

Sustaining Law School Research and Service

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I approach the topic of this plenary session – the purposes and objectives of law schools beyond educating students – with a certain degree of unease. My discomfort comes from the little-discussed gap between the goals of most North American law schools and the expectations of the primary sources of funding for those law schools: state/provincial governments (in the case of public institutions) and students (for public and private institutions).¹ This gap threatens to undermine some of the great achievements of law schools in North America – to stifle the ability of law school faculty members to contribute to the promotion of justice and the advancement of law through scholarship and service. In this brief paper I will consider: (1) the goals of law schools as measured by the job duties of faculty members; (2) the gap between those goals and the expectations of important stakeholders; and (3) whether and how the goals can be justified and sustained in the decades ahead.

The typical tenure track/tenured member of the professoriate at a North American law school has three job duties: teaching, research/scholarship and service. At many schools the faculty member's duties are described according to a 40:40:20 ratio, where teaching and research each constitute 40% and service 20% of the faculty member's responsibilities. There are of course variations in the way that these duties are conceptualized and carried out among the more than 200 law schools in North America. Yet this model – in which teaching occupies less than half a faculty member's responsibilities -- certainly dominates the law schools typically considered to be "good." The proportion of a faculty member's job devoted to teaching actually is often reduced still further at schools considered to be "elite." Faculty members at these elite schools typically teach fewer courses per year than faculty members at the merely "good" schools. Moreover, research appears to be the greater of the two equals in the tenure decision at many schools, particularly for those striving or considered to be elite.²

What does this say about the goals of North American law schools? At a minimum, this conceptualization of faculty member responsibilities implies that the production and dissemination of knowledge are viewed as goals at least equal with the goal of educating the next generation of lawyers. Service – typically defined broadly as including everything from

¹ A recent symposium issue of the *Journal of Contemporary Legal Issues* contains several articles touching on this topic. See, Richard A. Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 *J. Contemp. Legal Issues* 67 (2008); Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 *J. Contemp. Legal Issues* 139 (2008); Steven R. Smith, *Gresham's Law in Legal Education*, 17 *J. Contemp. Legal Issues* 171 (2008).

² For a critical take on this dynamic, see Matasar, *supra* note 1, *passim*.

faculty governance to service to academic organizations or to the profession -- is an important but typically lesser obligation. The traditional allocation of duties for law school faculty members in Canada and the U.S. means that for each dollar of salary only 40 cents is devoted to teaching. Sixty cents of each governmental and student tuition dollar spent on faculty salaries is used to “cross-subsidize” research and service.³

Are these goals well-accepted by important stakeholders such as the groups funding law schools in North America? There is reason to be concerned about whether students and governments understand the multiple roles of faculty members. Even where understood, it is not clear that these important stakeholders appreciate the contribution law school faculty members make to the legal system and broader society.

Students typically express more interest in faculty members’ teaching effectiveness and in a law school’s ability to deliver a sufficiently broad and deep curriculum than in the research prowess of faculty. Students who serve as faculty research assistants benefit directly, financially and educationally, from faculty research. Yet the total number of students who benefit in this way is small as a percentage of the total number of students enrolled. For many students, faculty research – if thought of at all – is something esoteric which takes faculty member’s time and attention away from student needs.⁴

Similarly, it could be argued that provincial/state governments place little value on research and service in law schools. North American government funders typically focus on the number of students enrolled in programs, sometimes directly tying governmental funding to enrollment targets in various programs. To the extent that governments allocate funds specifically to support faculty research, the focus often appears to be on scientific or medical research, particularly research perceived to have direct public benefit, either through advances in medicine or the potential for commercialization. Thus there is little governmental funding for legal scholarship in the United States, particularly compared to the federal funding available for

³ For a detailed discussion of cross-subsidies, see Rubin, *supra* note 1, at 140-53. In some simply mathematical sense, eliminating faculty research would double the amount of time that faculty members could devote to teaching. See, e.g., *id.* at 142-43. This time could be used in different ways – to “intensify” the effort faculty members devote to their current teaching load, to increase the total number of course offered to students, or to make some other investment in teaching.

⁴ The view that much of the focus of faculty research reflects selfish interests rather than the needs of students is described in Matasar, *supra* note 1, at 72. This brief paper will not consider whether and how faculty research productivity may actually improve a law school’s reputation and, eventually, add to the prestige and value of the school’s degree in a way that benefits students. Dean Richard A. Matasar has been quite skeptical about the likely success of law school efforts to help students by working to improve a law school’s rankings in this manner. Matasar, *supra* note 1. But see Rubin, *supra* note 1, at 149 (“research output is closely connected to the law school’s prestige”).

scientific and medical research.⁵ The situation in Canada is better, given the existence of the Social Science Humanities Research Council (SSHRC).⁶ Yet SSHRC is the most poorly funded and often critiqued research granting entity, the poor and sometimes beleaguered sibling to the better funded science and health granting agencies.⁷

The governmental focus on education over research for law is mirrored in the accreditation schemes in the United States and Canada. Law school accreditation or admission rules in different jurisdictions often focus on education rather than research. The accreditation standards for law schools developed by the American Bar Association in the U.S. refer to faculty research and scholarship, but without the level of detail devoted to other components of the standards.⁸ Section 401 provides, for example, that faculty “shall possess a high degree of competence, as demonstrated by its education, experience in teaching or practice, teaching effectiveness, and scholarly research and writing.”⁹ There are no detailed “interpretations” or guidelines regarding this standard, which suggests that the standard has been little used in practice. Dean Steven R. Smith has argued that even this weak support for the research and service missions of law school faculty members is subject to challenge.¹⁰ If the ABA standards are modified to remove even these small hints of support for research and service then law schools in the U.S. could face market pressures to reduce faculty research and service over time.¹¹

The current U.S. accreditation approach at least is consistent with the expectation that law school faculty members should engage in research and service in addition to their scholarly duties. Canada currently is grappling with whether and how to continue a system in which graduates of designated schools are considered eligible to apply for admission to the bar. A task force established by the Federation of Law Societies in Canada released a consultation paper and an interim report proposing a process through which law schools would be asked to

⁵ The federal government funded more than \$29 billion worth of research and colleges and universities in 2007. See U.S. Census Bureau, Table 770. Performance Sector of Research and Development (R&D) Expenditures: 2000 to 2007, available at <http://www.census.gov/compendia/statab/tables/09s0770.pdf>.

⁶ Social Sciences and Humanities Research Council of Canada, available at <http://www.sshrc.ca/site/home-accueil-eng.aspx>.

⁷ See, e.g., Elizabeth Church, Scholarships for business studies draw outrage, *Globe and Mail* [Canada], February 20, 2009, available at http://www.theglobeandmail.com/servlet/story/RTGAM.20090220.wscholarships20_GTA/BNStory/National/home.

⁸ Smith, *supra* note 1, at 202 (noting standards 401, 402, and 404). See also American Bar Association, Section of Legal Education and Admissions to the Bar, 2008-2009 Standards for Approval of Law Schools, available at <http://www.abanet.org/legaled/standards/standards.html> [hereinafter ABA Standards].

⁹ ABA Standards, *supra* note 7, at §401.

¹⁰ Smith, *supra* note 1, at 202-209.

¹¹ *Id.*

certify that students had obtained “competencies” in certain selected topics.¹² The current Canadian proposal does not include any institutional requirements beyond, perhaps, the number of credit hours required for graduation. The end result is a substantial risk that Canada will adopt a system of accreditation that in effect approves the graduates of any institution that certifies that it provides students with education in the designated competencies.

It thus appears that the Canadian Federation will not establish any institutional requirements governing the quality of faculty or confirming the importance of an “academic” law school – that is, one whose faculty members engage in teaching, research and service. Dean Smith’s long term concern about the role of research in U.S. law schools may soon become a pressing reality for Canadian law schools if “teaching only” law schools are introduced in Canada. These law schools could easily compete for students by charging slightly lower tuition and still generate significant profits if, for example, faculty members are hired locally rather than on the national or international market, if teaching loads are doubled, and if the new law schools are unencumbered by the need to establish and maintain a comprehensive law library. Governments and students arguably might not choose to continue the current allocation of funds to academic law schools without additional information about how faculty scholarship and service benefit students, the profession, and the broader society.

So far these concerns are hypothetical. Government and student funds support a system in which an average faculty member spends most of his or her time on non-teaching activities. What explains the fact that these stakeholders continue to support and often to prefer law schools – particularly elite schools -- that devote a significant portion of their energy to research and service?¹³ Does this represent a form of acknowledgement that research-intensive law schools offer important benefits to students and the broader society? Perhaps so. Yet it is significant and slightly troubling that academic law schools in the United States and Canada have not developed and communicated a robust explanation of their important role in society. Why and how should the focus on research and service be sustained in the years ahead? The remainder of this paper focuses on an outline of justifications that I believe North American law schools should be prepared to explore and to better document if the vital contributions of law school faculty members to research and service are to be maintained.

1. The Interests of Students: Exploring the Relationship between Research and Teaching

¹² Federation of Law Societies of Canada, Task Force on the Canadian Common Law Degree, Consultation Paper (September 2008), available at <http://www.flsc.ca/en/whatsnew/whatsnew.asp#national>; Federation of Law Societies of Canada, Task Force on the Canadian Common Law Degree, Interim Report (March 2009) (report on file with author).

¹³ This paper acknowledges but does not analyze the possibility that students benefit from the elite character of certain law schools rather than from the impact of research and service conducted at those institutions. See *supra* note 4.

It is common for research universities and individual faculty members to proclaim that research improves teaching and vice versa. Yet as noted in a recent article by Professor Benjamin Barton, there is either no correlation or only a slight positive correlation between research productivity and teaching effectiveness when teaching effectiveness is measured by student teaching evaluations.¹⁴ On one level, the lack of correlation is not particularly surprising given that teaching evaluations are not a direct measure of the substantive value of a course. Student teaching evaluations instead provide important information about the teacher's effectiveness in conveying the subject matter, which might not be directly implicated by substantive expertise and research proficiency.

On another level, Professor Barton's article should inspire faculty members to be less complacent about the link between research and teaching. Law faculty members should evaluate their own course content and teaching methodology to ensure that students are receiving tangible benefits from the faculty member's involvement in research. On a "macro" level of the law school curriculum, Dean Edward Rubin has suggested a significant reform of legal education to offer students the benefits of a research-intensive experience in the third year of law school.¹⁵ Researchers interested in the relationship between research and teaching still have much work to do. New research projects might focus more directly on the relationship, if any, between faculty member research and the level of student knowledge, comprehension and ability to apply course materials in creative and innovative settings, for example.

2. The Role of Legal Research in Promoting Justice

The second challenge for law schools in North America is to engage in a more rigorous analysis of the benefits of legal scholarship. Legal scholarship takes many forms, of course. Legal scholars can develop new theoretical or conceptual approaches that are intended to be descriptive, predictive, normative, or some combination of each. "Traditional" legal scholarship often focuses on the development of the law in a particular substantive area through case analysis. Scholars may also be involved in the creation of casebooks and treatises focused on particular areas of law. An increasing number of scholars use interdisciplinary approaches such as law and economics or empirical approaches to studying, for example, the impact of law on behavior. Legal scholarship is disseminated in a variety of ways, such as through student-edited law reviews, peer-reviewed publications, SSRN downloads, books, law reform reports and draft legislation.

¹⁴ Benjamin Barton, *Is There a Correlation Between Law Professor Publication Counts, Law Review Citation Counts, and Teaching Evaluations? An Empirical Study*, 5 *J of Empirical Legal Studies* 619 (2008). As Professor Barton notes, the "good news" for proponents of faculty research is that there was no negative correlation—that is, research-productive faculty members were not viewed as any less effective than their colleagues. *Id.*

¹⁵ Rubin, *supra* note 1, at 164-68.

Critics of legal scholarship routinely point to the relatively small number of law review articles cited in judicial decisions as an indication that legal scholarship has little impact.¹⁶ Practitioners often characterize legal scholarship as “irrelevant.” This attitude can be conveyed to students, reinforcing student concerns that faculty research detracts from their preparation to enter the profession. Legal scholars need to address these concerns directly.

Legal scholarship has made a host of contributions in the development of common law and legislation as well as in the broader social understanding of the role of the law in promoting human rights, economic development, and equality. Yet the wide range of foci and forms creates challenges for researchers interested in studying the impact of legal scholarship on the development of law and society.

One approach would address more explicitly the critique that academic scholarship is often different in focus and methodology from legal research in practice. Legal research in practice is directly driven by the needs of clients or at least informed by the interests of those clients. It is not at all clear that law schools could provide a public benefit from engaging in precisely the same research projects and methodologies that are already produced in the private market. Law schools arguably serve a valuable social role in permitting a broader range of research from different perspectives. Legal scholars could study the range and type of scholarship to demonstrate the way in which academic scholarship contributes to the development of theory, law, and social dialogue rather than focusing solely on the citations of legal scholarship in court decisions. Individual faculty members should consider whether and how their work has an impact on relevant audiences ranging from other scholars to policy makers and should be prepared to engage with students, members of the profession, and the public generally about the value of legal scholarship.

3. Service and Public Benefit

A smaller but still significant portion of a faculty member’s work duties involve “service.” There are several different types of service. Faculty governance within the law school or university is necessary from a managerial standpoint and clearly adds to the managerial strength and integrity of the law school and broader university. Faculty members are involved in service to the profession through, for example, leading continuing legal education classes, organizing conferences open to the profession, and serving on bar or other professional group committees or Task Forces. Finally, faculty members further the public interest by working with governmental or non-governmental organizations and law reform groups. A host of law school

¹⁶ There are a number of studies of the sources cited in court opinions; law reviews and legal treatises typically have relatively low rates of citation. See, e.g., William H. Manz, Citations in Supreme Court Opinions and Briefs: A Comparative Study, 94 Law Libr. J. 267 (2002); and Mary Anne Bobinski, Comment, Citation Sources and the New York Court of Appeals, 34 Buff. L. Rev. 965 (1985).

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faculty members in both Canada and the United States have contributed to the development of law through these important law reform activities.

Faculty members also serve the public by participating in media inquiries about legal issue of public importance. Faculty service arguably directly benefits the public and indirectly benefits students by confirming the faculty as a source of knowledge about important legal issues.

Faculty service thus takes many forms and directly touches on the public interest. Having said this, there appears to be little if any research documenting the impact of faculty service in these areas. Faculty members and law schools should be prepared to address this lack of documentation.

This brief paper has focused on a potential gap between the goals of most North American law schools and the expectations of state/provincial governments and students. This gap threatens to continuation of the North American system of allocating law faculty to teaching, research and service rather than focusing on teaching alone. This paper suggested that legal scholars interested in preserving and enhancing the current model of legal education should focus energy on demonstrating with greater particularity to these stakeholder groups the benefits of their work