

Reflections on Teaching Access to Justice in Law School

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“First we kill all the lawyers”
William Shakespeare, Henry VI

Introduction: Lawyers’ Role in Society

Shakespeare’s well known statement, “first we kill all the lawyers” highlights the role that lawyers play in protecting the rule of law. Eliminating lawyers opens the path to dictatorship because lawyers serve as a bulwark to arbitrary power and reinforce the importance of justice and human rights. This image of lawyers as protection against arbitrariness and injustice has been brought into high relief since September 11 as Canadian and American governments have, to varying degrees and in varying ways, justified torture as a legitimate counter-terrorism strategy.¹ Against this context, some members of the legal profession have shown remarkable dedication and perseverance in offering their time and talents to hold their governments accountable to fundamental human rights norms, including those that prohibit torture.²

Yet, Shakespeare’s dictum is not entirely accurate. As is all too clear, lawyers can be enlisted by unscrupulous or negligent officials in processes which denigrate the rule of law and warp fundamental values such as human dignity and equality. Lawyers in Canada, a country which professes fidelity to the rule of law, have demonstrated a willingness to participate in breaches of fundamental human rights norms, including the prohibition on torture.³ The same is true in the United States. In both systems lawyers have justified state participation in torture. Despite the clear prohibitions on torture in both national and international law, lawyers have harnessed the knowledge and skills developed in law school to finesse definitions and redefine norms for the explicit purpose of enabling or obscuring official complicity in torture.⁴

¹ The complicity of Canadian officials with torturing states is document in two Commissions of Inquiry. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar – Analysis and Recommendations*, (2006) and The Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, (2008), online: <http://www.iacobuccinquiry.ca>

² In Canada, these lawyers include dedicated individuals such as Barbara Jackman, Paul Copeland, Barbara, Alex Neve and Jasminka Kalajdzic.

³ Paul Copeland has chronicled some of the ways in which Canadian lawyers have been complicit in torture. He notes, for example, that lawyers like Ward Elcock, former head of the Canadian Security Intelligence Service, have justified participation with torturing states before the Arar Inquiry while related officials have done the same before Canadian courts in security certificate cases. Similarly, justice lawyers have over claimed national security confidentiality in the Maher Arar case. For example, national security confidentiality was claimed over a memo containing the following: “On October 10, 2002, Mr. Hooper (a senior, now retired CSIS officer) stated in a memorandum: “I think the U.S. would like to get Arar to Jordan where they can have their way with him.” The Federal Court did not agree. *Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar (2007 FC 766)* available on-line at <http://decisions.fct-cf.gc.ca/en/2007/2007fc766/2007fc766.html>. Paul Copeland, *Speaking Notes for Department of Justice Conference* (cited with permission and on file with author).

⁴ Lawyers arguing on behalf of the Attorney General of Canada have contended that the Convention Against Torture does not apply to Canadian officials operating abroad. Submissions of the Attorney General of Canada on the Canadian Charter of Rights and Freedoms To The Internal

These competing roles that lawyers have taken in the national security landscape are not simply reflective of the adversarial stance that lawyers generally find themselves in. Rather, they reflect a larger debate about the proper role of lawyers in society.⁵ Some contend that lawyers can and should only be enablers; they simply canvass the range of legal possibilities for their clients without regard for underlying morality or the impact of their analysis. Morality is not integral to the lawyer's job. Others consider the lawyer-as-enabler paradigm symptomatic of a larger crisis within the legal profession, a profession which has come to exist largely to perpetuate profit or court influence without regard for the larger good.⁶ They note that the professionalism crisis has roots in law schools. In response, some advocate for various instruments to enhance professionalism within law faculty, including the adoption of a code of conduct for students.⁷

Critics might charge that codes of conduct, while benign on their face, can undermine individuality and free expression because they risk perpetuating and institutionalizing majoritarianism within law schools. The concern is that a code of conduct can become one more means for ensnaring unpopular views and opinions on campuses. Ultimately, such snuffing out of dissent undermines the very morality and courage to move against the tide that

Inquiry Into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, (January 25, 2008), online: <http://www.iacobuccinquiry.ca/pdfs/documents/2008-01-25-Submissions-re-Charter.pdf>. (Iacobucci Inquiry).

For a brief overview and critique, see Reem Bahdi "Commentary: Justice Department Justifies Contracting out of Torture" *Lawyer's Weekly*, February 01 2008 available on-line at: <http://www.uwindsor.ca/units/law/newschannel/archives/facW08.nsf/inToc/0A970675C3CA3C7A8525747A0044D61B?OpenDocument>

In the American context, the now infamous story of a series of memos from several lawyers advising the Bush administration, including Deputy Assistant Attorney General John Yoo and White House Counsel Alberto Gonzales has been documented in a series of excellent books including Philippe Sands *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (Palgrave Macmillan, 2008). These memos, *inter alia*, sought to redefine the meaning of torture and arguing that the Geneva Conventions did not apply to Guantanamo Bay detainees. The memos were released on April 16, 2009 by the Department of Justice and are now available at http://www.aclu.org/safefree/general/olc_memos.html

⁵ The debate is canvassed and addressed by my colleague at the University of Windsor, David Tanovich. See for example, Law's Ambition and the Reconstruction of Role Morality in Canada *Dalhousie Law Journal*, 2005 . Professor Tanovich argues that there is a disconnect between the role lawyers want to pursue (i.e. a facilitator of justice) and the role that they perceive the profession demands they play (i.e. a hired gun). He argues in the paper that over the last 15 years, Canadian lawyers have been engaged in a process of role morality reconstruction. Under this reconstructed institutional role, lawyers are problem-solvers whose mandate is to seek justice not only for their client but also for the broader legal, social and political system within which they operate. He holds that an ethic of client-centered zeal advocacy has slowly begun to be replaced with a justice-seeking ethic that seeks to give effect to law's ambition. The paper is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=764606

⁶ See for example Philip Slayton, *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession* (Penguin). Slayton is a former dean of law at the University of Western Ontario. In an interview with McLean's Magazine, Slayton was asked the following question and gave the following response: "You taught law for 13 years, both at McGill and the University of Western Ontario, where you were the dean of law. Is there something about legal training that nudges lawyers toward amorality?"

Yes, I think so. Law students are taught and lawyers subsequently believe that it is not their job to pass judgment on their clients as people, or to pass judgment on what their clients want to do. Lawyers are enablers. They are there to try to do what their client wants, and are in many cases paid handsomely for it. The whole question of the values behind the rules of the legal system is not on the whole of great interest to law schools or the legal profession. And there's an additional point: lawyers are taught to manipulate the rules in favour of their clients. If you're a manipulator of rules, then you can't respect the rules as such or believe that they incorporate important values. The full interview is available at <http://lesstewart.wordpress.com/2009/01/14/lawyers-are-rats-a-top-legal-scholar-exposes-the-corruption-of-his-professio/>

⁷ David Tanovich, "Learning to Act Like A Lawyer: A Model Professional Code of Conduct for Law Students" forthcoming *Windsor Yearbook of Access to Justice – Special Issue in Honour of Rose Voyvodic* (2009). See also Steven K. Berenson, "What Should Law School Student Conduct Codes Do?" May 5, 2004 available on-line at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=529442

codes of conduct ostensibly aim to protect. Such criticism has less to do with codes of conduct themselves and more to do with the manner in which they are implemented.

The challenge for law schools is how to support law students to think about the role of lawyers in society, build dedication to justice and the rule of law broadly understood, encourage risks and standing outside of the mainstream, while at the same time nurturing the adversarial skills needed to practice law and serve the client's interests.

The University of Windsor's Access to Justice Course

The University of Windsor's Faculty of Law has sought to address the challenge of educating socially conscious lawyers by introducing a course entitled Access to Justice. I co-teach the course, which is, in many respects, still very much a work in progress. The course is mandatory for all first year law students. To the best of my knowledge, Windsor is the only law faculty in Canada which requires students to take a course focused on justice and access to justice as pre-requisite to obtaining a law degree. Access to Justice represents an institutional theme of our faculty.⁸ We place great emphasis on the course. This is reflected in the teaching resources that are dedicated to it and in the credits that are attached to it. The course is taught by a core team of 5 instructors along with a host of guest speakers.⁹ It is assigned 6 credit hours, more than traditional first year courses such as criminal law for example.

As we enter into the course's 6th year, this paper offers preliminary reflections on the course's content, objectives, methodology, challenges and results.

Course Content

The following description of the course is taken largely from our course guide. The guide is handed out to students at the beginning of the year. We begin by defining key questions and asking students to keep these questions in mind throughout the year: What does the ideal of 'access to justice' mean? What are the implications of a commitment to that ideal regarding the law in contemporary Canada? We note that these questions animate access to justice both in terms of this course and as an institutional theme of the University of Windsor's Faculty of Law.

We advise students that we will explore various issues using the ideal of access to justice as our principal reference point and guide. At the same time, we discuss the relationship between the ideal of access to justice and other ideals of central importance in law, particularly the rule of law and equality. We critically analyze the substance and process of law in the modern Canadian administrative state. We begin by plainly set out for students that law can be and has been an instrument of oppression.¹⁰ We also pay attention to the extent to which the legal profession has both promoted and hindered access to justice in various legal contexts. Our

⁸ See Welcoming Remarks of Dean Bruce Elman to the Class of 2011 available at <http://www.uwindsor.ca/units/law/LawTop.nsf/SubCategoryFlyOut/C7FC02FE59D72786852574BB0056A1E3>

⁹ The instructors for 2008-2009 include Bill Bogart, Laverne Jacobs, Jasminka Kalajdzic, Amanda Burgess and myself.

¹⁰ See for example C. Backhouse, "What is Access to Justice?" in J. Bass, W. Bogart, and F. Zemans (eds.) *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada/Irwin Press, 2005).

ultimate objective is to provide a foundation for understanding and applying the ideal of access to justice in specific contexts.¹¹

The course is divided into three main parts.

Part I “Foundations” addresses: critical analysis; “what is access to justice?”; the rule of law; and, the impact of law in achieving justice. Part I invites basic discussion of access to justice and its ramifications. The following are some “foundational” points that are discussed:

a) Critical thinking and analytical skills are important for all courses; clearly for this one. This course invites questions regarding the law itself: how it supports the achieving of justice; how it contributes to injustice. In responding to those questions, capacity for critical thinking and analytical skills need to be supported and enhanced.

b) “What is access to justice” is a fundamental question that needs to be asked right at the beginning of the course. It implicates several issues, including the differences between formal and substantive equality, a distinction that is crucial to Canadian jurisprudence.¹² It is a question that we revisit many times throughout the course. At the outset we provide a framework for responding to that question “What is access to justice” while recognizing that there is no commonly accepted answer.

c) We also discuss some basic attributes of what constitutes “good law”. In that regard we discuss the “rule of law” and its relationship to “good law” and “access to justice”.¹³

d) We examine the impact that law has on underlying social, economic, and political issues as part of a basic understanding of “access to justice”. “Access to justice” issues arise not only with regard to law itself, but also with regard to law’s actual effects. A law “on the books” may seem just but the consequences that it produces may be quite unjust. At the same time gauging the effectiveness of law and employing the right legal tools (litigation, criminal sanctions, tax law and so forth) to achieve justice is often a complex task.¹⁴

Part II “Courts and Access to Justice” considers the process and methodology of judicial decision-making from the perspective of access to justice. Courts have long played an important role in the legal organization and regulation of Canadian society. In such first year courses as Criminal and Property Law you study the work of courts in resolving disputes of a

¹¹ We introduce students to a particular access to justice framework set out in R. Macdonald, “Access to Justice in 2003 – Scope, Scale, Ambitions” (Foundation Paper prepared for Law Society of Upper Canada, International Symposium on Access to Justice, May 2003).

¹² For an excellent analysis of equality jurisprudence in Canada, see Diana Majury, “Equality Kapped: Media Unleashed” forthcoming, *Windsor Yearbook of Access to Justice – Special Issue in Honour of Rose Voyvodic* (2009).

¹³ Three leading Canadian cases that discuss the rule of law are: *Reference re: Secession of Quebec* [1998, SCC]; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005, SCC]; and *Charkaoui v. Canada* [2007, SCC]

¹⁴ See generally W.A. Bogart, *Consequences: The Impact of Law and its Complexity* (Toronto: University of Toronto Press, 2002).

particular kind or subject matter. We take a step back and seek to understand and assess the general decision-making process of courts and the methodology of judicial reasoning. In so doing, we seek to identify the ways in which that process and methodology can advance or hinder realization of access to justice.

To begin, we explore the variety of perspectives that judges can use in grappling with legal questions and see how different perspectives can lead to different results.¹⁵ We also examine the rules and techniques of judicial interpretation.¹⁶ We then move on to an examination of the various factors that influence people's willingness and ability to assert or defend their legal rights. An important factor, upon which we focus, is the high cost of litigation.¹⁷ We identify the implications of these costs for access to justice and consider recent judicial and other responses.¹⁸ We also introduce class action proceedings.¹⁹

Next, we seek to shed light on the common instinct, at least among lawyers, to use litigation as a means of social reform. In particular, we consider the extent to which courts can competently and effectively undertake or review social policy. This leads us into a case study of social reform.²⁰ We focus on the role of courts in relation to a particular group of people who, due to their social inequality, are vulnerable to being denied their rights and explore the extent to which they have been successful in using the courts to assert their rights. We also examine the question of litigation and social change in relation to Metis and Aboriginal rights claims.²¹

¹⁵Students tend to enjoy reading L. Fuller's classic, "The Case of the Speluncean Explorers" which we supplement with Coombs, M. and Greene, D., "Speluncean Explorers- Contemporary Proceedings."

¹⁶ For a brief introduction, see A. Hutchinson & P. Marshall, "Making Moves: Legal Reasoning" in *The Law School Book: Succeeding at Law School*, 2nd ed. (Toronto: Irwin Law, 2000), pp. 73-85

¹⁷ Morrison, Ian and Janet Mosher, "Barriers to Access to Justice for Disadvantaged Groups" Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review* (Toronto: Ontario Law Reform Commission, 1996), Vol. 2 and M. Trebilcock, *Report of the Legal Aid Review 2008*.

¹⁸Three important Canadian cases concerning costs and cost rules are: *Polewsky v. Home Hardware Stores Ltd.*, [2003] O.J. No. 2908; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38, 2007 SCC 2; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21.

¹⁹For an introduction to class actions in Canada, see Kalajdzic, J., Bogart, W.A. and Matthews, Ian, "Class Actions in Canada: Country Report Prepared for The Globalization of Class Actions Conference", Oxford University, December 2007, published in *Annals of the American Academy of Political and Social Sciences* in Jan. 2009

²⁰ This year, we focused on the debate over same-sex marriage in Canada. Some of the resources we examined include: Miriam Smith. 2005. "Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada." *Politics & Society* 33: 2; Miriam Smith. 2005. "The Politics of Same-Sex Marriage in Canada and the United States." *PS: Political Science and Politics* 38:02; Reference Re: Same-Sex Marriage [2004] 3 S.C.R. 698, 2004 S.C.C. 79, par. 40-60; Halpern et al v. Attorney General of Canada et al [2003] 225 D.L.R. (4th) 529 (C.A.) (Ont. C.A.); Lynn D. Wardle. 2006. "The 'End' of Marriage." *Family Court Review*, 44:1.

²¹ See for example Jean Teillet, "The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario" for *The Ipperwash Inquiry*, March 31, 2005.

These discussions all help set the stage for considering the advantages and disadvantages of alternative methods of dispute resolution, such as mediation. To that end, we introduce students to the general principles of Alternative Dispute Resolution (ADR).²²

Parts I and II are covered in the Fall semester.

In the Winter semester we move on to **Part III “Legislatures, Administrative Bodies and Access to Justice”**. Courts are but one institution of the Canadian legal system. Legislatures and administrative bodies play an equally important, if not more important, role in the legal organization and regulation of Canadian society. Legislatures are a fundamentally important source of law because they provide us with statutes or legislation. Administrative bodies, including government departments and arms-length regulatory agencies, are creatures of statute. They can be significant sources of law, but they also take on most of the burden of implementing laws, promoting and monitoring legal compliance, and resolving legal disputes. An understanding of the decision-making processes and methodologies of legislatures and administrative bodies is therefore fundamentally important for any lawyer. That understanding provides a foundation for the many upper year courses that focus on specific areas of law and on these institutions, for example, labour relations and securities laws

The modern administrative state represents a defining characteristic of contemporary Canadian society. The modern administrative state includes a variety of legal institutions that create, implement and adjudicate law, ostensibly in pursuit of ideals such as equality, social justice and the common good. Over time, the Canadian administrative state has put in place an impressive array of institutions and programs (such as medicare, social assistance, public education) that have contributed to realizing those ideals. At the same time, however, sexism, racism, poverty and many other forms of discrimination and disadvantage persist in Canada: the ideals of equality, social justice and the common good remain only partially realized. Law, legal institutions and the legal profession have not only engaged and ameliorated inequality and social injustice but have also constructed and maintained them.

We begin the second semester with an overview of the administrative state and with an introduction to the concept of “tools” or “tool choices” in the context of discussing the shift towards “new governance” and the administrative state.²³ Simply put, “tools” are the means chosen by government to achieve legislative objectives. Governments have different means available at their disposal to produce a particular social goal. The ability to understand what tools are available to policy and decision-makers and how to assess their impact, particularly from an access to justice perspective, is perhaps one of the most important skills aspiring lawyers can develop while in law school. Most law in Canada takes place within administrative

²²My colleague Julie Macfarlane is the leading Canadian academic in this area. The key works we assign to students include Dr. Macfarlane’s “The Mediation Alternative” in *Rethinking Disputes: The Mediation Alternative*, (Toronto: Emond Montgomery, 1997) and excerpts from her acclaimed book, *The New Lawyer* (UBC Press, 2007) along with “Transforming Relationships Through Participatory Justice” (2003) Law Commission of Canada.

²³ W. A. Bogart, “The Tools of the Administrative State and the Regulatory Mix” in C. Flood & L. Sossin (eds.), *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) .

agencies; yet, law curricula, especially in first year, tends to focus on courts and litigation. By putting an emphasis on administrative tools, we hope that our students will not only understand the tool options available in a given context but will also become proficient in assessing the access to justice consequences of adopting one tool choice over another.

We ultimately focus on a number of tools. Before we do that, however, we examine a particular area of administrative regulation in detail. Our objective in part is to allow students their first opportunity in law school to read and think about a statutory scheme in its totality. Given that this is an access to justice course, we decided to focus on the statutory schemes that govern the administration of human rights. The statutory regime used to promote human rights and regulate discrimination under the Ontario *Human Rights Code* underwent a radical shift in 2008. In the second term, we examine the constitutive elements of this change in governance and its consequences for access to justice. A panel of distinguished guests who represent the main pillars of the new regime set the tone for this exploration. Overall, in the second term, we discuss the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, international human rights law and the *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11. In so doing, we are interested in providing an introduction to each of these regimes as discrete systems, but we also want students to think about how they compare to one another and to what extent they complement each other.²⁴

As the term progresses, we hope that students come to realize that Canadian administrative agencies are unique: they each have their own statute, regulation and culture which define how they function. Agency uniqueness is most clearly defined by the types of tools available to those who work within its framework. Consequently, towards the end of the term, we move into an examination of some different tools: discretion, ADR, self-regulation and privatization. We present various case studies with regard to these tools to allow students to think about how the tool choices highlighted in a particular context impact upon access to justice. In terms of ADR we pursue some of the basic ideas regarding ADR that we discussed in the fall term and study their application in the administrative state in its search for more accessible and satisfactory methods of dispute resolution.

We also look at discretion as a tool of the administrative state²⁵ and specifically examine the role of discretion in the context of national security or anti-terrorism. After discussing the different types of discretion that arise in the administrative context, we consider the pros and cons of using discretion as a tool choice to advance the national security agenda in light of access to justice. We have been fortunate to have two individuals who are intimately familiar with national security investigations – Abdullah Almalki and Shirley Heafey – join us for this module. Mr. Almalki was imprisoned and tortured in Syria. Canadian officials were implicated in his ordeal.²⁶ Mr. Almalki was eventually released and is back in Canada where he hopes for

²⁴ See for example Gerald Heckman, "The Role of International Human Rights Norms in Administrative Law" Chapter 12 in Colleen M. Flood and Lorne Sossin eds., *Administrative Law in Context*, (Toronto: Emond Montgomery, 2008).

²⁵ See generally Mullan et al., "Use & Misuse of Discretion", *Administrative Law: Cases, Text and Materials*, 5th Edition (Toronto: Emond-Montgomery, 2003), c.12, 947-95 and Justice Beverly McLachlin, "Rules and Discretion in the Governance of Canada" (1992) 56 *Saskatchewan Law Review* 167 along with Chapter 1, Keith Hawkins, *The Uses of Discretion* (Oxford, 1995).

accountability and redress. Shirley Heafey is a lawyer who formerly directed the body which oversees the work of the RCMP.

In the self-regulation context, we look at the regulation of the legal profession as our case study.²⁷ We examine several aspects of self-regulation of the legal profession, including standards for admission, quality assurance, promotion of equity, delivery of legal services by non-lawyers and the obligation of lawyers to promote justice.²⁸ In the privatization context, we examine the various forms of privatization and the implications of these forms by looking at a specific case-study, the deregulation of university tuition fees.²⁹ Finally, we examine the many issues of accountability and transparency in the exercise of power in the administrative state and the various means invoked to address such issues. We examine one such means in some detail: the Ombudsman.³⁰

We acknowledge that the course will remain unfinished in several ways. We can only introduce concepts that will be address in various courses throughout law school. We do not purport to give the “answer” to many of the issues that will be raised throughout the year. We introduce a set of social facts that implicate access to justice. We encourage students to ask the right questions about law’s role in promoting access to justice in Canadian society. We take it as a given that Canadian society values access to justice and its constituent concepts such as equality and the rule of law. We do that in part because our courts and legislatures have repeatedly stressed this point. Access to justice is also the express theme of this Law Faculty and this course was created to reflect and reinforce this institutional theme.

Course Objectives

Our course objectives are varied. We provide students with explicit examples of how we expect to meet our objectives through the course but indicate that these are only examples and that the students themselves are to think about how the issues, readings and structure chosen advance the objectives. The course objectives identified in our course guide are:

1. To provide an institutional forum for discussing the meaning of access to justice and considering its implications.

²⁶ Internal Inquiry Into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, online at <http://www.iacobucciinquiry.ca>

²⁷ See Margot Priest, “The Privatization of Regulation: Five Models of Self-Regulation” (1997-1998) 29 *Ottawa Law Review and Law Society of Upper Canada, Implementing the Law Society’s Competence Mandate: Report and Recommendations*, Professional Development and Competence Committee, March 22, 2001.

²⁸ See for example Rose Voyvodic, “Reimagining Legal Ethics After *Touchstones for Change*” in Elizabeth A. Sheehy, *Calling for Change: Women, Law and the Legal Profession* (Ottawa: University of Ottawa Press, 2006).

²⁹ W.A. Bogart, *Good Government, Good Citizens?: Courts, Politics, and Markets in a Changing Canada* (Vancouver: University of British Columbia Press, 2005), Chapter 7 “The Youngest Citizens in and Education as a Public Good?”

³⁰ Linda Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Boston: Martinus Nijhoff Publishers, 2004), Chapter 1 “Introduction” & Chapter 3 “The Ombudsman: Domestic Accountability and Good Governance”

2. To enable students to understand the variety of institutions and processes of law and the variety of roles which lawyers perform in those institutions and processes. To this end, we invite speakers from across the legal profession to address the class.
3. To introduce students to the rules, principles and institutions that define and regulate the professional, ethical and public interest obligations of lawyers so that they can situate the law and the legal profession within the development and maintenance of the broader social order.
4. To enable students to analyze the relationship between, on the one hand, legal reasoning, concepts, institutions, education and practice and, on the other hand, the circumstances and sources of social injustice and inequality (such as sexism, racism, and poverty).
5. To expose students to a range of perspectives from which the appropriateness of legal doctrine, theory, institutions, and practice can be analyzed.
6. To better equip students, through a diversity of evaluative components, to develop their ability to work cooperatively in a group as well as develop analytical skills and critical thinking skills.

Methodology

The Access to Justice course is team taught by 3 full-time faculty members and 2 adjunct professors. We meet once a week in “large group” which includes the entire first year class and is delivered in lecture format. We also meet once a week in “small group” which consists of approximately 23 students. Small group is facilitated by one of the five course instructors but most of the time is spent on student group presentations and student-driven discussions. We want to instill the notion that access to justice is everyone’s responsibility from the beginning of one’s legal career.

We make a conscious effort to invite leaders from the Canadian legal profession to lecture in the course. This lends credibility to the access to justice theme and allows students to see first hand how different members of the profession must engage justice in their work. We have been fortunate enough to have several highly respected judges such as Alan Lutfy, Chief Justice of the Federal Court, and Stephen Goudge, Ontario Court of Appeal judge and Commissioner in an Inquiry about the failings of the pediatric forensics system within Ontario, aboriginal lawyer Jean Teillet (whose commitment to the course is so great that she has willingly travelled for almost 12 hours to present a 70 minute lecture year after year), Andre Marin, the ombudsman for Ontario, Derry Miller, the Treasurer of head of the Law Society of Upper Canada, and Shirley Heafey, as noted above, who is a highly respected lawyer and former Chair of the Commission for Public Complaints against the Royal Canadian Mounted Police.

We have, as also noted above, also been fortunate to have Mr. Abdullah Almalki speak to the class. A Commission of Inquiry determined that Canadian officials played a role in his detention and torture in Syria. Mr. Almalki has not yet received redress not have Canadian officials been

held accountable for the roles they played in his detention and torture. Mr. Almalki offers a human face to the law and law's impact and his participation serves as poignant reminder that "legal interpretation takes place in the field of pain and death."

We do not focus the course on "black letter law" though we do bring cases in to illustrate and reinforce the specific teaching objectives of a given week. We do this in part because we want to encourage students to actively think about law in a way that goes beyond doctrinal silos. We want them to think about social context in grappling with law and to approach their legal education, and eventually their practice, with critical self-reflection. That is, we want them to simultaneously learn about law and legal institutions while at the same time critically thinking about norms and institutions through an access to justice lens.

Challenges

Access to Justice generally receives lower evaluation grades from students. This is likely attributable to several factors, including the possibility that the course disrupts the belief systems of those who are required to take it. In short, it makes them uncomfortable by presenting them with new ideas that speak to and perhaps challenge deeply held and possibly unexamined convictions. At the very least the course stands in contrast to traditional law school courses and probably also flies in the face of the expectations of a good number of students whose vision of law school is shaped by the more traditional legal curricula.³¹

We do address topics that some may consider "controversial" or outside the mainstream – harassment within the legal profession, gender equality, same-sex rights, anti-terrorism. Perhaps driven by liberal Canadian social and political traditions, we generally indicate to our students that we are not interested in replicating our own personal values on these matters (though we do have them) but we do expect students to know the prevailing law and to abide by it. One of our goals is to help students understand that there are different ways of seeing and understanding. We are not propagating moral relativism through this message. Rather, we want students to understand that both facts and law may not be as clear as first appears, that we all carry unexamined assumptions that guide our interpretation of things. These assumptions need to be unearthed and examined as part of the process of good decision-making.

As we address questions of justice and equality, we inevitably enter into difficult pedagogical terrain. Much has been written about the dilemmas raised by education aimed at anti-oppression and social change.³² One of the issues that comes up within the general question of

³¹For an overview and critique of the traditional approach to law school curricular, see Roy Stuckey et al., *Best Practices For Legal Education: A Vision and A Road Map* (Clinical Legal Education Association, 2007).

³²The most engaging and comprehensive book I have read about adult pedagogy is Stephen Brookfield, *The Power of Critical Theory for Adult Learning and Teaching* (Open University Press, 2008). Brookfield draws on the main texts of critical theory and argues that adult learning must focus on challenging hegemony and unmasking power.

what is the best pedagogical approach is what stance instructors should take in relation to their subject-matter and how much they should insist on the value of their own particular human rights perspective. Some would contend that our approach may be too “soft” and that the best pedagogical approach is to insist on what we believe to be right and wrong to help delineate the range of discussion, even if this means alienating students who we are trying to engage. Otherwise, we risk creating the impression that access to justice is “in the eye of the beholder” or that it is an option which one can legitimately accept or reject. Others insist that true change only comes from engaging those who would otherwise not listen and that it is important to create an open environment where, subject only to the need for mutual respect, no subject should be too sensitive for discussion and no question or opinion that should not be engaged. I have, I must confess, not found the ideal theory for my own teaching practice which tends to straddle these two positions.

Our other challenge is how to evaluate student learning in this area. To date, we have not strayed far from relatively traditional evaluation methods. We require students to make presentations in groups and to write short critical essays; however, the majority of the mark in the course comes from a traditional sit down exam. One can critique this approach for several reasons. I will only canvass two. First, despite our insistence on collaboration and the need to move away from competition, students feel the pressure of getting good grades so that they can secure a position and they generally believe that they can get a better grade on their own than in cooperation with a group where the group is given a single mark. Second, it might be that experiential learning would be a more effective way of getting students engaged and enthusiastic about access to justice.³³ To date, we have not experimented in earnest with experiential learning.

Results

Although students evaluate the course at the end of the year, we have not conducted an evaluation of the course’s long-term impact upon our graduates.

Despite the occasional resistance from students and frustrations along the way, teaching the course has confirmed its importance. The most important thing we do through this course is not impart knowledge or enhance skills – though we do hope to do just that. The most important objective of the Access to Justice course, as I see it, is to introduce students to critical self-reflection as an integral part of their engagement with law and legal practice. This self-reflection arises as a by-product of the course. Self-reflection is important because: it encourages thinking about one’s role in society rather than focusing on a single piece of legal analysis; it creates the possibility of assessing one’s practice, at all levels, through an access to justice lens; it insists that one be alive to the power dynamics in a given situation; and, it encourages thinking about social context and law’s role in perpetuating or, alternatively, ameliorating power differentials as the case may be. Although we have not yet conducted a

³³ The experiential learning literature relating to law schools is vast. Cognitive learning, as opposed to experiential learning, tends to ignore the affect in learning and focuses on abstract analysis over concrete engagement. Cognitive theories of learning, as opposed to experiential learning theories, also tend to place less value on subjective experiences as the basis of learning.

formal evaluation of the course and its impact, my hope is that self-reflection will become an important part of practice for students who graduate through our institution.

Every year, we hear from students who tell us that the course has opened their eyes to the way in which law impacts upon people's lives. This realization has made them more attentive to their potential influence as both lawyer and citizen in building a society that is built on justice and the rule of law. This year, a group of students wrote a poem for Abdullah Almalki. Mr. Almalki was deeply touched as was our entire teaching team. By presenting their observations in the form of a poem, the students demonstrated their comfort with moving beyond the traditional black letter law approach to their legal studies. They also demonstrated, by adopting the role of poets, their willingness to be visionaries and voices in the wilderness, because poets in our society tend to be both. And, by adopting an unconventional mode to critique state action in the name of fundamental human rights, they showed their ability to act out of conviction and courage. This is what we hoped for.

I close by reproducing the student tribute to Mr. Almalki, access to justice and the rule of law.

Poem for Access to Justice³⁴

*I am not the man I use to be
Living in the land of the "Glorious and Free"
Taken from my life without a single hug or kiss goodbye
Left with no justice, only questions why?*

*Moved around the world from nation to nation
Told that it was my own country that made the accusation
I speak to a guard and tell him that there must be a mistake
But he looks at me and says "what is being done is for your country's sake"*

*I am questioned and told to confess
They leave me broken, there is no redress
Put in a cage as men watch my life drift away
Should I just tell them what they want me to say?*

*The interrogator turns around and begins to walk out the door
But before he leaves he asks, "can you help identify more?"
I return home with the pain of what I saw
Whatever happened to the Rule of Law?*

³⁴ Access to Justice small group of Amanda Burgess, 2009 Discretion and National Security Presentation Team.