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“Valour Rather Than Prudence”: Hard Times and Hard Choices for Canada’s Legal Academy

*Harry Arthurs**

One ought to celebrate the centennial of the University of Saskatchewan’s College of Law by recalling its past successes and predicting its future achievements. However, many of those successes did not come easily, either to Saskatchewan or to other Canadian law faculties, nor can we be sure that the legal academy’s trajectory of progress, once established, will continue indefinitely. In many respects, this might appear to be a golden moment for Canadian legal education and scholarship: there are more law faculties, professors and law students than ever before; extensive and successful experiments in pedagogy and curriculum design have been proliferating across the country; the quality (and diversity) of students entering law schools, and of the faculty welcoming them, has never been higher; and the extent, variety, ambition, and influence of legal scholarship in 2012 could hardly have been imagined a generation or two ago, let alone when the College of Law was founded in 1912. Nonetheless, these are hard times for Canadian law faculties. Their current successes are threatened by an economic crisis that is choking off much-needed resources, by the reassertion of professional control over legal education, and by the revival of legal fundamentalism. I argue that to deflect these threats and to continue to progress, law faculties must be willing to adopt a more aggressive and more valorous stance vis-à-vis their relevant others than they have done in the recent past.

I. THE LAW SCHOOL AND ITS “RELEVANT OTHERS”

In 1923, after a decade-long but relatively low-keyed controversy, the Law Society of Saskatchewan abandoned attempts to educate would-

* University Professor Emeritus and President Emeritus, York University. This essay was first presented as a contribution to the Future of Law Conference in honour of the centenary of the College of Law, University of Saskatchewan. I am grateful to Constance Backhouse and Roderick Macdonald, and to conference participants, for their comments on an earlier draft of this paper. I also acknowledge the able research and editorial assistance of Scott Byers (JD Sask, 2011).

be lawyers and conceded the right of the province's university to establish a law school, to set its curriculum and academic standards, and to determine the credentials of its faculty. The university won the day (according to its president) by exhibiting "prudence rather than valor."¹ Some thirty-five years later, in 1957, after a decade-long controversy in which valour sometimes took precedence over prudence,² Ontario's universities finally prevailed on the Law Society of Upper Canada to follow the lead of Saskatchewan (and most other provinces) by accepting university-based legal education as the only route to professional practice and by conceding the right of law faculties to design their own academic standards and programs.³ Moreover, as in Saskatchewan, but almost half a century later, Ontario's Law Society ceased to operate its own law school.⁴ Then, in the 1970s and 1980s, it gradually abandoned its active surveillance of developments in legal academe and by the end of the century, it allowed its regulatory authority over academic legal education—the provenance and extent of which was unclear—to fall into disuse.⁵

Of course, the profession remained a significant contributor to the shaping of legal education in Saskatchewan, Ontario, and elsewhere. The form and content of articling and/or bar admission programs

¹ Beth Bilson, "'Prudence Rather than Valor': Legal Education in Saskatchewan 1908-23" (1998) 61 Sask L Rev 341.

² C Ian Kyer & Jerome E Bickenbach, *The Fiercest Debate: Cecil A Wright, the Benchers, and Legal Education in Ontario 1923-1957* (Toronto: University of Toronto Press, 1987).

³ I have focused on Saskatchewan because it is legal education in this province we are celebrating, and Ontario, because it is the largest province, because—as a net importer of law graduates—its admission requirements tended to influence the development of law faculties outside Ontario, and because I know it best. However, as the literature reminds us, relations between the profession's governing bodies and university law faculties varied considerably over time and from province to province. See e.g. W Wesley Pue, *Law School: The Story of Legal Education in British Columbia* (Vancouver: University of British Columbia Faculty of Law, 1995) ch 3-5; Peter M Sibenik, "Doorkeepers: Legal Education in the Territories and Alberta, 1885-1928" (1990) 13 Dal LJ 419 at 457-62; John M Law & Roderick J Wood, "A History of the Law Faculty" (1996) 35 Alta L Rev 1 at 8-15; Dale Gibson & Lee Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Winnipeg: Peguis Publishers, 1972); W Wesley Pue, "Common Law Legal Education in Canada's Age of Light, Soap and Water" (1996) 23 Man LJ 654 at 665-74; GA McAllister, "Some Phases of Legal Education in New Brunswick" (1955) 8 UNBLJ 33; John Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979).

⁴ HW Arthurs, "The Affiliation of Osgoode Hall Law School with York University" (1967) 17 UTLJ 194.

⁵ See Harry W Arthurs, "The Tree of Knowledge/The Axe of Power: Gerald Le Dain and the Transformation of Canadian Legal Education" in G Blaine Baker, ed, *Mélanges Gerald Eric Le Dain: Tracings of a Life* (Ottawa: Supreme Court Historical Society, Forthcoming).

established by the governing bodies influenced the courses that law faculties chose to teach and students chose to study.⁶ The profession's citizenship and residency requirements for admission to practice regulated the flow of law students across national and provincial borders.⁷ Furthermore, its "unauthorized practice" and professional conduct regulations effectively defined the prospects for clinical legal education.⁸ But far more important than these occasional regulatory interventions was the profession's informal influence over the culture of legal education: the images of the legal system and the profession that judges and lawyers conveyed in classroom lectures and commencement speeches;⁹ the signals that law firm interviewers sent to students seeking employment; the financial and psychic rewards that "real" lawyers bestowed on (or withheld from) their professorial counterparts;¹⁰ and the reforms in law and the legal system advocated by academics and resisted by lawyers (or occasionally vice versa).

Most importantly, the profession continued to be regarded by the legal academy itself as its "relevant other." The mandate, the very *raison d'être* of law faculties, as it was generally understood, was to produce well-trained recruits for the legal profession. Practitioners were often invited to serve as part-time instructors, and in many faculties taught a significant proportion of the courses. The professional nexus was used by law deans to justify preferred treatment by their university administration on matters ranging from library holdings, to faculty recruitment, to instructional costs. Success in placing their graduates as judicial clerks or having them hired by leading law firms became the metric by which a faculty's reputation would be measured and, in recent years especially, law faculties have made strenuous efforts

⁶ HW Arthurs, "The Political Economy of Canadian Legal Education" (1998) 25 *JL & Soc'y* 14; Annie Rochette & W Wesley Pue, "Back to Basics? University Legal Education and 21st Century Professionalism" (2001) 20 *Windsor YB Access Just* 167.

⁷ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1; Federation of Law Societies Inter-jurisdictional Mobility Task Force, *A Framework for National Mobility* (Ottawa: Federation of Law Societies of Canada, 2002).

⁸ For an account of regulatory tensions surrounding Ontario's first law school clinical program see Frederick H Zemans, "The Dream Is Still Alive: Twenty-Five Years of Parkdale Community Legal Services and the Osgoode Hall Law School Intensive Program in Poverty Law" (1997) 35 *Osgoode Hall LJ* 499 at 512-521. For relative standard provisions defining the practice of law see e.g. *Law Society Act*, RSO 1990, c L-8, s 26.1; *Legal Profession Act, 1990*, SS 1990-91, c L-10.1, ss 30-32; *Legal Profession Act*, RSA 2000, c L-8, ss 106-107; *Legal Profession Act*, RSBC 1998, c 9, s 15.

⁹ Michel Bastarache, "The Role of Academics and Legal Theory in Judicial Decision-Making" (1999) 37 *Alta L Rev* 739; Allan Hutchinson, "The Role of Judges in Legal Theory and The Role of Legal Theorists in Judging (or 'Don't Let the Bastaraches Grind You Down')" (2001) 39 *Alta L Rev* 657.

¹⁰ Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005) at 321-322.

to cultivate their alumni in order to win their goodwill and financial support. In such an environment, it is no wonder that professional influence over legal education has remained dominant—even without formal professional participation in the governance or oversight of the academic enterprise.

However, the profession's influence did not go unchallenged. The practising bar may have been the “relevant other” of the legal academy, but it was the “other” nonetheless. For most law professors, practice was the road not taken. Their graduate school experience enabled them to think about law in ways that practitioners were unlikely to, the rhythm of their lives gave them time to do so, and their own life choices tended to predispose them to challenge, not reproduce or reinforce, conventional legal wisdom.

In the legal academy of the 1940s and 1950s, these challenges might have passed relatively unnoticed. As late as 1960, there were less than a hundred full-time law teachers in all of Canada—too few to make their influence felt.¹¹ However during the 1960s, as universities and their law faculties expanded exponentially, the number of law teachers also grew rapidly—to three or four hundred by the end of the decade. Moreover, this growth occurred at an historic moment when professional, political, academic, and other elites were being discredited, when traditional ideas about law and about education were being challenged, and thus when law faculties were coming to be perceived as sites of contestation and engines of social transformation. In the result, Canadian legal academe at the end of the 1960s was very different both quantitatively and qualitatively from what it had been ten years earlier. Of course, not all law schools changed to the same extent, or in the same way, but it could generally be said that by the 1970s and 1980s most had begun to acknowledge a second “relevant other”—the university—whose influence counterbalanced that of the first.¹²

¹¹ However, even within the very tiny cohort of Canadian law teachers prior to the 1960s, there were individuals whose intellectual interests and connections extended far beyond law. See e.g. Sandra Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Toronto: McClelland and Stewart, 1987); RCB Risk, “The Many Minds of W.P.M. Kennedy” (1998) 48 UTLJ 353. For a general survey of early Canadian legal scholars and scholarship, see RCB Risk, *A History of Canadian Legal Thought: Collected Essays* (Toronto: University of Toronto Press, 2006).

¹² Mission statements contained in student handbooks or on websites provide some indication of how law schools wish themselves to be regarded. For example, Osgoode/York believes its mission is “to contribute to new knowledge about the law and the legal system by being a centre for thoughtful and creative legal scholarship, to provide an outstanding professional and liberal education to our students so that they can assume positions of leadership in the legal profession, among legal academics and in all aspects of public life, and to serve Canadian society and the world in ways that further social justice.” (Osgoode Hall Law School, York University, “About York University and Osgoode Hall Law School”,

The stock-in-trade of the contemporary university is scholarship. Academics are expected not merely to disseminate information through teaching, but to generate and critically evaluate ideas through scholarly research and publication. Universities therefore came to expect that their law faculties would do more than supply the profession with technically competent recruits, and that law professors would engage seriously in original scholarship. Many law professors eagerly embraced this new expectation and began to define themselves as scholars. At first, they focussed on analysing, interpreting, and evaluating legal concepts, processes, and institutions. This filled a considerable gap in Canadian legal scholarship, where as late as the 1970s and 1980s, no standard text or authoritative treatise existed in many fields of law.

Over time, however, legal academics began to produce scholarship that diverged considerably from the intellectual agenda and discursive conventions of the practising bar. This divergence can be explained in several ways. In part it was a belated acknowledgment of the multiple roles played by law as a regulatory, mediative, and tutelary institution in complex and dynamic modern societies; in part it stemmed from a growing conviction that lawyers had historically disserved their traditional clientele by underestimating or misconceiving what they needed to know in order to practice competently; in part it was an attempt to meet the diverse needs of law graduates who were increasingly specializing within private practice or moving out of practice into alternative careers in the public or private sector; in

online: Osgoode Hall Law School and York University <http://www.osgoodepd.ca/about_York_Osgoode.html>. UBC law faculty, which aspires "to be one of the world's great centres for legal education and research" promises to "[p]rovide an exceptional and inspiring legal education that enables students to excel in professional practice and serving society [and to]...[e]ngage in research that produces outstanding scholarship with local, national and global impact...." See University of British Columbia, "UBC Law Strategic Plan", online: University of British Columbia <http://www.law.ubc.ca/strategic_plan/vision.html>. Alberta is committed to "...provide service to the community, to educate prospective lawyers and others seeking a thorough understanding of the law and the legal system, and to promote the acquisition of legal knowledge and the advancement of legal scholarship...." See University of Alberta Faculty of Law, "Law Faculty Council Policy Manual", online: University of Alberta <<http://lawschool.ualberta.ca/students/current/~media/law/facultystaff/administration/documents/LFCPolicyManual-CurrentasofJuly152009.pdf>>. Toronto takes pride in its "core values and traditions of scholarly excellence, societal relevance, institutional leadership and risk-taking." See University of Toronto Faculty of Law, "Brief History of the Law School," online: University of Toronto <<http://www.law.utoronto.ca/about/brief-history>>. Schulich/Dalhousie, somewhat more modestly, offers its students "a solid preparation for the practice of law...and encourages respect for and participation in public life." See Dalhousie University Faculty of Law, online: Dalhousie University <http://dlm.cal.dal.ca/_LAWS.htm>. Saskatchewan's College of Law apparently does not publish a mission statement.

part it was fuelled by the understandable desire of legal scholars to benefit from insights developed in adjacent disciplines; and in part it flowed naturally from the fact that academics had consciously chosen not to practice, precisely so that they would be free to engage with law and legal ideas in unconventional ways.

Whatever the explanation, the legal academy now had two “relevant others” whose demands and expectations differed considerably. This in turn had a number of important consequences. First, debates ensued over the allocation of the limited resources available to law faculties. For instance, time spent on research could not be spent on teaching; time spent on instruction in “the basics” could not be spent on developing students’ broader understanding of what law is and does; and time spent producing systemic critique and interdisciplinary scholarship could not be spent on the publication of treatises and case-notes. Second, these debates affected not only resource allocation—teaching loads and library budgets, for example—but whom law faculties hired and, to an extent, whom they attracted and admitted as students. Where a law school chose (or was forced) to position itself in relation to its two “relevant others,” how it chose to allocate resources, determined how it would be perceived by those others, as well as by potential student and faculty recruits. Third, since perception did not always correspond to reality, and reality did not always conform to aspiration, law schools began to consciously adopt distinctive personalities by developing new mission statements, admissions procedures, courses and curricula, pedagogic strategies, research institutes, programs of outreach to the bar and the community, and joint degree and graduate programs. Finally, these developments required that law schools engage more intimately and extensively with the university and the profession—on both of which they depended for resources, influence, and legitimation. But when these were provided by one of the two “relevant others,” they revealed the schizophrenic character of the legal academy: they were often proffered for different reasons and on different terms, directed to different projects, and designed to advance different visions of legal scholarship and education.

I have both overstated and understated the tension between the two major influences playing on the legal academy. On the one hand, most law schools managed to maintain positive relationships with both the profession and the university, to achieve acceptable compromises in resource allocation, to cultivate multiple *personae*, and to serve multiple interests. So too did many law teachers, though some outliers felt isolated and resentful. As a result, it can fairly be said that by the twenty-first century, Canadian law faculties had become more scholarly than ever and more effective in training their graduates for the varied and volatile careers that awaited them. On

the other hand, to some extent they maintained their multiple personalities by avoiding hard choices. Alas, hard times make hard choices unavoidable—and these are hard times for Canadian universities and lawyers and, consequently, for the legal academy.

II. HARD TIMES FOR THE LEGAL ACADEMY

A. THE ECONOMY

The current world-wide recession, which shows little sign of abating, is having an obvious effect on the legal academy's two "relevant others." Universities are affected by cutbacks in government grants; money for research is in short supply and competition for what remains is distorted by policies that prioritize funding for "practical" subject areas or projects that attract matching funds from private sources; costs of instruction will ultimately have to be contained by expanding class sizes and/or curtailing labour-intensive pedagogies; faculty salaries and working conditions are likely to deteriorate; and students and their families, despite enhanced bursary and scholarship programs, will be increasingly hard-pressed to pay rising tuition costs. The legal profession is also in difficulty. Unfavourable business conditions always affect lawyers, whether they serve middle and working class clients or governments and large businesses. The "hollowing out" of the Canadian economy—with fewer and fewer head offices—has led to the restructuring of its legal profession, as fewer large firms compete for a shrinking number of corporate clients. Competition from new sources—ranging from self-help online services to foreign law firms to paralegals to in-house law departments to offshore "back of house" providers of routine legal services—threatens the long-term economic prospects of many conventional legal practices. At the same time, the number of applicants for admission to Canada's legal professions has been growing steadily, including a significant cohort of graduates of foreign law schools, members of foreign law firms, and soon, graduates from newly-established law faculties in Ontario and British Columbia. Law faculties will feel the effects of these developments in various ways. Some of the effects are directly related to financial factors. As rising numbers of law graduates are unable to find articling positions or entry-level professional jobs, students will be less and less likely to enrol in legal academic programs as these programs will be seen to be professionally negotiable. In addition, as the economic prospects of the bar deteriorate, lawyers will be less and less willing or able to contribute the funds needed to replace dwindling government grants.

But more importantly, the economic crisis is likely to influence the intellectual ethos of legal education and scholarship. From the 1940s through the 1970s, Canada's buoyant economy supported the expansion of the welfare state and engendered an optimistic,

reformist view of law's potential to advance social justice. But "the economy is the secret police of our desires."¹³ In times of economic crisis especially, governments of all political stripes tend to focus on cutting expenditures rather than launching costly projects of social engineering. Recurring crises over the past three or four decades have not only led to significant reductions in law reform budgets, in funding for legal aid clinics, and in support for advocacy groups—all of which inspired both legal scholarship and student career choices—but have also helped to "normalize" a minimalist view of state action and to entrench pessimism, even cynicism, about the potential of law as a strategy for social reform. On the one hand, the advent of the *Charter*¹⁴ may to some extent have masked or retarded the onset of this new "neo-liberal normal." On the other hand, perhaps the onset of the "neo-liberal normal" explains why so many social movements *faut de mieux* turned to the *Charter* to advance their cause. However, I would argue, even in the *Charter* era expectations of what law should and can do to improve the lot of ordinary citizens have diminished considerably. And to make a more general point: the economy to a significant extent determines the political content of what at any given time legal scholars write, law students learn, lawyers assume, judges pronounce, and legislators decree about the legal system. Hard times in the economy are therefore likely to provoke painful revision of the progressive view of law in which the intellectual DNA of the Canadian legal academy has long been secreted.¹⁵

B. PROFESSIONAL CONTROL OVER LEGAL EDUCATION

Predictably, "hard times" have triggered not only economic but also political difficulties for law faculties. In particular, they have revived a long-dormant conflict over the profession's control of legal education. In Saskatchewan in 1923 and in Ontario in 1957, to cite two examples, this conflict was resolved by the development of formal, quasi-constitutional understandings about the respective responsibilities and powers of law faculties and law societies. But even more important than such formal arrangements was a *détente* that developed in the decades following 1960 between the academy and the profession. Apart from occasional intemperate outbursts of *o tempora*,

¹³ Graffiti observed in Swiss Cottage, London, in 1985.

¹⁴ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

¹⁵ Harry Arthurs, "The State We're In: Legal Education in Canada's New Political Economy" (2001) 20 Windsor YB Access Just 35; Susan Boyd, "Corporatism and Legal Education in Canada" (2005) 14 Soc & Leg Stud 287; Theresa Shanahan, "Creeping Capitalism and Academic Culture at a Canadian Law School" (2008) 26 Windsor YB Access Just 121; Margaret Thornton, "The Law School, the Market and the New Knowledge Economy" (2007) 17 Legal Educ Rev 1.

o mores at bar association and law society meetings, the profession seldom contested the academy's primacy in the design and delivery of legal education.¹⁶ Therefore, the academy had no reason to challenge the profession's policies relating to admission to practice.

This arrangement between the legal profession and the legal academy was mutually beneficial. The law schools helped the profession in many ways: LLB/JD programs produced numbers of well-trained graduates with the capacity to adapt to the diverse new career profiles of the profession; graduate and continuing education programs allowed practitioners to maintain or enhance their intellectual capital; legal scholars produced indispensable standard reference works and useful research for projects of law reform; and equitable law school admissions policies slowly modified the profession's once indefensible demographics. And the profession in turn helped the law schools: law firms sponsored academic prizes, bursaries, internships, lecture series, professorships, and new facilities; and practitioners taught courses and gave guest lectures. More importantly, though, the profession legitimated the whole project of academic law by accepting law professors in senior government positions, on the bench, and in professional organizations, by consulting them on complex files and citing their publications, and by using student grades and professorial recommendations as the primary metric when hiring articling students and junior associates.

However, this mutually beneficial *détente* ended abruptly in 2009, when the Federation of Law Societies of Canada (FLSC) and its member bodies adopted the recommendations of its Task Force on the Canadian Common Law Degree.¹⁷ The Task Force was originally mandated to address three contentious issues: the admission to practice of law graduates from abroad; the establishment of new Canadian law schools; and the risk that the profession's exercise of its power to control admission to practice might violate the Competition Act. However, the Task Force chose instead to focus primarily on the curricula of existing Canadian law schools. This was a political event of great significance. For the first time in the recent history of Canadian legal education, the profession's governing bodies were formally asserting their claim to be entitled to tell law schools what they must teach, to whom, and to some extent, how.

¹⁶ There was one notorious exception: see Robert Bureau & Carol Jobin, "Les Sciences Juridiques à L'Université du Québec à Montréal: Fifteen Years Later" (1987) 11 Dalhousie LJ 295.

¹⁷ Task Force on the Canadian Common Law Degree, *Final Report* (Ottawa: Federation of Law Societies of Canada, October 2009), online: Federation of Law Societies of Canada <[http://www.flsc.ca/_documents/Common-Law-Degree-Report-C\(1\).pdf](http://www.flsc.ca/_documents/Common-Law-Degree-Report-C(1).pdf)> [Task Force]. I provide a detailed account of these developments in Arthurs, *supra* note 5.

Whether law societies, with their limited statutory powers, have such a right is dubious. Also dubious is their ability to disregard university governance statutes that assign university senates and boards the right to determine law school curricula, admission standards, instructional methods, and resource allocation. But whatever the legal rights and wrongs, the Federation should clearly not have established a task force unilaterally, nor should the provincial law societies have adopted its recommendations without formally consulting law faculties and university governing bodies. By acting unilaterally, the Federation and the law societies effectively repudiated the “unwritten constitution” that had governed political relations between law schools and the profession’s governing bodies for the past fifty years.

Under the former dispensation, as the Task Force report itself acknowledged, law societies pretended to regulate, and law faculties pretended to comply.¹⁸ No longer. Law schools that do not comply with the new requirements will not be “approved” and their graduates will not qualify for automatic entry to the bar admission process in any province. To ensure compliance, each law dean must now certify that his or her faculty conforms to the new requirements and describe in detail how the faculty’s regulations and programs ensure that every graduating student has been instructed in accordance with those requirements. The implications for legal education and scholarship will be far-reaching. Law schools that do not already conform to the requirements must either acquire new resources or redeploy existing resources in order to do so—a difficult decision indeed in hard times. The imposition of common curriculum and admissions standards will affect the ability of law faculties to adopt or maintain equity admissions programs, specialized curriculum streams or unconventional pedagogic strategies. Worse yet, the requirement for annual reapproval will exercise a chilling effect on future innovation. As time goes on, the list of required courses will almost certainly grow; surveillance to ensure compliance will almost certainly become more intrusive; and the willingness or ability of universities and law faculties to resist will be greatly weakened as their initial acquiescence comes to be construed as an acknowledgement that this is the way things are, always have been, and must therefore always be.

Not only the *modus operandi* of the Federation’s Task Force, but also the wording of its report make it clear that all of these consequences were clearly contemplated. So too does the refusal of the Task Force to even mention, let alone recommend, a proposal that it should adopt a set of constitutional principles to protect fundamental academic values, ensure academic participation in the implementation and

¹⁸ *Ibid* at 16-18.

revision of the new standards and acknowledge the effect of the new dispensation on resource allocation within law faculties.¹⁹ In short, the political dynamic of Canadian legal education has been transformed by the bar's naked assertion of power and by the decision of the legal academy to opt for prudence rather than valour.²⁰

C. THE RETURN OF LEGAL FUNDAMENTALISM

I have not completed my catalogue of the hard times confronting our law schools. Perhaps the most serious of all is the return of what might be called "legal fundamentalism."

For a century or more, legal scholars (and some thoughtful practitioners and judges) have one way or another insisted upon the indeterminacy of legal decisions, the historical contingency of legal institutions and processes, and the cultural variability of what people understand "law" to be. There is, of course, no manifesto to which all Canadian law faculties or professors members subscribe. The only attempt to write one, in the early 1980s, provoked more controversy than concurrence.²¹ Nonetheless, I maintain, in the 1960s the legal academy began tentatively to explore a series of what I will describe (for want of a better descriptor) as "anti-fundamentalist" propositions. The legal academy embraced these propositions with some enthusiasm in the 1970s and 1980s, and by the 1990s it had begun to translate them into discursive conventions (what we teach and write and how) and institutional practices (how we organize collective activity and present ourselves to our various publics). Today, while anti-fundamentalism is far from universal, it finds at least tacit expression in the mission statements, curriculum reports and academic programs of most law faculties and in the CVs and course syllabi of many individual law professors. Its underlying assumptions, and their implications, can be captured in a series of syllogisms:

- *Substantive legal knowledge is inherently indeterminate, has a short shelf life, and is used (if at all) in unpredictable combinations by lawyers in various kinds of practices.* The study of particular

¹⁹ See Annie Rochette, "Introduction to the Special Issue on the Federation of Law Societies Task Force on the Approved Law Degree" (2009) 3 Canadian Legal Education Annual Review 135.

²⁰ In addition to the two organizations of legal scholars in note 19, *supra*, several university presidents, law deans and law faculty councils did register strong objections when the Task Force circulated its draft proposals. However, no law faculty or university has so far challenged the new regime by declaring its intention not to comply or by seeking legal recourse against it.

²¹ Consultative Group on Research and Education in Law, *Law and Learning*, (Ottawa: Social Sciences and Humanities Research Council, 1983). I was the principal author of this report.

subjects should therefore be regarded not so much as an end in itself but rather as a vehicle for teaching law students how to analyze and resolve legal problems.

- *No convincing argument or evidence demonstrates that any particular area of substantive law is indispensable for either students' intellectual formation or lawyers' professional functions.* Law schools should therefore construct their curricula so as to afford students an ample, arguably unlimited, choice of courses and seminars, whose content and pedagogic strategy should be largely at the instructors' discretion.
- *Many lawyers spend much of their time performing routine procedures that can be (and are) also performed by para-professionals and support staff with no formal knowledge of the underlying legal rules or principles.* Law schools believe that, while students should be made aware of these routine procedures in a general sense, training in their use is best undertaken elsewhere.
- *Successful resolution of most problems encountered in legal practice requires not only knowledge of substantive and adjectival law but also an ability to negotiate the practicalities of the legal system, to engage with the real-life circumstances of the parties and to take account of the larger social and economic circumstances within which their interests are imbricated.* Law students should therefore learn not only to locate problems within their legal-systemic and larger societal contexts, but also to work effectively with non-legal actors to resolve them.
- *Law graduates not only provide conventional legal services to clients, but also occupy leadership and technocratic roles in business, government, politics and social movements.* Law teachers should therefore expose their students—many of whom will occupy these roles—to insights from adjacent disciplines so that they will better comprehend how law shapes and is shaped by social and economic forces and cultural practices.
- *Law and legal practice have become increasingly complex, and are changing at an increasing rate of speed.* Law schools should therefore educate law students to adapt to complexity and change, and to embrace and promote change that is in the public interest. Legal scholars should assist the profession and the public by identifying the need for change, offering insights into the best way to achieve it, documenting its effects, and critically evaluating its consequences.
- *Academics, lawyers working on public policy issues, as well as many specialist practitioners require greater breadth, depth and variety of knowledge than is provided in basic JD courses.* Law faculties should therefore offer enriched or advanced JD programs, graduate programs, and programs of continuing education.

To acknowledge once again the limits of this description, while most Canadian law faculties and individual professors subscribe to these anti-fundamentalist propositions, they do so with varying degrees of conviction, and actually act on their implications with varying degrees of consistency. Still, it would be difficult to find a single law faculty that opposes them on grounds of principle, or for that matter, many individual law teachers who do so.²²

By contrast, legal fundamentalists tend to believe that “law”—as a field of study, as a profession, as a social institution—has an essential meaning, a core content, and distinctive institutional characteristics that may change slowly over time but at any given moment can be authoritatively specified. The criteria for specification and the source of the authority to specify are not, for fundamentalists, open to question: they are the constitutional and institutional arrangements found on every conventional map or model of law. Compelling evidence that constitutions change meaning and institutions change functions over time seems not to disturb their certainty; their own lived experience that statutes, regulations, judicial decisions, and practical professional knowledge all have a limited shelf-life seems not to alter their insistence on law's immutability. Fundamentalists also believe that legal rules can and do shape human and corporate conduct. However, they decline to acknowledge that the rules themselves are often ambiguous, that they are interpreted and applied by themselves and other human agents, that those agents are susceptible to cultural, social, and economic influences, and that legal rules are often circumnavigated or disregarded when they run counter to the felt necessities of the time or the interests of powerful clients. Finally, fundamentalists are dismissive of the idea that law can be produced other than by formal institutions of the state, in accordance with constitutionally mandated procedures. But they remain oblivious to the undoubted power of non-state normative systems that operate within, beyond and often in opposition to state law—including normative systems they themselves construct as public officials, as architects of the structures of private governance, and as shapers of quotidian legal routines.

The report of the FLSC task force exemplifies this fundamentalist approach. All law graduates are expected to demonstrate: (a) three “skills competencies” (in problem solving, legal research, and oral and written legal communication);²³ (b) “an awareness and understanding”

²² But there are some: their contributions range from sophisticated scholarship to vulgar rants. See, respectively, Ernest J Weinrib, “Can Law Survive Legal Education?” (2007) 60 *Vanderbilt LJ* 401; and Robert Martin, “University Legal Education is Corrupt Beyond Repair” (2009) 40:4 *Interchange* 437.

²³ Task Force, *supra* note 18 at Recommendation 4B 1.

of legal ethics and professionalism (in a course dedicated to that subject);²⁴ and (c) a “general understanding of the foundations of law”²⁵ (principles of common law and equity, statutory construction and analysis, and the administration of justice), “of the core principles of public law”²⁶ (constitutional law, including the *Charter* and the rights of Aboriginal peoples; criminal law; and administrative law) and “of the foundational legal principles that apply to private relationships” (contracts, torts, property, and “legal and fiduciary concepts in commercial relationships”).²⁷

I identify this approach as “fundamentalist” because the Task Force treats its selection of these particular “competencies” and “understandings” as *res judicata*, requiring no further explanation than the fact that eminent and experienced lawyers have signed their names to the report. But its selection is clearly both over- and under-inclusive. For example, numeracy, inter-personal skills, and the capacity to organize information are “competencies” almost all lawyers must deploy, but law students will not be obliged to acquire them. Another example: the “foundations of law” mysteriously do not appear to include legal theory, legal history, or the sociology of law. And one more example: students’ “awareness” of “ethics and professionalism” need not extend to the governance of the profession or to the economic and social forces that tempt or compel its members to transgress the rules of professional conduct. Worse yet, no theoretical or practical rationale is provided for designating certain substantive subjects as required and others as not. The Task Force does not claim that most lawyers actually use the designated fields of substantive knowledge in their practices; nor could it: almost no one practices in all of the fields mentioned, very few practice in some of them (such as criminal or constitutional law), and a great many who practice in specialized fields require knowledge of substantive subjects other than those specified (such as tax, employment, or intellectual property law). It does not assert that lawyers must understand the subjects identified because it will enable them to adapt to the changes in law that will inevitably occur during their careers. For example, no mention is made in the Task Force report of international, comparative, or transnational law, which are likely to become increasingly important given the globalization of Canada’s economy (nor, parenthetically, does the Task Force believe that “a general understanding of the core legal concepts applicable to the practice of law in Canada”²⁸ should extend to the concepts of civil

²⁴ *Ibid* at Recommendation 4B 2.

²⁵ *Ibid* at Recommendation 4B 3.1.

²⁶ *Ibid* at Recommendation 4B 3.2.

²⁷ *Ibid* at Recommendation 4B 3.3.

²⁸ *Ibid* at Recommendation 4B 3.

law). Nor does the Task Force justify its selection on the ground that certain fields of substantive instruction have been given priority on the basis of the public good or general welfare: for example, “legal and fiduciary concepts in commercial relationships”²⁹ are required, but similar concepts in family, professional or governmental relationships are ignored.

In developing its list of requirements, then, the Task Force report acknowledges the relevance of neither theory nor empirical evidence. It therefore ignores the extent and rapidity of social, cultural, political, and economic change which shortens the shelf life of much substantive law and requires ongoing revision of the institutions and processes through which law works. It ignores technology that is changing access to legal information and the processing of legal transactions and, therefore, the course of legal routines, the cost structure of legal practices, the clientele that lawyers serve, and (for all of these reasons) the competencies and substantive knowledge they must possess in the future. It ignores the marked functional differentiation of roles within the legal profession that requires specialists to narrow but deepen their legal knowledge and general practitioners to broaden theirs while embedding it in standard forms and structured routines whose deployment does not entail costs that will price them out of the markets they serve.

In short, by declining to look at evidence of how lawyers used to practice, how they practice today, or how they are likely to practice tomorrow, the Task Force has rejected evolution and, instead, embraced the juridical equivalent of intelligent design. By prescribing “competencies” and “understandings” to be dispensed by every law school and acquired by every graduate, the Task Force has relied, selectively as fundamentalists do, on text and exegesis to impose its beliefs on non-believers and to stop the inexorable process of change that is inherent in any community that generates and disseminates ideas. By using coercive methods to ensure that new lawyers possess stipulated knowledge, skills, and beliefs, without holding existing practitioners to the same standard, the Task Force exhibits a degree of hypocrisy not unknown in fundamentalist circles. Finally, by claiming the right to insist that law faculties design their programs and allocate their resources in accordance with the new requirements, regardless of their governing statutes, the Task Force metaphorically ignores the separation of church and state—of the profession and the academy—as fundamentalists are wont to do.

Of course, the Federation of Law Societies is not alone in its commitment to legal fundamentalism. On the contrary, it seems to be following the lead of its American counterparts, which in recent

²⁹ *Ibid* at Recommendation 4B 3.3.

years have developed an aggressive “competencies”-based strategy to influence the content of law school curricula.³⁰ If the U.S. experience is a guide to future developments in Canada, we can expect to see two further developments.

The first development is the alignment of the legal academy into pro- and anti-fundamentalist camps. In very general terms, non-elite law schools in the United States have taken to disparaging their elite counterparts for failing to equip graduates for the practice of law, for offering too many courses and seminars that (in their view) lack professional salience and exist only to indulge the specialized scholarly interests of the professoriate, and for spending an undue proportion of their ample resources on research. To some extent, elite schools have responded not by altering their curricula or abandoning their scholarly priorities but by enriching the student experience in various ways. However, the non-elite schools appear to have developed a close working alliance with the practising bar with a view to encouraging state bar associations to adopt national admissions standards similar to those promoted by the FLSC. As a likely by-product of such a development, many law schools will feel obliged to “teach to the test,” to ensure that their curricula cover the subjects and deliver the competencies specified in the national standards. Only elite schools whose degrees demonstrably enhance the job prospects of their graduates and their ultimate access to prestige, wealth, and power will be able to resist this tendency. Further, because they will be relatively impervious to developments elsewhere, elite schools are unlikely to expend much effort in resisting fundamentalism.

While the elite/non-elite division amongst Canadian law schools is much less sharp than in the United States, it is easy to imagine that some law schools will tilt toward the fundamentalist position. Start-up law schools seeking approval under the Federation’s guidelines, schools attempting to differentiate themselves from more prestigious regional rivals, schools that depend heavily on support from their local bar and community, schools that cannot afford—or do not care—to invest heavily in research: any of these may be tempted to define their mission and advertise their wares as training in lawyerly “fundamentals” that will best equip graduates for professional practice.

A second likely development is that students themselves will pressure law schools to adopt fundamentalist values and programs. In the United States, this pressure has taken the form of several class actions brought against lower-tier law schools by their disgruntled

³⁰ For a synopsis of US reports advocating greater emphasis on the acquisition of competencies, see Joint NOBC/APRL Committee on Competency, *Final Report* (2010), online: National Organization of Bar Counsel <<http://www.nobc.org/uploadedFiles/Announcements/Final%20Report.doc>>.

former students alleging that they were induced to study law by false promises that they would have excellent prospects of professional employment after graduation.³¹ While such lawsuits have not so far succeeded in the United States, and are not likely to in Canada, students have long used more conventional tactics to force law schools to concentrate on what students (like the FRSC task force) describe as “fundamentals”—“competencies” on the one hand, and “core” subjects on the other. Students, for example, may “vote with their feet” (and their fees) by seeking admission to the law schools they perceive to be most closely aligned with the profession’s vision of legal education. If enrolled elsewhere, they may expend disproportionate amounts of their time and energy on courses that carry the profession’s *imprimatur*. When they select from the menu of optional courses, they may shy away from those, like legal history and philosophy, to which the profession gives short shrift. When they evaluate their instructors, or provide input to law school appointment or promotion committees, they may disfavour professors who do not teach required courses or purvey the “core” competencies. To the extent that student views directly or indirectly influence resource allocation within the law school, they may cause resources to be shifted from research, graduate studies, and “esoteric” seminars to the teaching of “fundamentals”, and to career counselling and other student support services. Indeed, some argue that these fundamentalist views are not only fostered by the profession but are also in fact deeply embedded in the law student culture.³²

III. VALOUR RATHER THAN PRUDENCE: PROTECTING THE INTEGRITY OF THE LEGAL ACADEMY

In this concluding section of my essay, I propose a series of responses to the three challenges to Canadian legal education that I have identified. Because of the magnitude of these challenges and their inter-related and ramifying effects, I contend that law faculties and the professoriate will have to adopt a somewhat less prudent (not to say passive) stance than they have in recent times and reassert the bolder, more valorous positions that enabled them to make great strides in the last three or four decades of the twentieth century.

³¹ See Kyle McEntee & Patrick Lynch, “Way Forward: Transparency at American Law Schools” (2012) 32 Pace L Rev 1 at 1-5; Patrick Lee, “Law Grads Sue Over Tuition”, *The Wall Street Journal* (11 August 2011) online: <<http://online.wsj.com>> search: “Law Grads Sue Over Tuition,” select: “Advanced Search,” select: “4 Years”; Peter Lattman, “9 Graduates Lose Case Against New York Law School,” *The New York Times* (22 March 2012) online: The New York Times Company <<http://dealbook.nytimes.com/2012/03/22/9-graduates-lose-case-against-new-york-law-school>>.

³² Susan Sturm & Lani Guinier, “The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity” (2006) 60 Vand L Rev 515.

A. THE ECONOMY

Law schools have limited ability to either absorb or avoid the reductions in government funding that over the long term will adversely affect their ability to introduce new programs, experiment with new pedagogic approaches, and intensify their research activities. They cannot ask students to pay more because their economic prospects are declining; they cannot appeal to traditional donors, such as their alumni, many of whom are also feeling the effects of the prolonged recession; and they can hardly expect universities to shift resources from other harder-pressed faculties to law, which in most institutions is relatively generously resourced. They therefore face two choices, both of which they should have the courage to resist.

The first choice is to become more aggressively entrepreneurial: to auction off their reputations and facilities; accept funds from any source, no matter how inconsistent with the reformist inclinations or intellectual priorities of its faculty members; and to move in the direction of the "corporate university."³³ The second choice is to opt for asceticism: to abandon intensive but expensive forms of pedagogy in favour of relatively cheap set-piece classroom lectures; to hire more part-time practitioner-lecturers in order to save on full-time professorial salaries; to turn from grant-supported empirical and interdisciplinary scholarship to more traditional forms of scholarship that can be performed inexpensively online or in the law library; and to abandon international partnerships and participation in scholarly conferences, in order to save travel costs.

How then to square the circle of rising costs and falling revenues? Some increase in entrepreneurship and fundraising seems inevitable; so too does the introduction of some element of restraint in professorial salaries; so too does some form of "graduate tax" whereby alumni who earn large salaries in practice volunteer (or are required by law) to repay some significant part of the cost of the education that made their success possible. But most of all, law faculties must learn to make pragmatic but honourable compromises between entrepreneurship and asceticism.

B. PROFESSIONAL CONTROL

The assertion of professional power, in the form of new requirements for "approval" of law faculties, represents perhaps the most far-reaching threat to legal education and scholarship. However, it also represents the threat that, in a functional sense, is easiest to counter. Law schools can simply say "no" to law societies. Faculties can design curricula in accordance with their best academic judgment, not the

³³ Margaret Thornton, *Privatising the Public University: The Case of Law* (Oxford: Routledge, 2012) at 16.

profession's new requirements. Deans can decline to submit annual statements attesting to their faculty's compliance. However, while there are principled, practical and (I believe) legal reasons for adopting this bold stance, it is a high risk strategy. If faculties and deans "say no", their law schools will no longer be approved; and if they are no longer approved, students will be less likely to apply to or enrol in them.³⁴ On the other hand, law societies cannot simply refuse admission to graduates from law faculties that are not approved. To the contrary: they will have to find a way to test those graduates on an individual basis, rather than extending to their degrees the autonomic recognition that is extended to graduates of approved faculties. This, I suspect, is beyond the capacity of most law societies.

Finally, by "saying no" law deans and faculties would force governments to mediate an unpleasant (and unnecessary) dispute between universities and law societies, both of which are ultimately creatures of provincial legislation. Any one of a number of approaches would resolve this conflict, but the most obvious would be to ensure that the requirements for admission to practice are determined bilaterally by the bar and the academy, rather than unilaterally by the former. This, after all, is how similar disputes were resolved in Saskatchewan in the 1920s,³⁵ Ontario in the 1950s,³⁶ in the United States,³⁷ and in some other professions such as medicine and architecture (but not engineering).³⁸ Whatever form new, bilateral

³⁴ Ironically, despite the fact that the University of Toronto's faculty of law was not "approved" from 1949 to 1957, a number of highly qualified students opted to attend it, rather than the Law Society's own Osgoode Hall Law School, although doing so meant that their legal education would be longer by one year.

³⁵ Bilson, *supra* note 1.

³⁶ Kyer & Bickenbach, *supra* note 2.

³⁷ Under Title 34, Chapter VI, §602 of the Code of Federal Regulations, the Council and the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar are recognized by the United States Department of Education (DOE) as the accrediting agency for programs that lead to the JD degree. In this function, the Council and the Section are separate and independent from the ABA, as required by DOE regulations. However, up to 10 of the 21 members of the agency are law school representatives: American Bar Association Section of Legal Education and Admission to the Bar, *The Law School Accreditation Process* (Chicago: American Bar Association, 2012) at 3, online: American Bar Association <http://www.abanow.org/wordpress/wp-content/files_flutter/1307552148ABAlawschacredproc.pdf>.

³⁸ Canadian medical and architectural faculties are accredited by committees established jointly by their respective professional associations and associations of university faculties in those disciplines. For medical accreditation see "Committee on Accreditation of Canadian Medical Schools," online: The Association of Faculties of Medicine of Canada <<http://www.afmc.ca/accreditation-cacms-e.php>>; for architectural accreditation see <http://cacb.ca/index.cfm?Vair=sections&Id=7194&M=1355&Repertoire_No=660386109>. For a comprehensive list of accrediting bodies in Canada see <<http://www.aucc.ca/canadian-universities/quality-assurance/professional-program-accreditation>>.

institutional arrangements might take, decisions about how lawyers should be qualified for practice must be understood to involve extensive, principled and evidence-based discussions of what they need to know, how best to ensure that they initially acquire and frequently update that knowledge, and who ought to bear functional and fiscal responsibility for implementing various aspects of a proper scheme of lawyer accreditation. Insisting on such reasonable arrangements as a condition of participation in the law societies' new "approval" regime takes more courage than most law faculties exhibited when they failed to resist the bar's recent assertion of power.

C. LEGAL FUNDAMENTALISM

If anti-fundamentalism is under attack, the most prudent defence might be to proffer evidence that legal rules and legal reasoning still dominate the discourse in the classrooms of most law schools, that the dispensing and acquisition of professional competencies remains an important goal of most law teachers and students, and that doctrinal scholarship continues to represent a significant proportion of the scholarship published in our academic journals. Such evidence is not hard to come by, but this placatory defence constitutes an implicit repudiation of the ideals and ambitions that Canada's legal academy has embraced for half a century or more. Valour—I contend—is the better approach.

Even a modestly brave anti-fundamentalist might make the point that law schools do not exist solely to train future practitioners, but that they also have an obligation to critique the legal system, to contribute to a general understanding of how it works and if possible, to improve it. These important contributions require law professors to acquire a range of legal-intellectual competencies and to develop and disseminate a range of socio-legal analyses that differ considerably from those associated with professional practice. Moreover, because many law graduates do not enter private practice, but are employed to design, implement, influence, or frustrate public policy, there is a strong argument for ensuring that law schools properly prepare them for their future, non-traditional legal careers. Indeed, because many conventional practitioners also engage in similar activities—as advisors to business, government, or social movements, or in their own right as advocates, elected officials, or judges—there is an equally strong argument for law schools to expose all students to these additional perspectives.

But a truly valorous anti-fundamentalist would make quite a different case. Legal professionals, she or he might say, know less than they think they do about what competencies and knowledge are actually deployed in practice today. Moreover, they know next to

nothing about how legal practice will change over the forty or so years during which today's law graduates will have to use what they learn in law school. A legal education that sought only to replicate the skill set and knowledge base of today's lawyers would therefore look very different from the fundamentalist version mandated by the Federation of Law Societies, and sought by many students. A legal education that aimed to equip today's graduates for the turbulent economy and society in which they will spend their professional careers would look more different still.

Thus, the best, most effective, and constructive response to fundamentalism is for legal academics to do what they do best: to understand as completely as they can the present nature of legal professionalism, the forces that have shaped and are inexorably changing it, the "core knowledge" and "competencies" that will enable law graduates to function effectively in the future, and the intellectual perspectives that will enable society to shape law to its needs or (depending on one's inclinations) to allow law to shape society so as to ensure proper respect for social justice, personal autonomy, the environment, efficient markets, or any combination thereof, should conflict arise.

IV. CONCLUSION

Today especially, because of and in spite of the hard times, law faculties must engage in robust dialogue with their relevant others—especially the legal profession whose recent re-assertion of power, and turn to fundamentalism, represent existential threats to legal education as we have come to know it. In addition, dialogue must be equally robust within the academy itself. The very fact that four or five decades of progressive legal education has produced a generation of leading lawyers who are hostile or indifferent to the institutions that educated them must give the academy pause. So too must the continuing failure of law faculties to convince their students that the education offered to them is in their best interests not only as citizens but as future lawyers. Finally, robust dialogue is necessary within the legal academy because it is the life force of any intellectual community. Contestation over what I have called fundamentalism should not end with a winner and a loser. It should be ongoing or, better yet, should evolve into a broader and deeper debate over law, the legal system and legal professionalism. A culture in which challenge and response are a way of life represents the most promising environment for ensuring intellectual excellence, passionate pedagogy, and an enhanced awareness by the academy of its responsibilities to the profession, to the university, to its students, and to society at large. Such an environment, as it happens, is also the best one in which to grow future lawyers.