The Public Dimension in Legal Education

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The Public Dimension in Legal Education

If law be not a science, a university will best consult its dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices it. Christopher Columbus Langdell in 1887.¹

I. Introduction

Legal education, while always a subject of fascination to law students and professors, only periodically becomes a matter of more general interest. But that is what I believe has happened in Canada in the mid-1980s as the result of three publishing events.

The first was the publication in 1983 of Law and Learning, the Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law (hereinafter referred to as the Arthurs Report).²

The second was the National Conference on Legal Education held in Winnipeg, October 23-26, 1985, the proceedings of which were published in part in 1987 as Legal Education in Canada.³

The third was the 1987 publication by the Osgoode Society of a superb history of that turbulent period when legal education in Ontario became the subject of daily newspaper headlines: The Fiercest Debate: Cecil A. Wright, The Benchers, and Legal Education in Ontario 1923-1957, by C. Ian Kyer and Jerome E. Bickenbach.⁴

On the assumption that the fundamental purpose of the legal profession, as of the law itself, is to bring about a just society, I adopt in

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¹. Christopher Columbus Langdell "Harvard Celebration Speech" (1887), 3 L.Q.R. 123, 124.
². Ottawa, Minister of Supply and Services, Canada.
³. Montréal, Federation of Law Societies of Canada/Fédération des professions juridiques du Canada.
⁴. Toronto, Published for the Osgoode Society by University of Toronto Press.
this article the standpoint of the public and pose the question "What does the public have a right to expect of legal education?" From this perspective nothing more will need to be said of the second publication above, since unfortunately it devotes small attention to this issue.

II. The Background

The earliest formal instruction in the common law was provided at the Inns of Court in England, but, following Blackstone's first lectures at Oxford University in 1753 (leading to his appointment to the Vinerian Professorship in 1758), a number of other universities established chairs in the law. Finally, in 1826, Harvard established the first university law school. The next major advance in legal education came with the introduction of the case method by Dean Christopher Columbus Langdell at Harvard in 1870. Langdell's case method was based on the belief that law was a science which could be discovered by studying decided cases. If law was a science, the law library was its laboratory.

In Canada the first permanent common-law school was founded at Dalhousie University in 1883 by Richard Chapman Weldon, "a man who was clearly inspired by Harvard Law School." From the beginning the University had the co-operation of the Nova Scotia Barristers' Society. The Society controlled the articles of clerkship and admission to the bar, but otherwise left it to the University to provide for legal education. Kyer and Bickenbach write that the result of this harmonious partnership was that, by 1921, the school's second dean, Donald A. MacRae, had "brought Dalhousie to a position of leadership in legal education in Canada"; its curriculum was recommended by the Canadian Bar Association and served as a model for law schools throughout the country.

Nevertheless, perhaps because it lacked financial resources, or perhaps because of the blind adherence of the Law Society of Upper Canada to the English system of office apprenticeship, Dalhousie unfortunately...
never actually set the pattern of legal education in Canada, and a succession of able deans — MacRae himself, John Read, Sidney Smith, and Vincent MacDonald were lured from the school to other positions. Dalhousie's approach was emulated in some other provinces, but it was only in 1957 that the most powerful of the law societies, the Law Society of Upper Canada, succumbed to progress. In that year, Osgoode Hall Law School, which had been run by the profession since its founding in 1889, became a university law school (though without a university until its affiliation with York University in 1968). As well, the Law Society signalled its acceptance of other university law schools in the province.

Since 1957 there has been an enormous growth in the number of law schools, law students and law professors in Canada. Including civil-law schools, there are now 21 university law schools in the country with about 9,500 students and over 600 law professors. The number of law students in fact more than tripled in the years 1962-63 to 1976-77. The increase in women law students has been particularly striking (from 5% of all students in 1962-63 to 37% in 1980-81). This remarkable growth levelled off in the late 1970s, though a steady demand for places has remained.

But has this expansion been a good thing? An American law dean, John Henry Schlegel, said of Canadian law schools in 1984:

What seems to have happened is that in merely thirty-five years the Canadians have recapitulated American developments of over one hundred years... and [come to] the same dead end.  

That dead end is the notion that the law is a body of definable rules: a finite body of knowledge that is all too quickly exhausted, leaving a dispirited faculty and a student body oriented solely to practice. But that is running ahead of our story.

The public significance of legal education, as opposed to its significance for the profession, the students, and the schools, has never been a dominant theme in the assessment of legal education. An approach to it was, however, sketched by Alfred Z. Reed in a study for the American Bar Association in 1921, where he noted that the practice of law is a “a public function, in a sense that the practice of other

be hard for readers to comprehend the stubborness of the Benchers in the face of contemporary trends in legal education, particularly in the United States.... One has perhaps to analogize to the flag debate or to the more recent debate over the Charter to get some idea of the feelings in play — two other debates incidentally, with similar overtones of competing British and American influences.”

10. John Henry Schlegel, “Langdell’s Legacy Or, The Case of the Empty Envelope” (1984), 36 Stan. L.R. 1517, at 1527. Schlegel’s chronology is a bit off — the time period in Canada was actually 27 years.
professions, such as medicine, is not. Practicing lawyers do not merely render to the community a social service . . . They are part of the governing mechanism of the state. Their functions are in a broad sense political.¹¹

Moreover, the public interest perspective was adopted in "a now classic 1943 law review article"¹² by Harold Lasswell and Myres McDougal. Lasswell and McDougal argued that previous efforts to integrate law and the social sciences had been largely unsuccessful because of a "lack of clarity about what is being integrated, and how, and for what purposes".¹³ Their basic proposition was as follows:

[I]f legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic training for policy-making. The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.¹⁴

Hence, in addition to the traditional emphasis on the mastery of legal technicalities, the Lasswell-McDougal law curriculum consisted of "thought skills" such as of goal-thinking, trend-thinking, and scientific-thinking. Furthermore, all these skills of thought needed to be supplemented by observation skills and management skills.

Goal-thinking for Lasswell and McDougal required the clarification of values, and had to relate general propositions to operational principles so as not to become, in their terminology, too philosophical. Implementation of values required trend-thinking, which looks to the future and is unswayed by current preferences. Implementation of values also required scientific-thinking in order to direct trends, where possible by the skillful management of the factors that condition them. Efficient training in scientific thinking required that students become familiar with the procedures by which facts are established through planned observation, mostly by various forms of inference. Finally, for Lasswell and McDougal acquaintance with methods of observation not only furnished a sound basis for policy planning but also contributed directly to skill in the practical management of human affairs.

¹¹ Alfred Z. Reed, Training for the Public Profession of the Law (New York, Charles Scribner's Sons, 1921) at 3.
¹³ Lasswell and McDougall, id., at 204.
¹⁴ Id., at 206.
In their 1974 report to the American Bar Foundation on American legal education, Boyer and Cramton provided a perspective on Lasswell and McDougal 30 years later:

With the publication of the famous article by Lasswell and McDougal on legal education and public policy in the 1940's, thought about the nature and function of law entered the “post-Realist period”. Despite the wide currency of the Lasswell-McDougal approach and the considerable discussion it provoked, the concept of the lawyer as policy maker and implementer of democratic values had only a modest influence on the total law curriculum. At best, more emphasis was given to the policy aspects of standard course content, and a sprinkling of seminars devoted to policy questions were added to the curriculum. These policy courses, however, were usually electives that were taken by only a small proportion of the eligible law students, and their introduction was largely confined to a handful of elite private schools until the rapid improvement of publicly-supported law schools in recent years.15

Boyer and Cramton expressed considerable frustration at this educational wheel-spinning:

A striking as well as depressing aspect of current debates over the future shape of the law school curriculum is the ancient lineage of many of the major issues, and their cyclical reappearance in the literature on legal education. Indeed, the historians remind us that the effort to integrate law and the behavioral sciences has been going on for nearly half a century and that “[a]rticles could be lifted out of the Law School News of 1915 and passed off today as tolerably fresh ideas in the Journal of Legal Education”.16

It is hard to avoid the conclusion that American legal education may have gone as far as the predominant jurisprudential schools of recent times allowed. Roscoe Pound and the American legal realists had their disagreements, but they shared a distrust of all legal American absolutes because of how they had seen them used by legal American courts to protect vested property interests. The realists, in addition, as Jerold Auerbach puts it “were simplimindedly devoted to empirical social science research as the methodological answer to all questions”.17 Auerbach concludes that:

17. Jerold S. Auerbach, “What Has the Teaching of Law to Do with Justice?” (1978), 53 New York U.L.R. 457, at 461. It is interesting to note that this perceptive article on legal education is written, not by a lawyer, but by a professional historian.
The idea of law as a public profession, with obligations that transcend client loyalty (which, after all, must be seen in its social context: loyalty to those who can pay the most), seems too strong to die but too weak to prevail.\textsuperscript{18}

Canadians have fortunately not shared the extremes of behaviour, controversy, and ideology that have marked the American experience in the law and legal education. Moreover, by being the better part of a century behind in the institution of widespread legal education in universities, we are better situated to take advantage of the perspective which historical reflection can offer. But the greatest advantage Canadian law schools have over those in the United States, and the reason the issues in university legal education differ so substantially in the two countries, is Canada's continuance of the apprenticeship tradition in articling and in profession-run Bar admission courses. Canadian university law schools are as a result freer to devote themselves to the more academic and intellectual aspects of the law.

We may therefore reasonably aspire to the conceptualization and development of a public perspective on legal education in a more supportive professional context. It is no doubt true in Canada as in the United States, as it was there pointed out by David Mellinkoff, that:

Lawyers as a group are no more dedicated to justice or public service than a private public utility is dedicated to giving light. It just happens that for a variety of personal reasons lawyers... have chosen to engage in an occupation that more than others is "affected with a public interest"... The profession is a public profession because as a profession it exists to satisfy a public need. But individual lawyers are members of that public profession to satisfy private, personal needs. ...\textsuperscript{19}

Whatever the personal motivations of individual members of the profession, the central truth for the profession as a whole must remain as stated by Zemans and Rosenblum in the introduction to their 1981 study for the American Bar Foundation:

The enormous influence that lawyers wield in both the public and the private sectors makes their professional development of particular concern in a democratic society. There is little doubt that the legal profession is both ubiquitous and extremely influential in the life of the... polity. The prominence of lawyers in public elective and appointive office, even considering in addition the lawyers holding numerous other government jobs or serving as important policy advisors, represents only a part of the political role of the bar. More pervasive and potentially more important is

\textsuperscript{18} Id., at 473.
The public dimension in legal education is thus not to be measured simply by the role of that minority of the profession which directly engages in public life or government administration, but rather by how well the profession as a whole serves the public interest. In other words, even the private-law role of the lawyer must be justified in terms of the common good and not merely by the standard of the client's interest.

What kind of legal education is needed to prepare members of the profession to serve the public interest? Because of the continuance of the apprenticeship system to which I have already referred, Canadian law schools cannot readily look to American schools for working ideals.

The Arthurs Report finds that the current ideal of legal education in Canada, one which it finds acceptable as an ideal, but not as presently applied, is humane professionalism. It consists of three elements: legal rules (doctrine), legal skills (interviewing, advocacy, negotiation), and developing a humane perspective on and a deeper understanding of the law as a social phenomenon and an intellectual discipline. These elements of humane professionalism are arranged in no fixed proportion or sequence, but are all contained within an eclectic, optional curriculum. Unfortunately, eclecticism has in the Report's view proved to be the wrong vehicle for humane professionalism, because it has resulted in the predominance of doctrinal teaching, which is identified with professional formation. In the Report's view, what Canadian law schools are doing today is not academic but professional. Despite good intentions in the law school the professional always overwhelms the academic, which the Report terms "the chosen vehicle of humane values".

The Report argues that academic studies in law will occur only if a distinctive academic option is created at the LL.B. level within an overall structure of pluralism. This scholarly option could take many forms, perhaps the simplest being the institution of a scholarly stream within existing law schools.

In a perceptive review, Judge Maxwell Cohen points that the Arthurs Report leaves unaddressed a number of difficulties. There is, first, the sheer difficulty of ensuring the emergence of a new scholarly perspective.

20. Supra, note 12, at 1.
21. Supra, note 2, at 54.
22. It is a historical irony that although Kyer and Bichenback can rightly chronicle "Caesar" Wright's career as a triumph of progress in legal education, they can also make the assertion that "in many respects ... Wright created a model for the type of legal teacher and scholar that was severely criticized by the Arthurs Commission in the study Law and Learning," supra, note 4, at 276.
Cohen notes that “even McDougal and Lasswell could not create a ‘separate’ stream programme within the entrenched teaching structures — however policy-oriented they were (and are) at Yale, in the law school generally”23. The more general difficulty he puts more broadly:

In other words has the Arthurs Report really told us any part of the answer to the central question raised by the Report itself, namely, even if it is possible to define with more manageable precision what is meant by “fundamental”, how shall law schools proceed to incorporate that definition into programmes that are credible both to the social scientist and humanist on the one side and that will be of some utility to the better understanding and running of the legal order in its daily operational life on the other.24

In my view, this is no more than to say that we cannot look to the Arthurs Report for all the answers. Personally, I find persuasive its arguments as to the necessity of a scholarly discipline of law and, concomitantly, of the creation of the requisite conditions for such an approach in law schools. But my concern here, the public significance of legal education, has less to do with the emergence of a new sub-profession of academic-minded lawyers (which is rightly the preoccupation of the Arthurs Report) and more with humanizing the professional study of law for the great majority of law students who will choose not to be legal scholars. My perspective is the totality of legal education viewed in the public interest.

III. Legal Education in the Public Interest

In this respect I start from a few key assumptions or postulates. First, to speak of society is to speak of law, since law is the principal means for the achievement of social ends; law cannot be defined apart from these ends, foremost among which is justice. Second, the importance to society of law means that the public has a unique stake in law-making. Third, the legal profession is the most influential law-making profession: even when lawyers are not themselves the actual legislators or administrators (as they still are in considerable part), they are the indispensable advisers of governments, legislatures, subordinate law-makers, and administrators of

23. Maxwell Cohen, (1983), 61 Can Bar Rev. 702, at 709. Mark Weisberg, “On the Relationship of Law and Learning to Law and Learning” (1983), 29 McGill L.J. 155, defends traditional legal exegesis against what he feels is its depreciation in the Arthurs Report and charges (at 160): “The Report suggests, correctly, that we should reject the vision of law as an autonomous system to be studied in isolation from its connection with the world. But in its insistence on the privacy of ‘law and’ research it offers the opposite vision: law as totally merged with the world. Lost in this clash of opposites is any sense of law as a partially autonomous system.”
24. Id, at 709.
the law. They also make up the judiciary, which interprets the laws. They can also be said to be the single most important body of policy-makers in corporations, unions, associations, etc. in our society. Fourth, just as the importance of law means that the public has a unique stake in law-making, so the importance of lawyers means that the public has a unique stake in legal education. Fifth, the public interest demands that legal education relate to social goals or ends as well as to means, and particularly that it present law as the principal social means for achieving justice.

Let us turn first to an analysis of what it is that lawyers do. A comprehensive list of lawyers' tasks is provided by Lasswell and McDougal:

Drafting, promoting, interpreting, and amending constitutions.

Drafting, promoting, and interpreting executive orders, administrative rulings, municipal charters, and so on, and attacking or sustaining their constitutionality.

Drafting and interpreting corporate and private association charters, agreements, dispositive instruments, and so on, and attacking or sustaining their validity.

Deciding or otherwise resolving causes or controversies, and making other decisions which affect the distribution of values, as judges, executives, arbitrators, referees, trial examiners, and so on.

Bringing to, or obscuring from the attention of decision-makers the facts and policies on which judgment should rest.

Advising clients on how to avoid litigation and controversies and on how to make the best possible use of legal doctrines, institutions, and practices for the promotion of their private purposes and long-term interest. (Clarifying, inter alia, intentions as to property disposition, business transactions, and family relations).

Consulting and negotiating with clients, businessmen, opposing counsel, and decision-makers of all kinds.

Reading, digesting, and reinterpreting the decisions and reasoning of past decision-makers of all kinds.

Guiding, conducting, and preparing for investigations and hearings (criminal, regulatory, legislative, social-scientific, administrative).

Preparing arguments, legal forms, witnesses (ordinary, expert), trial briefs, and so on.

Selecting courts, juries, arbitrators, negotiators, and other decision-makers.

Selecting clients.

Selecting clerks, associates and successors.
Preparing or supervising press conferences, issuing news releases, preparing radio material, or newsreel material.

Developing influence through participation in civic and other public activities (organizing and directing pressure groups, lobbying propaganda, and other control procedures) and private sociability.

Participating in professional organizations (organizations engaged in selection, exclusion and training of members, and with the maintenance of standards of varying degrees of ambiguity).

Contributing by investigation, writing and lecturing to legal and social science (publishing facts and analyses of the relationship between legal rules and human relations; reformulation of legal rules).  

Some would undoubtedly wish to add to such a list the handling of the emotional aspects of dealing with clients. Indeed, this is one of the reasons for instituting clinical legal education.

Lawyers must learn to perform their legal tasks competently. There is therefore a great public interest in lawyers' behaviour and consequently in legal education, which is supposed to develop professional competence, by imparting to students the traditional knowledge and skills of the lawyer. As Lasswell and McDougal put it:

> It is the lawyer's mastery over constitutions, statutes, appellate opinions and textbooks of peculiar idiom, and his skill in operating the mechanics (procedure) of both governmental institutions (courts, legislatures, administrative boards, executive offices) and private associations (corporations, partnerships, trade associations, labour unions, consumers' cooperatives), that set him apart from, and give him a certain advantage over, such other skill groups in our society as diplomats, economists, social psychologists, social historians and biologists.  

The last thing society needs from legal education is a new class of well-intentioned but professionally unskilled social scientists. What the public prizes about the legal profession is its professionalism, its sure sense of craft. The public expects from lawyers such qualities as a sharp sense of relevance, a rigorous analysis of words and concepts, and a working-hypothesis approach to synthesis — in other words, all the action-oriented techniques appropriate to maximize the possibilities for success of any undertaking or enterprise. The lawyer is expected to be the facilitator *par excellence* of our society.

Such a point of view is not at odds with the *Arthurs Report*, which, I think it is fair to say, accepts the primacy of professional education, and

26. On this point see Edward Veitch, "The Vocation of our Era for Legal Education" (1979), 44 Sask. L.R. 19 at 34.
even insists that students in the proposed scholarly stream must "be assured that they are not forever excluding themselves from professional opportunities".28 In fact, one of the subordinate, though important, themes of the Report is that professional objectives themselves "are not particularly well served by the present eclectic curriculum".29 In particular, the Report argues that the example of medical education supports the desirability of establishing clinical studies in law. President Derek Bok of Harvard has recently developed the same theme of the inadequacy of legal education from the professional point of view:

[L]aw schools train their students more for conflict than for the gentler arts of reconciliation and accommodation. This emphasis is likely to serve the profession poorly. In fact, lawyers devote more time to negotiating conflicts than they spend in the library or the courtroom, and studies show that their bargaining efforts accomplish more for their clients. Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our times.30

This is a powerful plea for a more pluralistic legal education. While there is no need to pursue this theme here, because the profession's own interest in technical competence is not different from that of the public, I would observe in passing that the necessity of clinical education in university law schools would be made more striking if there was ever any lessening in the requirements for articling or admission to the bar, which at present provide superior clinical experience.

However, in this paper I want to focus rather on what I believe is unique about the public interest in legal education, i.e. that law is the social means to the achievement of justice. This is what I call the public dimension in legal education. It might be argued that even here, the professional interest, rightly understood, is the same as that of the public, but unfortunately this is not generally perceived by the Bar to be true.

Even the Holmesian "bad man" needs to know not only how to achieve his own goals, but whether they are legally acceptable and whether they are likely to be considered socially acceptable. A client who

28. Supra, note 2, at 142.
29. Id., at 53.
30. Derek Bok, "A Flawed System of Law Practice and Training" (1983), 33 J. Legal Ed. 570, at 582-3. At the first People's Law Conference I had occasion to say, supra, note 5, at 16: "A legal system designed solely to regulate people's conduct is appropriate for the ideal of confrontation. A legal system designed to respond to and secure people's needs points beyond confrontation to cooperation."
wishes to purchase a property which for its best commercial exploitation requires a land use variation does not need to know merely how to go about obtaining the variation. He or she also needs guidance as to any foreseeable neighbourhood reaction which might either prevent his or her obtaining it or render it largely ineffective even if obtained.

In fact even the individual lawyer's duty to serve his or her client's interest is coupled in the very first Rule of the Code of Professional Conduct of the Canadian Bar Association with parallel duties to “the court, members of the public and his fellow members of the profession”. Once he or she has accepted a client, of course, he or she owes that person his or her best efforts, subject to a prior duty to the Court. He or she may act only “within the limits of the law”, and so may not, for example, “abuse the process of the tribunal” or “knowingly assist or permit his client to do anything which the lawyer considers to be dishonest or dishonourable”.

However, between clients, as it were, and as measured in the totality of his or her professional life, the lawyer cannot shirk moral responsibility for the kind, variety, quantity, etc. of the clients he or she accepts. He or she is, after all, a free and responsible human being. The lawyer may choose to refuse a client either to spend more time with family or to avoid representing only a particular class of person. He or she may agree to represent a client for the regular fee or out of idealism (or for both reasons).

More important, the profession as a whole will not be seen to serve the public interest if it appears to look only to the sum total of interests of individual lawyers in their individual clients. The public interest requires lawyers to defend every class of defendant, to draft and interpret laws as well as to litigate them, to demand justice and equality for all and to effectively mobilize social forces to achieve these goals.


32. The C.B.A. Rule on The Lawyer as Advocate, Chapter VIII, id., reads as follows: “When acting as an advocate the lawyer must, while treating the tribunal with courtesy and respect, represent his client resolutely, honourably and within the limits of the law.” The commentary on the Rule adds, inter alia:

The lawyer must not, for example:
(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of his client and are brought solely for the purpose of injuring the other party;
(b) knowingly assist or permit his client to do anything which the lawyer considers to be dishonest or dishonourable...
must ensure that every lawyer understands these public responsibilities and that an adequate number of lawyers is motivated and indeed inspired to undertake them.\textsuperscript{33}

I must admit that my own teaching experience has left me with a somewhat more modest view of the pedagogical possibilities with respect to individual students than Lasswell and Mc Dougual appear to have. They write, for instance, that “a legitimate aim of education is to seek to promote the major values of a democratic society and to reduce the number of moral mavericks who do not share democratic preferences.”\textsuperscript{34}

In my view, the proper aim of what I shall call perspective studies is cognitive rather than affective, i.e., to make law students aware of both social values (or ends) and legal means. If this also has the effect of eliciting from students socially desirable value choices all the better, but that is a happy result beyond pedagogical guarantee in the individual case.\textsuperscript{35} Nevertheless, it is absolutely essential that the overall system of legal education be structured in such a way as to maximize the likelihood that the social value of justice will be served as well as understood by lawyers.

Professor Francis Allen puts the need for education in values strongly and I believe accurately:

Law school education and research is or ought to be preoccupied with values. We ask or ought consciously to be asking not only “how to do it” but “why do it” and “ought we to do it all all”? There are few departments of the university in which such questions are so much a part of the daily grist as the law schools. The reason why it is important that such questions be asked is not simply that we are under obligation to be critics of the law and its institutions. We are under that obligation, and the

\textsuperscript{33} In his monograph Unequal Justice: Lawyers and Social Change in Modern America (New York, Oxford University Press, 1976) at 12. Professor Jerold S. Auerbach defends the thesis that:

In the United States justice has been distributed according to race, ethnicity, and wealth, rather than need. This is not equal justice. The professional elite bears a special responsibility for this maldistribution.

He defines the professional elite as corporation lawyers and law professors recruited from Anglo-Saxon Protestant stock. Law Professors had a modus vivendi with practitioners which “permitted them to speak their conscience on public issues while they prepared their best students for corporate practice” (at 155). In my view one could not analyze the role of the professional elite so negatively in Canada, if only because Canadian society itself is probably less economically motivated.

\textsuperscript{34} Supra, note 12, at 212.

\textsuperscript{35} On this point see Andrew Petter, “A Closet Within the House: Learning Objectives and the Law School Curriculum”, in Gold, supra, note 1, at 77.

\textsuperscript{36} Of course, different considerations are in play in courses such as legal ethics and professional responsibility, where teachers should feel the need directly to affect each student’s future behaviour. On this, see Boyer and Cramton, supra, note 15, at 267-8, and also on the general emotional climate of the law school, at 258-270.
law school's role as critic of the law, and, indeed at times of the legal profession, is one of its most important social functions. If it is inadequately performed by the law schools, it will be performed by others; and there is no assurance that the criticism of the others will be as informed or as relevant. There is another reason for legal education's concern with values, however: such concern is essential to the understanding of law. How can law be "known" in any fundamental sense apart from its purposes? And how can the future development of the law be anticipated except by reference to how well these purposes are being achieved and how acceptable they remain to the wider society as the community's needs and perceptions change? Concern with values is thus far from being merely of academic interest. On the contrary, it goes to the very essence of technical professional competence.37

It is important to have a teaching staff dedicated as a whole to teaching law with an awareness of its dimensions, beginning with legal method itself. There are those who think the contemporary law school is doing this badly. Basing his analysis on what he calls the total curriculum — not only the formal curriculum but the hidden curriculum consisting of the unarticulated views about law held by the faculty — Professor Karl Klare argues that law schools disable their students intellectually by overstudying both the inner rationality and coherence of the common law and the legal reasoning contained in doctrinal analysis:

This claim about legal reasoning — that it is autonomous from political and ethical choice — is a falsehood. . .

Legal reasoning exists primarily as an array of highly stylized modes of justificatory rhetoric. From the standpoint of logic — as opposed, for example, to the perspectives of anthropology or hermeneutics — there simply is no necessity or determinacy to legal reasoning, no inner compulsion to its methods. Legal reasoning is a texture of openness, indeterminacy, and contradiction. Students need to know that in order to work creatively as advocates and analysts. To be empowered as legal thinkers our students must be totally freed from the tyranny of belief in the false coherence or compellingness of legal argument. But in fact our teaching leads ineluctably in the opposite direction, toward reinforcing the mistaken belief that legal reasoning accounts for legal results. . .We teach legal reasoning as though doctrine had a determinate meaning, as though doctrinal analysis were capable of resolving cases without resort to political and moral choice. We teach legal reasoning as though enduring principles of social organization were embedded in the logic of the doctrines themselves (as opposed to the political and ethical meanings of the doctrines).38

As typically taught, legal reasoning endows with much legitimacy what Cardozo called the rule of analogy or the method of philosophy by

37. Supra, note 1, at 14-15.
which the directive force of a legal principle is exerted along the line of logical progression, of which he writes:

It has the primacy that comes from natural and orderly and logical succession. . . . At least it is the heir presumptive. A pretender to the title will have to fight his way. . . . In default of other tests, the method of philosophy must remain the organon of the courts if chance and favor are to be excluded, and the affairs of men are to be governed with the serene and impartial uniformity which is of the essence of the idea of law. 39

Unfortunately, this method often fails to exorcise what Cardozo termed “the demon of formalism” 40 or to deny what Holmes called “the fallacy of logical form”, 41 which conceals the underlying “judgment as to the relative worth and importance of competing legislative grounds, . . . the very root and nerve of the whole proceeding”. 42 Only a public perspective can achieve this ultimate realism.

IV. Perspective Courses for Values Perspective

In my view, law must be studied as a value science rather than as a value-free discipline. Law schools, therefore, should offer “perspective courses” in order to cultivate in students this view of law as inescapably public and social. Canadian law schools have improved in this respect from the mid-1960s onward, according to the Arthurs Report:

Within the curriculum, courses offering perspectives on the legal system as a whole increased: legal history and philosophy, law and economics or law and society. Moreover, courses were introduced that demanded some understanding of social context, although they were ultimately professional in orientation: urban planning, labour relations, social welfare or civil liberties. 43

What has occurred has been called “the law and . . .’ course phenomenon”, 44 which was intended to situate legal rules in their non-legal context. It introduces into the law a slice of real life, but a narrow one, and of course such offerings are entirely optional.

The picture as seen by the Report therefore remains a dark one:

40. Id., at 66.
43. Supra, note 2, at 48.
Yet our survey of teaching methods and curriculum shows that most students receive no exposure at all to scholarly subjects such as legal history or theory or interdisciplinary perspectives on law, and that few have anything more than minimal exposure. .45

I can only think that this is truly an unfortunate state of affairs from the viewpoint of the public interest. On the whole, law students in Canada are receiving negligible exposure to perspective studies. In my opinion, the public interest demands that students be required to pursue a minimum number of perspective courses at law school so that they can fulfill their role as policy-makers and articulators when they become practising lawyers. In other words, law schools must make compulsory for every law student at least two or three perspective courses such as legal history, jurisprudence, judicial process, legal process, law and society, legal methods and research methods.

This is not an infallible way of assuring the protection or furthering of the public interest, any more than the rest of the law school curriculum provides an absolute guarantee of professional competence. But it seems to me to be the best available protection of the public interest in the achievement of justice.

V. Entrance Requirements

A supplementary — and complementary — means of protecting the public interest is ensuring that all law students are prepared to take full advantage of the more reflective part of the law school curriculum by having completed a more general course of studies before entering law school. It has been an unfortunate, in my thinking, characteristic of Canadian legal education (in comparison, say, with the U.S.) that law schools entrants have not been required to have obtained a first degree. Most in fact have done so, and indeed the strong preference of most admission committees has been in this direction, but a minority of law students even now do not have a first degree — and some law schools even allow law students to work on a first degree course (such as a Bachelor of Commerce degree) simultaneously. The lack of background of this minority of students inevitably colours both their own comprehension and that of the schools as a whole. In my view, every law student should be required to complete a first degree as a condition of admission.46

45. Supra, note 2, at 135.
46. I do not of course mean to suggest that students who have completed their first degree requirements but not yet formally received their degrees before the opening of the law school term should be denied admission. What matters is that they should have fulfilled the requirements for the degree. Given that the percentage of first-year law students without prior
The necessity for a first degree, which I derive from the need to serve the public interest, might also have an advantage for the law schools in relation to government funding. The *Arthurs Report*, recognizing that the scholarly option proposed will be expensive, refers to the realistic "fear that the professional Peter will be robbed to pay a scholarly Paul". Additional resources will indeed have to be found.

With a new emphasis on academics, particularly if it were to become a second-degree program (in this respect like graduate studies), legal education would have a ready-made case for being more heavily "weighted" in the scheme of government funding. The present weighting for law in Ontario is 1.5, whereas in comparable U.S. systems it is often 2.5. An improvement in quality in legal education must inevitably, it seems to me, lead to an increase in weighting and hence funding. Of course, there is no guarantee that increased funding made available to universities on behalf of law students would necessarily find its way to the law schools. However, given the political skills of the law faculties, it is probably safe to assume a reasonable proportionality between increased university funding resulting from increasing weighting for legal education and the actual availability of increased funding for legal education.

**VI. Conclusion**

I have not attempted in this discussion to be definitive with respect to the content of the perspective requirement in law schools. I have no doubt that there are in fact several approaches which might successfully be used. Each law school would undoubtedly develop its own approach.

What I do insist on is the right of the public to a legal education oriented to justice as well as to law, because democracy itself demands it.

Even apart from the *Charter* the day has disappeared when mere legislative fiat can confer legitimacy on law. Today the legitimacy of law degrees seems to be no higher than about 25% of the class at any common-law school and is as low as about 3% at some schools (this is in stark contrast to civil-law schools where as many as 75% of the incoming students may lack first degrees), I do not believe any large number of students will be seriously inconvenienced. But even if they were, I believe the goal of a student body with a better preparation for a perspective approach is worth it, in terms of the overall good. The strongest case for not requiring prior degrees is with respect to mature students who are given special admission. Since they are in any event such a small proportion of entering students, their admission without prior degrees would perhaps be consistent with a general rule otherwise requiring such degrees, with their maturity constituting an acceptable substitute for the degree requirement.

47. *Supra*, note 2, at 149.

48. The weighting of law students by the Maritime Provinces Higher Education Commission is better than that in Ontario — 4.0, in comparison to 1.5 for arts and 3.0 for graduate studies — but only 25% of the university budget is affected by such course weighting, the rest being based on an entirely different kind of formula.
is measured by the public according to its perceived adequacy in expressing the public’s conception of justice.

Justice itself is not objectively measurable, which is to say that it is a value-term bearing symbolic connotations as well as a more precise meaning. But it ought to be possible to find agreement at least on the minimal formulation of Professor Auerbach:

Justice should be defined not only by process but by product: is the result, measured by the interests of clients and the needs of society, fair?49

Law is the principal means to attain justice, and society cannot accept a system of legal education, any more than it can tolerate a legal profession, which does not recognize its responsibility to have as its principal aim the achievement of justice. Such a perspective will define the public dimension of legal education.

49. Supra, note 33, at 308.