

Universals in Law School Education

Jay Conison
Valparaiso University School of Law
USA

The primary aim of our conference, “The Role of Law Schools and Law School Leadership in a Changing World,” is for deans, professors, and others interested in legal education to exchange ideas and learn from each other. Those of us here form a diverse group of law schools and legal systems, and of deans and educators from them. Through the conference, we hope to find out, in a synoptic way, what we do as schools and as educators, why we do what we do, and what (for a panoply of reasons) we might be doing instead. We wish to learn, not just out of a thirst for knowledge, but to improve our respective programs.

There is a further aim of the conference. By sharing ideas and information about what we do now and what we think we should do in the future, we seek to identify universals. Every law school educates persons to become lawyers. Presumably, every law school should continue to do so. These are two universals. But can we say more? The conference organizers charge us with thinking about whether there are universally shared practices or purposes among law schools worldwide and whether there are fundamental norms we all endorse or goals to which we all aspire.

Universals and Social Phenomena in General

In the following pages, I will say a few words about universals in law school and legal education. Now, when examining universals relating to social phenomena (such as legal education), it aids discussion to distinguish three kinds of universals; we might refer to them as *functional* universals, *contingent* universals, and *aspirational* universals. What are these and how do they differ?

Consider coffee cups as a case study. A functional universal about coffee cups is that coffee cups are roughly bowl shaped—this is part of what it is for something to be a coffee cup, because it is integral to the function of holding liquids for drinking. If an item isn’t roughly bowl shaped, it is hard to see how it could be considered a coffee cup. Contingent universals, by contrast, are less tightly connected to function and less fundamental to what something is. For example, if there were a law that every coffee cup had to be blue, it would be a contingent universal about coffee cups that they are blue. But unlike as with bowl shapedness, this characteristic could be otherwise—coffee cups could be red (under a different legal regime) and still be coffee cups. Finally, as concerns aspirational universals, an example relating to coffee cups might be (assuming everyone came to agree about it) that coffee cups should be made of ecologically friendly material. Ecological friendliness is not currently a universal. Yet, social and environmental pressures might in time make it friendliness might even become a contingent universal.

The distinction between these three types of universal is not razor sharp. Still, it is serviceable enough to help with analysis. In the following, I will focus on functional universals about law schools and legal education. I will do this even though the conference organizers appear to be asking us to focus on contingent and aspirational universals. I focus on functional universals because doing so will, in the end, respond to the conference organizers' questions by setting the stage for an examination (though not pursued in this paper) of the range of potential contingent and aspirational universals regarding law schools and legal education. In addition, doing so will suggest that differences may well be just as important as universals.

Universals in the Law School—Some Basic Observations

It is easy to see that there are functional universals about law schools and legal education. If there were not any, we would not be able to say that the University of Cairo Law School is a law school, but the Yale University School of Management is not. Functional universals are essential for categorization. When we give reasons why one institution is, and another is not, a law school, these reasons are what lead us to a description of the relevant functional universals.

There are functional universals regarding law schools because the category "law school," is a *functional* category. If we categorize an enterprise as a law school, as opposed to something else, we do so because the enterprise fulfills a certain function, or because it matters for a particular purpose whether the enterprise is a law school. We have already provided a first approximation of such an analysis. We noted in passing that to say that an enterprise is a law school is necessarily to say that it educates and trains people to be lawyers. Granted, so much is obvious; yet, to point it out is still useful because it starts the process of unpacking functional universals. In particular, it points up the fact that to understand what a law school is or must be, we first need to understand what a *lawyer* is.

If we held an international conference on lawyers, and through it sought universals, we would note the tripartite division among universals and start our inquiry just as we have done here. For "lawyer," too, is a functional category. It matters whether someone is a lawyer because whether a person is a lawyer is significant for what the person does and is competent to do. A lawyer, speaking functionally, is a person who is skilled in knowledge and application of law. And so a law school, speaking functionally, is an enterprise that educates and trains people to be skilled in the knowledge and application of law.

Again, we have a statement that looks quite obvious, but again it helps push forward the functional analysis. For we have now advanced to the point where we see that understanding the nature of a law school is tied to understanding what law is. Law schools are what they are because they produce persons with certain knowledge and competences relating to law.

Now, once we start asking questions about what law is, the waters get very deep. Yet, we do not have to plunge into them very far. Our interest here is not jurisprudential but practical. For present purposes, it suffices to say that law is a (or, perhaps, the) fundamental form of social ordering. It is a structure or process that appears to exist—necessarily to exist—in anything we

would want to call an ordered *society*. It is central to the existence, maintenance, and progress of social order.

Hence, we sketch one answer to the question about universals in legal education. A law school is an educational enterprise whose function is to prepare people skilled in the knowledge and application of a fundamental form of social ordering. Different societies have different fundamental forms of social orderings—different types of legal systems. Hence, law schools will inevitably differ from society to society. At the very least, they will attend to the specific characteristics of the given society's legal system. Still, there is a fundamental commonality, in that all law schools are designed to serve the end of preparing people who are skilled in that fundamental form of social ordering, whatever particular form it takes.

Universals in University Education—Basic Observations

We could go in a variety of directions from here. We could, for example, explore the nature or natures of social ordering as a way to try and provide more detail.¹ Yet, there are many views on the nature of law as social ordering, and it is doubtful that such a line of inquiry, though interesting and important, would tell us a great deal more about the functional universal or reveal contingent universals. So I wish to pursue a different path. Another—oblique—way, to gain more insight is to examine functional universals in university education and then look at the relationship between them and the functional universals in law school and legal education.

The question we asked about universals in law schools and law school education can equally well be asked about universals in universities and (undergraduate) university education. Are there universals in university education, irrespective of place, irrespective of institution, and irrespective of academic focus? Is there a basic functionality to universities? Does it make a difference for any important purpose whether an institution is or is not a university?

On the one hand, it is obviously more difficult to take a functional approach here. Universities have been with us for centuries and over those centuries they have evolved and differentiated to a substantial degree. The many thousands of universities have adapted to different social structures, different social needs, different countries and political units, different legislation, different funding mechanisms, and a host of other environmental factors. One important evolutionary path has been a movement away from the religious foundation for universities, which originally provided a strong unity of purpose and function. A second evolutionary path has been movement away from a strong focus on a liberal arts approach to education (originally rooted specifically in classical studies) and instead toward a system marked by programmatic diversity; increasing emphasis on professional, if not practical concerns; and increasing attention to current, as opposed to less time-dependent, subjects of study. It seems hard to tease out universals regarding universities amidst the specialized programs of study, the

¹ See, e.g., Henry H. Hart, Jr., and Albert M. Sacks, *The Legal Process* (1994), which implicitly builds a theory of legal education on the basis of a view of law as a particular kind of social ordering.

specialized universities, and the de-emphasis of the common curriculum. What common functions or differentiating principles remain after the centuries of evolution? Must any universal here be aspirational?

Yet, it *must* be possible to talk about the function of a university and to identify universals in university education. For example, we can distinguish the University of Melbourne from Hamburger University. We know that the former is a university and that the latter (a legitimate and successful educational institution of some kind) is not, despite the fact that both use the term “university” in their name. What are the differences that lead to easily make this distinction? Identifying them should point us toward functional universals.²

One answer starts with the fact—or at least the credible claim—that what universities do as a core function, and what makes them distinctively universities—is to teach reasoned argument. Other terms can be used for this competence—disciplined discourse, for example. But whatever the characterization, the fact remains that universities fundamentally teach (or try to teach) students to integrate reasoned argument as a central characteristic of their mind and work. They seek to teach students to engage in reasoned argument *sub silentio*, as students try to master particular subjects themselves, and teach them to engage in reasoned argument with others as they learn in a social setting. Universities also seek to help students integrate reasoned argument into their outlook and their practice, by helping them recognize and evaluate good and bad argument in public and private discourse around them.

This is not all universities do, of course, but it is something very important and very central to their function; and an enterprise that declined to develop these competences would face skepticism over any claim to be a university. But there is an additional, important point to make here. For the core function of developing competences with regard to reasoned argument is not an abstract competence, disengaged from the world. It is true that some writers have made a case that universities should be places of isolation from the world, enabling young people to engage in uninterrupted self development (including development of these abilities regarding argument).³ Yet, the fact is that universities have always had worldly purposes. They have always prepared individuals to function in society and to make a difference in society. And universities could not possibly have survived and flourished, indeed gained such influence, if they did not have important social purposes.

The significance of reasoned argument is that teaching it is central to preparing individuals for a life of contribution to ordered society. For ordered society advances through communication and argument. One thoughtful articulation of this view has been offered by the Archbishop of

² Or, to approach the issue in another way, a growing phenomenon in universities is the addition of schools of hospitality management. These schools and programs have a clear career focus, and the career-training component of these schools could be taught in specialized trade institutes. Why, then, are these schools parts of universities? What does being part of a university add to their function and to their educational purpose?

³ See, e.g., Michael Oakeshott, *The Voice of Liberal Learning* (Indianapolis: Liberty Fund 2001).

Canterbury, Rowan Williams, in an address at Oxford University.⁴ Williams urged that the historical function of a university is to train people in the difference between good and bad argument, not as an abstract exercise, but for the practical purpose of developing people who can contribute to developing an ordered society. He noted the decline of this function in the face of its continuing importance to democratic society:

[A] true education is one which permits people to exercise their human nature without the constraints of delusion and manipulation—and therefore one that sets people free for the labor of constructing a reasonable society. . . . The reasonable society is not one in which some abstract ideal of rationality is imposed as a straitjacket on the organic life of communities; it is simply one in which we know how to talk with each other, how to negotiate, to challenge, to argue coherently about what is good for human beings as such.

. . . In a democratic age, [equipping people to take authority] is not the authority of a royal counselor or imperial proconsul; it is the authority of the literate and educated person to contribute to public reason.

Thus, notwithstanding the immense diversity of universities and university educational programs, we can say that preparing individuals for a life of contribution to ordered society, at least in part through cultivating the ability to engage in reasoned argument, is a core function of a university—it is a critical aspect of what makes something a university as opposed to something else. It is a (if not the) factor that makes the University of Melbourne a university but Hamburger University not.

Law School Education and University Education—A Relationship

Now if this view of universities and university education is correct, it follows that there is a great deal of similarity between the function of a law school and the function of a university.⁵ Both, as at least one core function, seek to prepare people to contribute to ordered society. A law school is more specifically concerned with a particular, fundamental form of social ordering that we call “law”; the university education as a whole has broader concern with ordered society and the multiple ways of ordering society. And (although we did not emphasize this in our discussion of universals in law school and legal education) both are centrally concerned with reasoned argument as a competence to be instilled and developed so that graduates can effectively contribute to society’s ordering and its advance. Is there anything more that we can say about the relationship in function and commonality of universal between law school education and university education?

⁴ Oxford University Commemoration Day Sermon (20 June 2004), available at <http://www.archbishopofcanterbury.org/1205>.

⁵ Williams notes that:

When the University of Oxford began, its short-term survival depended heavily on the need for trained canon lawyers, and a significant phase of expansion in the fourteenth and fifteenth centuries had to do with a remarkable renaissance in the study of civil law.

We might be tempted to describe the relationship as that between the general (university as a whole) and the special (the law school). This, after all, is a fair characterization of the relationship between the study of history at an advanced or focused level and a general university or undergraduate education. Advanced or specialized education in history takes one subject that can be used as an organizing principle for the core undergraduate education; it takes a subject that can, indeed, be used to inculcate competences relating to reasoned argument. It then proceeds with the education, emphasizing the substantive body of knowledge, with diminished attention to developing broad-based competence in argument and to the broad-based function of preparing individuals to be contributors to social ordering. In the advanced or specialized study of history, we highlight other functions of universities—the research function and the function of transmitting knowledge.

But this sort of relationship does not fully describe the connections between university education and law school education. Law is, of course, a field one can study at advanced levels and law school education has an important component of studying legal subjects at advanced levels. But the relationship of general and specific captures only a part—and, arguably only a secondary part—of the relationship.

One reason is that law school education continues to be an education focused on instilling a broad ability to contribute to social order and ordered society. Law school takes this core function of university education and elevates it in importance.

It elevates it because of yet another reason for doubting the view that law school is best understood as specific education, namely that law school by design remains a center for a general education: true specialization comes only with further study or practice.⁶ In part, law school necessarily remains a general education, because of the enormous range of fields or endeavors that law-trained individuals can and do pursue. But it also remains general because of the ultimately structural character of law school's educational concern—teaching process is so important because of the inevitable changes in law and society. Finally, law school continues to be, in large measure, an education in argument. So much of legal education is an education in how to argue and how to recognize and respond to good and bad arguments. In the United States, much of the first-year of studies specifically aims to develop a comprehensive analytical and argumentative methodology in students; while the methodology is intended to be used primarily in connection with questions of legal analysis, it is applicable to an enormous range of social and political issues and contexts. So for these three reasons, law school education is more a continuation or refinement of basic university education than a movement away from it into a specific substantive discipline.

Law school education, thus, even as an advanced form of education, retains the broad focus on preparing individuals to be equipped to contribute to ordered society, whereas other advanced forms of education generally leave this purpose behind. Law school education also continues to

⁶ Jay Conison, "Law School Education and Liberal CLE," 40 Val. U.L. Rev. 325 (2006).

emphasize development of the fundamental skill of reasoned argument and assessment of argument. Unlike as with, say, medical education, it retains the generality and plasticity of instruction, deferring specialization (as does undergraduate education) until a later time and later educational or social context.

Some Consequences

If this way of thinking about law school and legal education, and the universals underlying them, is correct, then two consequences follow for our discussion at the conference.

First, we cannot detach the quest for universals in law schools and in law school education from the quest for universals in universities and university education. Both law schools and universities, as a central function, seek to prepare individuals for participation (and where possible leadership) in the development of ordered society and in the development of social ordering. Both, also, have a fundamental concern with developing competence in reasoned argument. Far more than any other form of advanced or specialized education, law school education is a continuation of pervasive and foundational concerns of university education. One might characterize it as advanced liberal arts education.

Second, the question about universals in law schools and legal education is important, but more important is the question of the potential for future evolution and diversity. Universities and university education have evolved and adapted to changing social, economic, and political factors. Universities have evolved so as to combine the fundamental concern with developing persons able to contribute to ordered society, with other educational and social purposes and functions. Law schools are still relatively recent innovations, and so far have had much less time to evolve and diversify. As consequence, the historical function—the functional universal—has remained strong. But if the history of the evolution of the university provides a lesson, evolution in law schools is inevitable and a question with which we should engage is how to take advantage of this potential and manage the course of progress in legal education.