

Reflections on Law School Curriculum

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The paper focuses on some current discussions in Canada and elsewhere regarding the content of legal education and more generally legal education reform. Specifically, what is the relationship between legal education and training of lawyers: whether law schools should be providing liberal legal education, practical skills for the practice of law or both; how much experiential learning should be incorporated into a law school curriculum and in what manner? Debates about the content of legal education have been re-ignited since 2007 with the publication of the Carnegie Report;¹ the realities of legal practice, especially since the recent global recession - increased competition in the provision of legal services and reluctance of law firms to invest in training new lawyers. These shifts are occurring against the backdrop of neo-liberalism, globalization and the commodification of legal education.² The culmination of these events has led to calls by law societies for law schools to do more to prepare students for the practice of law, a phenomenon described as “practice ready”. The Carnegie Report identifies three apprenticeships necessary for the practice of law: (1) the cognitive or intellectual (knowledge of the law or legal rules); (2) skills (ability to apply legal knowledge) (3) values required of the legal profession.³ Critics note that law school curriculum tends to over-emphasize the acquisition of legal knowledge and not give enough attention to the skills necessary for the effective application of that knowledge in the service of real life clients or the ethical values expected of members of the legal profession in applying their legal knowledge to solve problems.⁴ Hyatt states: “Without the ability to take the principles one learns in the classroom and apply them in a people-smart manner, one is less than a complete lawyer and certainly not a professional.”⁵ These critiques of legal education have resulted in calls for a de-emphasis of liberal legal education in favour of an instrumentalist curriculum to better prepare law graduates to be “effective legal professionals”.⁶ These developments have led to fundamental questions such as the purpose of legal education or more broadly, what law schools should teach and how they impart the necessary knowledge. This in turn has implications for curriculum content and modes of delivery.

These issues were discussed at the Canadian Clinical Education Conference in London, Ontario, Canada in October 2010. The paper will discuss my reflections on the conference and the place and extent of skills training in legal education against the backdrop of the broader issue of the content and manner of legal education. It will also highlight some challenges and opportunities for Canadian law schools in their efforts to respond to the changing landscape of legal education and, more generally, the practice of law. The paper will conclude with an overview of the University of Victoria Law School experience in relation to experiential education.

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¹ William M. Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass, 2007) [*Carnegie Report*]. See also Roy Stuckley et al, *Best Practices for Legal Education: A Vision and Road Map* (2007).

² See Margaret Thornton, “Among the Ruins: Law in the Neo-Liberal Academy” (2001), 20 Windsor Y.B. Access Just. 3; Constance Backhouse, “The Changing Landscape of Canadian Legal Education” (2001), 20 Windsor Y.B. Access Just. 25.

³ See also Federation of Law Societies of Canada, *Task Force on the Canadian Common Law Degree: Final Report* (2009) at 7-10, 27 [*Federation of Law Societies Task Force Report*].

⁴ See Earl Martin and Gerald Hess, “Developing a Skills and Professionalism Curriculum – Process and Product” (2009-2010) U. Tol. L. Rev. 327; Wayne S. Hyatt, “A Lawyer’s Lament: Law Schools and the Profession of Law” (2007) 60 Vand. L. Rev. 385.

⁵ Hyatt, *ibid.* at 396.

⁶ Martin and Hess, *supra* note 4 at 327.

Skills Training in Legal Education

The ability to apply legal knowledge in particular situations is a hallmark of a legal professional. The Carnegie Report notes that students cannot achieve the skills apprenticeship through the same means as they do for the cognitive or intellectual apprenticeship. The Report states:

Students encounter this practice-based kind of learning through quite different pedagogies from the way they learn the theory. They are often taught by faculty members other than those from whom they learned about the first, conceptual apprenticeship. In this second apprenticeship, students learn by taking part in simulated practice situations, as in case studies, or in actual clinical experience with real clients.⁷

Calls for broader emphasis on teaching skills and values have implications for law school curriculum, as well as pedagogical and evaluative methodologies.⁸ Law schools must go beyond providing liberal legal education and teach students the skills they need to apply legal knowledge and the ethical standards and responsibilities of legal professionals. The assessment of practical competence calls for greater emphasis on a variety of formative rather than summative assessments, with opportunities for ongoing feedback and learning.⁹

The movement to ensure law students possess sufficient degrees of all the three apprenticeships necessary for the practice of law upon graduation is partly influenced by a desire for law societies not to offer bar admission courses and elimination of the articling requirement. Law graduates will be expected to exhibit satisfactory knowledge, skills and values necessary to serve clients as to be expected of members of the legal profession.¹⁰ Exactly what is meant by practical legal skills that law graduates are expected to have remains unclear. Are these skills and knowledge to be tested by an examination that focuses on output assessment, which would in turn dictate law school curriculum? If this is the dominant understanding or expectation of legal education, then law schools must prepare students to pass those assessments.¹¹ To the extent that the articling requirement could be eliminated in the near future, then the concept of practice ready may go beyond simply passing bar admission exams to include expectations that law graduates should be able to provide legal services upon graduation. This trend would seem to conflate the study of law as an academic discipline and professional training. As Weinrib notes, although legal education as an academic pursuit and professional training are complementary, they each have a separate focus.¹² Law school graduates are not expected to be “fully capable of providing competent professional services to clients in all matters”. However, they are expected to have acquired “foundational competencies necessary for the practice of law” with the remaining gaps to be bridged by the profession through the licensing requirement and continuing professional development.¹³ Although

⁷ *Carnegie Report*, *supra* note 1 at 28.

⁸ The Carnegie Report focused on legal education in the United States. Although there are some differences in the American and Canadian systems, for example bar admission courses run by provincial law societies and the articling requirement, the critiques of legal education have also been echoed in Canada. As well, provincial law societies are considering eliminating bar admission programs and the articling requirement. Criticisms of Canadian legal education predate publication of recent reports on legal education including the Carnegie Report. See Annie Rochette and Wes Pue, “‘Back to Basics’? University legal Education and 21st Century Professionalism” (2001), 20 Windsor Y.B. Access Just., 167.

⁹ *Carnegie Report*, *supra* note 1, chp. 5.

¹⁰ The current critiques are different from those that allege law schools do not teach enough substantive law but instead are too theoretical and/or ideological. While there may be some of those concerns implicit in the current critiques, there is at least an acknowledgement that students get a good grounding in the substantive law but not enough in its application to real live issues.

¹¹ It is noteworthy that the expectation of law graduates being practice ready is occurring at the same time that Canadian law societies are considering abolishing bar admission courses and the articling requirement.

¹² Ernest J. Weinrib, “Can law Survive Legal Education” (2007) 60 Vand. L. Rev. 401 at 425-6.

¹³ *Federation of Law Societies Task Force Report*, *supra* note 3 at 28. See also *Carnegie Report*, *supra* note 1 at 194. For example, the Law Society of British Columbia requires its members to complete at least twelve hours of continuing professional development programs each year. These programs provide ongoing education for lawyers as well as refresher courses for those returning to the practice of law. See

the training of lawyers is supposed to be a shared enterprise between law schools and the legal profession, there seems to be a growing expectation that law schools play a much more prominent role in educating lawyers. This raises questions such as the role of the legal profession in training lawyers and devolution of this responsibility onto law schools. It also raises the question whether law schools in their current form are adequately equipped to undertake their new and expanded role.¹⁴

Law schools will have to respond to the changing landscape of legal education and the profession. Although the full implications of the anticipated changes remain to be seen, it will likely change legal education in profound ways.¹⁵ As the Carnegie Report states: “the goal of greater integration means that the common core of legal education needs to be expanded in qualitative terms to encompass substantial experience with practice, as well as opportunities to wrestle with the issues of professionalism.”¹⁶ Not surprisingly, these forces of change have been met with resistance by law schools. However, there can be positive developments from the current winds of change for legal education that need to be embraced. Law schools should welcome the opportunity to engage in critical self-reflection of our curriculum and its relevance in a changing society. Law schools often view themselves as providing liberal legal education as opposed to technical training for the legal profession. However, most law graduates get called to the bar and at one point or another go into the practice of law. While the training of lawyers should be a shared responsibility among law schools, law societies and the legal profession, perhaps law schools can rethink what they do and how they do it in order to work well with their other partners in training lawyers.

Reflections on the Canadian Clinical Education Conference

The basic premise of the conference was the importance of skills training in legal education. It was generally agreed that the first year program should be mostly devoted to helping students acquire cognitive/critical skills through foundational courses, modelled principally on the Langdellian or case method approach. There is, therefore, little need for change in the first year program. However, some presenters suggested that first year courses could include some skill development, specifically, legal writing, which is already part of the UVic Law first year program. There was also a sense that the upper year program, especially the third year of law school, should be more integrative or a capstone with the aim of equipping students with practical skills and increasing their appreciation of the professional and ethical responsibilities of being members of the legal profession. Many law schools now offer courses in legal ethics and professionalism either as mandatory or electives. There is increased integration of legal ethics into many aspects of the law curriculum. Further, many schools offer skills-based courses and clinical programs of varying degrees and forms. Yet, many of the conference attendees, and perhaps others in the legal profession, seem to agree with the Carnegie Report that as professional schools, most law schools are currently not doing enough to prepare students for the practice law. A number of presenters from the United States described the curriculum at their law schools, which includes various forms and amounts of experiential learning. There was a lot of interest in the City University of New York Law School curriculum (CUNY), which requires all students to participate in one of its seven clinics for either one or both terms of their third year. The CUNY Dean of Law acknowledged that the program is very costly and is heavily subsidized by the university.¹⁷

Timothy McGee, “Law Society Continues to Help Build Library of Online Courses”, 2010 No. 4 Winter *Benchers’ Bulletin*, online: http://www.lawsociety.bc.ca/publications_forms/bulletin/2010/10-12-04_ceo-courses.html.

¹⁴ See Hyatt, *supra* note 4 at 392.

¹⁵ See Harry W. Arthurs, “The State We’re in: Legal Education in Canada’s New Political Economy” (2001), 20 Windsor Y.B. Access Just., 35 at 51-3.

¹⁶ *Carnegie Report*, *supra* note 1 at 194-5.

¹⁷ The program costs about \$40,000 per student a year whereas their tuition is currently \$10,000 a year. CUNY is not an affluent institution but the University has made funding for the law school a priority to promote access to legal education for underprivileged students while

Greater emphasis on experiential education would give students more opportunities to apply the knowledge acquired in substantive courses to the needs of live clients and a greater appreciation of the ethical responsibilities of being a lawyer. It would also have the added benefit of promoting access to justice as students in these programs tend to serve underprivileged clients who may otherwise not have legal representation. Although the service element of clinical programs is laudable, some scholars have questioned whether the main objectives are to provide service to marginalized populations or pedagogical. Advocates of clinical legal education note that such programs have pluralistic objectives and the complementarity of the service and pedagogical objectives.¹⁸

It was acknowledged that increased skills training could mean fewer opportunities for students to take substantive/perspective courses or less coverage of substantive content in particular courses, resulting in an impoverished liberal legal education. Ideally, skills-based courses should include academic components and opportunities for reflective learning. Students can therefore acquire sufficient analytical skills through experiential learning even if they are not able to take as many advanced courses as they otherwise would have. Such an integrated approach can also address issues of academic legitimacy that have plagued clinical programs within the context of law school curriculum.¹⁹

There was a lot of emphasis on clinics as an important aspect of experiential legal education. However, given the intensive nature of these programs and lack of stable funding, it may not be realistic to guarantee all students a clinical experience. One solution is to integrate skills components into otherwise purely substantive or theoretical courses and vice versa. Another is to have stand alone skills courses where students can apply doctrinal knowledge and learn interviewing and advocacy skills as well as the ethical demands of legal professionals.²⁰ Some of the barriers to fully implementing the integrative model include the tendency of law schools to hire faculty either as teaching faculty (including expectations of research and publication) or as clinical faculty with little or no expectations of research and scholarship. Faculty hired in the former category may not necessarily have practice experience and those in the latter category may not necessarily have academic backgrounds. Further, not all faculty members share an interest in experiential education or see themselves as providing training for the legal profession. It was emphasized that the involvement of all faculty members is not necessary for an integrative curriculum. However, it needs to be appreciated that there will likely be greater demands for courses that integrate skills training with substantive learning, with a potential corresponding reduction in enrolment in other courses. The hope is that students will be focused on acquiring certain competencies in their legal education, which may not be achieved with a purely liberal education. Needless to say, the notion of students acquiring certain competencies is vague, among other things, because there may not be agreement on what those competencies are or how to objectively assess whether students have achieved the acceptable levels of competencies. Furthermore, while evaluation methods should provide opportunities for ongoing and reflective learning, formative assessments may present challenges for instructors with large class sizes and students' reluctance to partake in these assessments.

In sum, although clinics are a major site for experiential education, they are by no means the only avenues for practical legal training. An integrative approach that pays attention to all the facets necessary to be an effective legal professional is to be preferred. Many substantive courses include

providing legal services to marginalized groups such as racial and cultural minorities and immigrants. *Ibid.*, at 36. For a discussion of the CUNY program and a similar program at New York University (an affluent institution), see *ibid.*, at 34 -43.

¹⁸ See Rose Voyvodic, "Considerable Promise and Troublesome Aspects: Theory and Methodology of Clinical Legal Education" (2001) 20 Windsor Y.B. Access Just. 111 at 123-5.

¹⁹ Voyvodic, *ibid.*, at 115-23.

²⁰ See the Carnegie Report, *supra* note 1 at 197-8.

skills training such as drafting legal documents and assessing clients' needs. As well, not all skills-based courses necessarily involve direct services to live clients. However, this does not diminish the practical skills that students develop in such courses. Thus, the alleged dichotomy between substantive and skills-based courses is more of a perception than reality. Further, the articling requirement in Canadian jurisdictions provides additional opportunities for students to prepare for the practice of law in ways not available in other jurisdictions.

The UVic Law Experience

Many law schools already provide a good combination of liberal legal education and practical skills in their curriculum. Perhaps the University of Victoria Faculty of Law curriculum is unique among Canadian law school in this regard because of the array of skills-based programs and experiential learning opportunities that are available to our students while also acquiring cognitive skills and an appreciation of ethical issues involved in the practice of law and public service more broadly.

The Law Centre Clinic is a full-term program, providing clinical education for 42 students per year. That is over one-third of each year's entering class! In addition, 24 students are enrolled in the Business Law Clinic each year and a further 36 students in the Environmental Law Clinic and the Environmental Law Clinic Intensive Stream each year. Essentially, almost every UVic law student can take at least one clinical course. Our clinical programs are well structured and have clear educational goals, including public legal education. They focus both on teaching and providing direct services to clients. All our clinics are externally funded. The current operating expenses for our clinical programs are over \$900,000 per year.

UVic law students have further opportunities to acquire practical skills such as the Law Co-op program (40 students per year out of a class of 108).²¹ In 2011-12, UVic Law students participated in no fewer than eight moot competitions, providing experiential learning opportunities for at least 34 students. There are also opportunities for skills training in other aspects of the curriculum. Examples include Legal Research and Writing; Law Legislation and Policy; Negotiation; Advocacy; Advanced Legal Research and Writing; Dispute Resolution: Theory and Practice; Mediation and Lawyers; Legal Skills; Legal Profession; and Real Property Transactions. Although these courses do not involve service to live clients, many of them use simulations to teach practical skills and ethical responsibilities. As well, many instructors use problem-based learning techniques that integrate experiential and reflective learning into their courses.

Conclusion

Law schools are at a crossroads in terms of their curriculum and the need to respond to changes in the provision of legal services. This presents an opportunity for law schools to evaluate their curriculum and consider where reforms are necessary. The goal should be to provide effective and meaningful legal education with the aim of providing law graduates with the necessary background and skills to be effective legal professionals capable of working in a variety of settings. A well-rounded legal education should include some combination of liberal education and experiential learning with attention to the ethical values expected of legal professionals. However, there is no agreement on how much of each of these elements of legal education should be incorporated into a law school curriculum. Care must be taken to ensure students receive a balanced legal education that fully integrates critical and analytical skills with applied knowledge and an appreciation of ethical responsibilities, preparing them for a variety of legal careers and enabling them to adapt to

²¹ The Co-op program has an educational component that students must complete before going on work placements.

changes in the law and society.²² Emphasizing one aspect of legal education to the detriment of others would undermine students' ability to be effective and versatile legal professionals and risks delegitimizing contextual approaches to the study of law. Regardless of the view taken on this issue, the three apprenticeships identified in the Carnegie Report are mutually reinforcing and a well-grounded theoretical education is necessary for effective practical learning.²³ As well, law schools should be conscious of the cost involved in experiential learning programs, especially clinics. Establishing these programs with inadequate resources would end up impoverishing students' learning, leaving them much worse off. Law schools should carefully assess their capacities, especially in light of shrinking financial resources, before adopting experiential learning initiatives. Finally, there needs to be a broader understanding of skills necessary to be an effective legal professional, including alternative forms of managing disputes. The non-traditional forms of epistemology in legal education such as clinics and co-op challenge the hegemonic forms of legal education that privilege particular forms of learning in favour of pluralistic epistemologies consistent with post-colonial thinking. This is a turning point in legal education that should be embraced.

²² Martin & Hess, *supra* note 4 at 330.

²³ See Rose Voyvodic, *supra* note 16 at 113-4.