Medicine is too expensive, too all-consuming. An engineering education is much the same. Students of engineering are permitted, sometimes encouraged, to take a few courses outside their faculty in order to gain some breadth. And there are some attempts to provide courses which place engineering in a broader context. But undergraduate engineering remains mainly a technical education. In this sense, proprietary law schools may be considered pale imitations of engineering departments.

University law faculties are very different. Jurisprudence, legal history, comparative law, human rights, tax theory, sociology of law, and the legal profession are but a few of the courses found in university law faculties and which have little to do with technical "tools of the trade". Even these courses are only part of the picture. A critical university approach permeates other areas of study, whether they be in criminal law or contracts, trusts or torts — indeed, in virtually all areas of inquiry.

At the same time, university law faculties are *not* like departments of history or political science. We demand more of our students than is asked of undergraduates in other disciplines; yet we abjure the narrow concentration of graduate thesis writing, where students must uncover an unplowed corner and cultivate it into a master's or doctoral dissertation. We do expect scholarly writing, good analysis, and critical evaluation, as do other university

disciplines. But we expect more: greater breadth, skills in applying principles and rules to specific situations, and, increasingly, exposure to clinical problems. So, on the one hand we expect our students to be able to handle the intellectual and scholarly aspects of university studies on a par with graduate students in other disciplines, but with different emphasis. On the other hand, we expect our students to be prepared to handle professional skills, at least after some practical experience, even better than would students who might obtain a "practical" training in proprietary law schools — if they existed in Canada.

This creative tension of the professional and the academic sides, as found in the university law faculty and in the demands made on its students, is intensified when translated into the requirements of university law teaching. University law teachers are expected to produce scholarly works just as their colleagues in history and economics are. But they are also expected to give their students practical insights into the working of the law — into clinical situations — as do their counterparts in medicine. In addition, their professional expertise and academic impartiality create demands on their services by governments to participate in policy formation for new legislation and programs. These are tasks which do not often confront historians, engineers, or physicians. The above observations about the various roles of law teachers are not by way of complaint. On the contrary, they present extraordinary challenges and opportunities for engaging in absorbing tasks. However, they also present the dangers of dividing one's time and energies into too many areas to be reasonably effective in any one of them.

We need to be aware of the unique combination of forces at work, as well as the dangers, in university law teaching. It is important that law faculties collectively recognize their sui generis position, or else they will not be able to explain it to the rest of the university and to the profession. Herein lies the danger. Outsiders who do not understand the distinctive characteristics and role of the university law school would undermine it by trying to change it in their own image. First, within the university there are those who do not understand this strange beast. A law faculty does not have hoards of master's candidates and smaller numbers of doctoral candidates justifying funding and providing manpower for research projects and for teaching sections of that necessary evil, first year undergraduate courses. Its professors do not turn out large numbers of short articles, to appear in "refereed journals", upon which such

a high premium is placed. This is not to say that all is well in law faculties with respect to good scholarly output. Rather, it is to say that the model presented to us by other disciplines is not for us; indeed, other disciplines may have something to learn from the better work of law faculties. In any event, an attempt to turn a law faculty into an analogue for, say, a department of political science would be unfortunate. The change would benefit neither law students nor universities, nor would it meet societal needs. While such a transformation of law faculties may be unlikely to occur, continued sniping and general criticism from other parts of the university are harmful: they destroy mutual understanding and respect, and they leave law faculties feeling exposed and unsupported in withstanding the second, more serious and immediate attack from without the university, that by the profession.

The legal profession in Ontario and most of the western provinces has never abandoned its view that law schools exist for the purpose of feeding the profession. The Law Society of Upper Canada resisted for almost 100 years the attempts of Ontario universities to begin university law schools. It was only in 1957, when the society realized it could not meet the demand for lawyers, that it consented to grant recognition to university legal education as part of the process of call to the bar. While more enlightened leaders of the bar recognize the broader dimensions of university legal education, many others hold to the image of law faculties as solely a means to produce practising lawyers. Two implications follow.

First, subordinating any other goals to that of training practising lawyers means that the dominant task of the law faculty becomes that of teaching the skills and providing the knowledge believed to be required in current practice. Supporters of this view might be willing to interpret teaching skills fairly broadly, to include careful analysis of legal problems, including applicable statute and case law, as well as "how to" skills, ranging from how to fill out forms and find the right registry office to how to interview, negotiate, and conduct a trial or appeal. They expect students to "know" land law, taxation, and other practical fields, but they do not believe that it is the task of the law school to devote resources to such concerns as whether landlord and tenant laws or the incidence of income tax are socially just. Supporters of this view would acknowledge that the needs of practice change from time to time, but would add that they are the judges of what is relevant and useful.

The second implication is that a system designed to produce legal practitioners should meet market needs as perceived by the profession itself. The flow of graduates should be reduced or increased as required to meet those needs alone, regardless of public assessment of public needs, regardless of student demand for legal education, and regardless of the general state of the economy as it affects career prospects in other professions and disciplines. In this view, it seems not to matter whether students in engineering, commerce, or education will have jobs, or whether, if other professions also succeeded in reducing the availability of education, a generation of young people would thereby be cheated not only of the chance for further education, but also of useful qualifications needed in a future job market. Somehow, this group of lawyers believes that it is a specially privileged class, entitled to protect its current members from general economic problems of society.

Many ordinary lawyers would object that the implications I have just asserted are unfair caricatures of the views of the practising bar. I hope so, and would like them to speak up. Thus far in the debate of the early 1980s, it has been the caricatures that have had the floor, and the ear of the media. Unfortunately, if this production-line view of legal education dominates the profession in the next few years, law faculties are likely to suffer irreparable harm.

Quite apart from the merits of lawyers' entitlement to special protection and apart from the feasibility of turning education on and off to meet perceived demand, there remains a more basic claim about the kind of education lawyers need. The traditional model of the private practitioner is itself sadly defective. It is trite to note that lawyers have an influential place in our society, that willy-nilly they are cast into roles of leadership within the legal system itself — as judges, legislators, and senior administrators. Outside the legal system they find themselves in roles where they need to be able to make critical assessments, both economic and social, of government decisions within the larger community.

At least as important, university legal education must not be limited only to prospective lawyers. Students not interested in the practice of law should be encouraged to attend law school in order to benefit from what we have to offer. And students who may initially consider practice as their primary goal should be encouraged to examine other careers as well. It is because university law faculties offer a unique blend of academic study and professional application of learning that their programs are valuable

in many callings outside the traditional practice of law. Accordingly, student numbers in law faculties must not be governed by the production-line view of legal education.

There are sound reasons, then, to defend university law schools from the assaults based on a misunderstanding of their special role. However, that is not to say that they should be immune from criticism, or that they are doing as much as we can reasonably expect from them; there is much room for improvement. Those of us who have experienced the decade and a half of explosive growth after 1957, followed by the shock of a further decade of financial constraint, are aware that our law faculties have not yet had the chance to mature, that the age and experience profile of our teaching staff is distorted, and that we have not yet learned how to cope with the even greater explosion in legal information. The philosophy and techniques of legal education are in question, and they should be. These problems make legal education bewildering and exhausting — and yet challenging and exciting. We need time, resources, and constructive criticism from within and from without. But if, instead, we are attacked by our academic brethren for not emulating them and by our professional brethren for not being at their beck and call, legal education will suffer and along with it the special contribution it can make to Canadian society.