Symbols and Substance in Curricular Reform In the United States and Canada

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Law schools across the United States and Canada are grappling with competing demands on the law school curriculum made by faculty, students, educational accrediting entities, regulators focused on the legal profession, government officials and the public. The traditional focus of legal education -- introducing students to historically-important subject areas through case analysis – has been under attack for decades from a wide range of perspectives. Law schools have responded with a variety of curricular reforms. One approach to curricular reform emphasizes imbedding critical or theoretical perspectives ranging from critical race theory to economic analysis into the curriculum. Another curricular reform effort involves rebalancing the mix of theory, substance, lawyering skills and ethics in the law school program. Yet another reform movement emphasizes globalization and potential changes in the economic underpinnings of the legal profession. This paper will briefly summarize the pressures on legal education, explore different methods of pursuing curricular reform, and address the critical distinctions between symbolic and fundamental reforms.

The pressures on law schools in the U.S. and Canada come from a wide range of stakeholders. Law school faculty members are actively engaged in debates about the content of law school curricula.[1] There have been at least three major streams of curricular reform driven largely by law school faculty members: (1) the introduction of critical or theoretical perspectives ranging from critical race theory to economic analysis; (2) the drive toward greater internationalization/globalization; and (3) the pedagogical shift away from heavy reliance on the traditional Socratic/case method of instruction combined with a single final exam as a method of evaluation. The first two reform movements have affected the range of classes law students are exposed to in the mandatory curriculum and are given access to in the elective curriculum. The first movement focused on a broader range of perspectives and analytical approaches transformed law school curricula from the 1960's into the 1990's.[2] The real or perceived pressures of globalization have driven the expansion of transnational, international, and globalized, cross-border curricular reforms over the past twenty years.[3] The somewhat different, pedagogy-focused reform movement represents an effort to bring developments in educational theory into the law school curriculum.[4]

Law school faculty members have also been deeply engaged in curricular reform efforts that have involved other groups, such as students and members of the legal profession. Students facing

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[1] The *Journal of Legal Education* regularly publishes a wide range of articles and commentaries on legal education authored by law school faculty members. Current and past issues of the journal are available online at http://www.swlaw.edu/jle. See also, Symposium, Legal Knowledge for Our Times: Rethinking Legal Knowledge and Legal Education, 20 Windsor Yearbook of Access to Justice 3-332 (2001).

[2] See, e.g., Nuno Garoupa and Thomas S. Ulen, The Market for Legal Innovation: Law and Economics in Europe and the United States, 59 Ala. L. Rev. 1555 (2008); Carrie Menkel-Meadow, Feminist Legal Theory, Critical Legal Studies, and Legal Education, or "The Fem-Crits Go to Law School," 38 J. Legal Education 61 (1988); Harry Arthurs and the Consultative Group on Research and Education in Law, Law and Learning (commonly known as "the Arthurs Report")) (Ottawa: SSHRC, 1983).

[3] For a sampling of articles assessing these changes see, e.g., Harry W. Arthurs, Law and Learning in an Era of Globalization, 10 German L. J. 629 (2009); Anita Bernstein, On Nourishing the Curriculum with a Transnational Law Lagniappe, 56 J. Legal Education 578 (2006); Simon Chesterman, The Globalisation of Legal Education, 2008 Singapore Journal of Legal Studies 58, available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1132642; Adele Blackett, Globalization and Its Ambiguities: Implications for Law School Curriculum Reform, 37 Columbia J. Transnational L. 57 (1998).

[4] Roy Stuckey, et al., Best Practices for Legal Education: A Vision and a Roadmap, available at: http://www.albanylaw.edu/media/user/celt/best_practicesfull.pdf.

high tuition levels are concerned about whether they will receive knowledge and skills that will allow them to succeed in the legal profession.[5] Major studies led by academics or members of the legal profession periodically challenge whether and how well law schools are preparing their graduates for practice. [6] As a result of these concerns, law schools -- particularly those in the U.S. where articling is not required before practice -- have dramatically expanded the range of courses and opportunities for students to acquire practice-oriented skills.[7]

Changes to accreditation standards are creating new pressures on the law school curriculum. Accrediting bodies in the U.S. and Canada are considering fundamental reforms to the systems determining whether law school graduates will be eligible to seek admission to practice. In the U.S., the focus is on the ABA accreditation standards as graduates from ABA-approved schools are permitted to seek admission in every state.[8] The current approach includes a mixture of standards that have been critiqued as focusing too heavily on "inputs" (faculty, buildings, library collections) instead of outcomes.[9] The current ABA standards do require that law schools "maintain an educational program that prepares . . . students for admission to the bar, and effective and responsible participation in the legal profession"[10] but schools have been given relatively broad latitude to define how best to achieve this objective. There has been substantial controversy about proposed revisions to the standards toward greater evaluation of "outputs", e.g., successful bar admission; the proposed revisions also include requirements that law schools focus more closely on learning outcomes.[11]

The revisions to the accreditation regime in Canada are even more fundamental. Canada's common law schools have operated for many decades without substantial accreditation requirements imposed by the profession.[12] This regulatory scheme was challenged by the convergence of several different forces, including: (1) proposals to create the first new law schools in Canada in decades; (2) claims by foreign law school graduates that they were being required to demonstrate competence in subjects that were not requirements for Canadian law school graduates; and (3) concerns about whether practice admissions requirements could be deemed anti-

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[5] See, e.g., David Segal, *Is Law School a Losing Game?*, N.Y. Times, January 8, 2011, available at: http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all.

[6] William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, Lee S. Shulman, Educating Lawyers: Preparation for the Profession of Law (2007)(commonly known as "the Carnegie Report on Legal Education")(summary available at: http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf); Section of Legal Education and Admissions to the Bar, American Bar Association, Legal Education and Professional Development: An Educational Continuum. Report of The Task Force on Law Schools and the Profession: Narrowing the Gap (July 1992)(the MacCrate Report), available at: http://www.americanbar.org/groups/legal_education/publications/maccrate.html.

[7] A sense of the broad range of curricular changes can be gleaned from periodic surveys of law school curricula in the U.S. See Committee on Curriculum, AALS, Overview of Curricular Innovation Survey, available at: http://www.aals.org/services_curriculum_committee_survey.php (based on 2006 survey, new survey in progress).

[8] Graduates of non-ABA approved schools can seek admission to practice in some states in some circumstances that are beyond the scope of this paper.

[9] Section on Legal Education, American Bar Association, 2010-2011 Standards and Rules of Procedure for Approval of Law Schools, at: http://www.americanbar.org/groups/legal_education/resources/standards.html.

[10] Id. (Section 301(a)).

[11] For detailed information about the revision process and commentaries, see http://apps.americanbar.org/legaled/committees/comstandards.html.

[12] See generally, Federation of Law Societies of Canada, Task Force on the Canadian Common Law Degree, Final Report (2009), available at: http://www.flsc.ca/en/pdf/CommonLawDegreeReport.pdf. For many decades, graduates of Canadian common law schools were eligible to seek admission to practice based on blanket approvals granted by provincial law societies over the decades. The number of law schools remained stable and periodic law school reviews were conducted as an ordinary academic function within universities. The overall quality of law schools and law school graduates remained quite high. Despite occasional debates between law schools and the profession about whether law schools were sufficiently attentive to the demands of practice, there was no ongoing system of monitoring or review of law schools by the profession. The articling and bar admissions requirements imposed by the provincial law societies were deemed sufficient to ensure high levels of professional competence. For more information about Canadian law schools, see materials at the Council of Canadian Law Deans website, available at: http://www.ccld-cdfdc.ca/about.html.

competitive. The Federation of Law Societies, acting on behalf of the provincial law societies, created a new regulatory regime that ties law school accreditation to certification that focuses directly on curricular requirements: (1) a specific, stand-alone ethics course; and (2) specific skills and knowledge competencies.[13] The Federation is now working to finalize the implementation of the new regime; law schools will likely have to begin reforming curricula to comply starting in 2012.

The wide range of movements and forces driving curricular reform in law schools in Canada and the United States might suggest that law school curricula are like weather vanes, easily changed in the breezes of intellectual fashion or stakeholder input. Yet, in a powerful counterpoint, curricular reform has been referred to as a 'graveyard for deans' or as easy to accomplish as 'moving a graveyard'.[14] There are powerful forces that lead curriculum reform efforts to result in reproduction rather than reinvention. Proposals to change law school curricula regularly encounter quite substantial barriers, which ultimately can deeply affect the chances for success of the curricular reform effort. It is important to recognize the significant challenge of change for any law school.[15]

Law schools in the U.S. and Canada have substantial investments in relatively fixed assets. Most law schools are governed to a significant extent by faculty members who are tenured or tenure track. These faculty members were educated on particular topics in a certain ways, creating a powerful set of norms and expectations about what legal education has been and should continue to be. Perhaps more importantly, they arrive in their law professor roles with highly advanced knowledge and skills in some substantive areas but not, typically, in organizational change management or educational theory. For these reasons, curricular reformers often focus on the pivotal role of faculty members in sparking and implementing curricular reform.

As important as faculty members are in driving or resisting change, it is also important to recognize the other constraints on re-imagining, or even just modestly revising, a school's approach to legal education. Law schools occupy buildings that were designed to carry out curricula taught in certain ways to certain-sized groups. The schools are funded within certain constraints, with little flexibility to dramatically modify their sources of revenue or expenses. Many law schools in the U.S. and all law schools in Canada are part of universities, which impose their own curricular guidelines and scheduling rules. Accreditation standards can command the allocation of significant resources and direct substantial aspects of the curriculum. Finally, as critical as members of the legal profession can be about the content of legal education, the profession itself can play a powerful role in discouraging innovation if hiring practices for law school graduates fail to value innovation in legal education. The conservative approach to law school hiring has a rational basis: if the leaders in the profession today were created by the traditional mode of legal education then perhaps that system could reasonably be preferred over a newer, untested approach.

For many law schools, the drive toward curricular reform therefore has been met by the almost equal and opposite forces opposing real change in the content and delivery of legal education. The end result of curricular reform efforts has all too often been similar to the production of new cars. Within the constraints of personnel, infrastructure and funding, it is not surprising the "new models" of legal education often bear a strong resemblance to the previous year's model, perhaps with the addition of some new options and a new nameplate.[16]

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[13] See Federation Report, supra.

[14] See, e.g., Thomas E. Baker, A Compendium of Clever and Amusing Law Review Writing, 51 Drake L. Rev. 105, 128-29 (2002)(citing Wylie H. Davis, That Balky Law Curriculum, 21 J. Legal Educ. 300 (1969)).

[15] For another commentary on this point, see John C. Westart, The Law School Curriculum: The Process of Reform, 1987 Duke L. J. 317.

[16] See, e.g., Anita Bernstein, On Nourishing the Curriculum with a Transnational Law Lagniappe, 56 J. Legal Education 578 (2006).

The results of many reform efforts have proven to be more powerful symbolically than substantively. Symbolic reforms nonetheless serve some very important purposes. First, these reforms are powerful evidence that the system of legal education is engaged with real debates about the content and methods of delivering legal education. Faculty members, deans, members of the profession and others are investing some of the few significant resources over which they have control – intellectual energy and time – on the challenge of curriculum reform. Second, symbolic reform efforts can be important because they are in fact symbolic – they are an important signal to law students, law faculty members, and the profession about the values and goals of legal education. To take but one example, a law school which requires its students to complete a transnational or international course or other related educational experience as a requirement of graduation may not need to reallocate resources to carry out the initiative but is nonetheless sending a powerful message to students about what the school believes about the relevance of international and global perspectives in the practice of law. Third, symbolic reforms can be the first step toward a more fundamental realignment of the curriculum. They serve as a statement of institutional values and a kind of outpost that may be reinforced with the allocation of more resources over time.

Fundamental curricular reform is rare and can be difficult to sustain without substantial and consistent pressure. Faculty members must be deeply involved in the creation of the reform and resources must be obtained and allocated to carry out it out. The curricular reform must be seen to provide benefits to students and those benefits must be valued in the market for law school graduates. My own experience with fundamental curricular reform at UBC has left me impressed with the power of imaginative and dedicated faculty members to transform an educational program.[17] As one of Canada's leading law schools with highly sought-after graduates and yet significant resource constraints, the Faculty had not engaged in a fundamental curriculum review in over twenty-five years when we committed to taking up the challenge. The process was surely not easy, running over three years of internal and external consultations, including broad-based consultations with law firms and alumni. The results were significant, with substantial modifications to the courses in the first year curriculum and upper year required curriculum designed to incorporate greater focus on transnational law, regulation, and ethics, among other things. The Faculty also addressed pedagogy, moving to teaching the entire first year in small sections with writing assignments spread throughout the year. These fundamental reforms required substantial changes to faculty teaching assignments and modes of teaching.

As exciting as these changes have been, the major lesson of the process was that we needed to move toward a more flexible approach to curriculum reform. We have resisted the idea that these fundamental reforms should become fixed features of the curriculum and have instead continued to study and to revise the curriculum in some way virtually every year. Once started, the process of reform can generate its own momentum. This flexible approach to our curriculum will be helpful as we face the opportunities and challenges ahead, ranging from our move into a new, technologically advanced law school building in the summer of 2011 to the demands for curriculum reform created by an entirely new accreditation regime. More fundamental changes are clearly on the horizon.

[17] For information about the process and outcomes of UBC Law's fundamental curricular reforms, see UBC Law Alumni Magazine, Fall 2006, available at http://www.law.ubc.ca/files/pdf/alumni/magazine/Fall_2006_Alumni_Mag.pdf; and http://www.law.ubc.ca/current/jd/curriculum/year1/index.html