

Legal Scholarship and Legal Education

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Abstract

Legal scholarship must be related to legal education, so that teaching does not reflect only one aspect of legal training, whether it be black-letter law, clinical training, or feeble attempts to graft on bits of other disciplines. Instead, students must be exposed to a true synthesis of law and other disciplines and areas of learning. This will require a serious reconsideration of teaching methods, preparation of teaching materials, and ways of testing law students. Academic law should not be merely reflexive. Some attempt must be made, if possible, to avoid the intellectual lag of the law. It may be necessary to develop different streams of legal education - with a cultural intellectual degree and an intensive technocratic qualification.

LEGAL SCHOLARSHIP AND LEGAL EDUCATION

BY GRAHAM PARKER

Legal scholarship must be related to legal education, so that teaching does not reflect only one aspect of legal training, whether it be black-letter law, clinical training, or feeble attempts to graft on bits of other disciplines. Instead, students must be exposed to a true synthesis of law and other disciplines and areas of learning. This will require a serious reconsideration of teaching methods, preparation of teaching materials, and ways of testing law students. Academic law should not be merely reflexive. Some attempt must be made, if possible, to avoid the intellectual lag of the law. It may be necessary to develop different streams of legal education — with a cultural, intellectual degree and an intensive technocratic qualification.

My premise is that legal scholarship cannot exist in a vacuum but must be related to legal education. Law professors teach a shallow form of legal reasoning because their discipline is mechanistic, non-intellectual, and derivative.

If I were a teacher of English literature and a Blake scholar, I would devote my scholarly energies to editing his correspondence, immersing myself in the social and political culture of the late eighteenth and early nineteenth century or, perhaps, exploring the religious beliefs of Blake and his contemporaries. If I taught Canadian history, I would be engaged in research on the Family Compact, the Selkirk settlement, the political beliefs of the Loyalists, the political life of Laurier, the economic history of prairie farming or the history of the Bering Sea dispute. If I were teaching physics, I would be engaged in research based on fundamental principles and attempts to test those principles and push back the frontiers of scientific thought. Of course, I may be of a philosophic bent and then I might be immersed in the philosophy of literary criticism, or of historical or scientific enquiry.

I have the distinct impression that all law professors who want to be known as scholars are concentrating on the 'philosophy of law' or, more accurately, political and social theory. Yet this is the sticking point because, as they think about the philosophy of law, they are driven to

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Postscript. There are no footnotes. The sources mentioned should be clear to anyone even vaguely familiar with the field. In any event, this comment is typically legal-argumentative, anti-intellectual, non-synthetic and superficial.

the realization that the law is only a secondary discipline and there is little 'pure' theory in the law, only 'applied' theory. In other words, when law scholars start an examination of Law, even in its 'purest' form, they discover that there are real problems in trying to describe legal reasoning. An engineer, in describing the problem of building a bridge across a river, does not give much thought to the fundamental laws of physics. Instead, careful thought is given to the logistical problems of having the materials on site in the correct time sequence, to the peculiar geological and climatic problems of the particular site, and to zoning, environmental, and labour problems. The 'theory' behind the bridge being a feasible structure is a given. Surely, the lawyer, who must predict the outcome, is in somewhat the same situation. Despite having very interesting theories about how society *should* function, the lawyer is stuck with the present structure of the courts, the political realities of judicial appointments, the length of the client's purse (and that of the opposing side) and the psychological dimensions of the tactics that must be used. Although wanting to create a better world, the lawyer is no more free to do so than the engineer or the architect. Perhaps the lawyer could go off to the wilderness and build a Utopian state in the way that Frank Lloyd Wright envisaged ideal architectural environments. The lawyer would then become a philosopher but cease to be a lawyer. The same is true of the physician. The study of medicine is based on 'pure' theory but neither the medical student nor the physician pay much attention to the principles of biology or chemistry when trying to study the liver or to cure a disease of the liver. Of course, it is not altogether appropriate to compare law and legal study with the physical sciences. One could describe law as a social science, although I would prefer to call it an art with a background of history, philosophy, and economics.

One of the most surprising aspects of the open discussion at the Symposium was the lack of attention paid to legal education. One hardly needs another essay on the law teacher as a person having schizophrenic tendencies. William Twining has eloquently described the dichotomy of Pericles and the Plumber.

Some questions about law teaching have relevance to legal scholarship:

- 1) Who are the most popular teachers, at least according to student evaluations?

I can only speak of Osgoode but my assessment is that the 'best' teachers are those who teach black letter law subjects. I don't think it is merely because they teach in a black letter fashion. The subjects are doctrinal and these same teachers are often prolific writers of good

doctrinal work. Why do the students like them? Because they perceive that these teachers are giving them information about the 'real' law. I don't think the teachers give the impression that this is the only way to perceive the law. Imagine a student confronted with two teachers presenting the same subject; let's say the course is mortgage law. One writes clearly and prolifically about mortgage law, teaches the course 'straight' with a formulation that is crystal clear in its statement of the principles of law. The other teacher wants to acquaint the students with the economics of the real estate market, the political theories of Henry George, Marxist theory of surplus value, and the sociology of urban planning. If one asked the students their preference, they would undoubtedly opt for the first teacher even if both teachers had an equal grasp of their subject and were equally proficient in expressing their ideas. The students have a thirst for black letter law and do not want to be confronted with ambiguity and theory. If the 'scholars' are on the side of the angels, what can be done to convert students to scholarly pursuits and divest them from crass professionalism?

- 2) Why is it that, if you look at the examinations of the second type of teacher, you will discover that only infrequently do policy issues appear in the examination questions?

What is the use of scholarship if it is not used in testing the students' understanding of the social and political problems of, for example, the law of mortgages? One could take the attitude that the 'radical' scholarly teachers who set very 'straight' examinations are being pedagogically responsible in that they are not preaching their own views but are testing the students on professional skills. This surely is evasive. 'Scholarly' teachers must integrate their scholarly interests with the subjects they teach. The scholarly bits cannot just be stuck on afterwards in fancy little seminar courses called "The Law And Something or Other." Of course, we might alleviate the problem if the law schools had mandatory pre-law courses that provided intellectual background rather than a mish-mash of courses resulting in B+ grades to appease the Admissions Committee.

- 3) If law teachers want to pursue and encourage scholarship, why do they persist with 100 per cent examinations?

It strikes me as fairly useless or at least plainly inconsistent for legal scholars to complain about lack of scholarship when they are not encouraging law students to write a set of mid-term essays on topics that are related to the course but not narrowly wedded to black letter regurgitation. Many of my friends in the Arts faculties tell me that their

research helps their teaching. I would think there is a corollary argument that students may gain new insights into black letter law by being forced to stretch their legal minds with some lateral thinking when they are obliged to prepare an essay that is only peripherally related to the core subject but nevertheless clearly related. I have always believed that the best form of learning is oblique learning when you don't actually realize that you are learning. This is well illustrated by John White's *Legal Imagination* and yet this 'casebook' has been ignored in favour of more *outré* offerings such as literary criticism and critical theory.

- 4) If legal scholars are dissatisfied with the present quality of scholarship, why is there a tendency to inflate grades and reward pedestrian, parrot-like regurgitation of third-rate rationalization known as legal reasoning?

I suggest that the C+/B- range of examination paper, when graded as adequate or on the top range of average, is over-rewarded when it does little more than regurgitate, more or less accurately, what was stated in class or in the casebook. How often do we say to students: "There will be clear rewards for students who make it obvious that they have done extra-curricular reading or thinking"? How often do we put our words into practice? Surely, this would not happen as often in English or History. Those examiners frown upon the 'Coles Notes approach' and yet we seem to reward such behaviour.

- 5) Why do law schools persist with the case method or, in some cases, the lecture method?

Is this due to laziness similar to the preoccupation with 100 per cent final examinations? The teachers complain about the lock-step mentality that seems to grip the first year student body, yet we seem to persist in unimaginative and inappropriate teaching methods. Indeed, we encourage them and it is aggravated by the use of a compulsory first year moot that, once again, emphasizes the use of appellate cases.

Why is problem-solving so infrequently used in law school? If we as teachers had to formulate problems for every day use, we might vastly improve our classes. I think we could change students' minds about legal education and their expectation of law practice if we simply taught them to be good diagnosticians, and yet we do very little of this. I can remember from my days in a law office that a client does *not* walk into the office and say, "Hi, I'm *Donoghue v. Stevenson*." Yet, I was taught to expect this because the law school curriculum has a compartmentalizing effect. The client does not identify herself as footnote six on page 982 of the casebook. We have failed the students except the 'elite' who are totally

immersed in some abstract problem in corporate tax and can legitimately ask for more and more black letter law. I am arguing for a proper integration of the law into workable and feasible curricular offerings. Instead, we are left with little gobs of law data that are not useful. I am *not* arguing in favour of a trade school. I may be arguing in favour of good diagnostics, but surely that is different. Some of the most skilled lawyers I know are not possessed of the superficiality of the hype artist with the glib answer. They are those who have a firm grasp of a total problem and can diagnose the most crucial issues and can orchestrate the best strategies. Doesn't law foster the quick study?

Have you noticed that when a new law school or a new law school curriculum tries to introduce students to a different approach to first year (such as concentrating on such concepts as 'rights', 'possession', 'responsibility') rather than conventional subject groups, they always fall flat? Is it because the law teacher simply lacks the expertise to integrate and synthesize? I know these skills are very tricky and would require a broad knowledge of surrounding disciplines and their relationship with legal matters. I always find the first year criminal law course very difficult because appellate case law is so two-dimensional. The course should include data (in a particular case) on the rules and theory of evidence and procedure. I would like to show the class a film depicting the make-up of the jury, the judge's biased attitude, the prosecutor's fair or vindictive attitude, and the ineptitude of the defence counsel. To make it perfect, we should also have a film consisting of interviews with the client, the attempted plea bargaining session, the choice of the jury, a biography of the judge, and psychological profiles of the accused, the defence lawyer, and the prosecutor. There should be material on the social, theological, philosophical, and psychological aspects of punishment, responsibility, and guilt. These factors would convince anyone that the law is still an art rather than a science and cannot be reduced to ideology and discussions about hierarchical hegemonies. Very useful insights were produced by the Realists who gave a new dimension to Facts and Rules. The Wisconsin school pioneered historical studies of the law of contract and tort showing that the concentration on appellate law gave a very false impression of the law. In particular, James Willard Hurst showed that the legislative process and statute law deserve treatment equal to that accorded to common law.

The present fad in what is called, rightly or wrongly, legal scholarship is a sterile and ideological concentration on political and social theory. It is reminiscent of the preoccupation of sociology, twenty years ago, with value-free research. This should not surprise us because legal academics are usually a generation behind in their adoption of fads since

law is a reflexive sub-discipline. The analogy to social science is also unfortunately obvious in the faddists' addiction to impenetrable jargon masquerading as erudition but, in fact, fostering confusion and obfuscation. This criticism is applicable to both the vaguely left critical legal scholars and the more conservative Chicago school law-and-economics enthusiasts. These new ideologies suffer from the same disability as the philosophical radicals (particularly Jeremy Bentham); they lack a sense of history and they largely ignore the real motivations of human psychology.

Some of the critical legal scholars started out with very legitimate criticisms of legal education and yet seem to have lost sight of these concerns in favour of macro solutions and Big Ideas and Grand Theory. The engineer has forgotten about building the bridge and, instead, is heavily engrossed in the philosophy of transport. How can we reconcile the need for some rigorous scholarship with the need to prepare students for a responsible, thoughtful, and ethical professional life? What are the solutions to this problem? One would be the divorce of scholarly pursuits from legal education. There could be a school of law and a school of jurisprudence. If the latter simply meant a research institute, then the prognosis for success is not bright. One only has to consider the institute at Johns Hopkins University in the 1930s or the Department of Law at the Institute of Advanced Study at Australian National University. Those examples show that a few 'legal' scholars congregated together will not produce a great corpus of work but will simply follow their own intellectual pursuits and, if we were fortunate, we would see good scholarly work in philosophy, history, or sociology. If we were less blessed, the scholarship would consist of simply more and more black letter law.

An alternative would be a degree in jurisprudence for those who did not want to be mere plumbers and indeed, had no inclination to practise law. Law teachers have not yet shown signs of the will or the intellectual preparation required to construct such a curriculum or find the people to teach it.

There is a second dilemma. An argument could be made that, because law is more an art than a science, the law school curriculum should consist mostly of liberal arts/law subjects that have as much law content as thought desirable. We could adopt the view that the best lawyer would be the student who is classically trained or has total immersion in legal philosophy, legal history *et cetera*. This idea is probably a very good one, but there are two problems with it. First, the faculty presently available is woefully undereducated; second, the students are convinced that they need coverage — the more cases the better and the more data the better. This may be nonsense for the single practitioner or even the

general practitioner in a large firm, but it is probably true of the corporate tax whizzbang who wants to sit in the back rooms of some law factory and devise schemes so that millionaires or large corporations are immune from paying tax and from governmental interference. Sometimes, I feel that the law school really exists to produce these super legal technocrats. The generalist who does not want to know by rote 1000 sections of the tax statute, but wants to be a well-rounded perceptive practitioner, is forgotten.

- 6) Why is it almost impossible for law teachers to give serious scholarly thought to legal education?

This may sound provocative; it is not meant to be. I suppose my basic problem is that I do not believe in radical macro solutions to anything. I find that such solutions are revolutionary and by definition one ends up in the starting place. I happen to believe in micro solutions and yet law teachers seem most reluctant to aim at relative success by accretion. For instance, law teachers have spoken over the years about the need for interdisciplinary studies. I have serious doubts about such an enterprise if it means setting up elaborate research institutes. There is very clear evidence that such projects have been a disaster. On the other hand, one law professor working with one psychologist, statistician, historian, or economist can have a useful partnership on a specific problem of mutual interest. Why not start with a very practical problem? Why not examine admission procedures and, in particular, the efficacy and adequacy of the Law School Admission Test? Surely this would tell us a lot about the nature of legal reasoning or the perceptions of law students. Why not have a study that examines, with the help of an education expert or a psychologist, the best methods of imparting basic routine knowledge to first year students and the best methods of evaluation? This seems so much more sensible than these macro approaches that make pontifical statements about the need for radical change but end up as discussions about political theory. Why not start being scholarly about something we know rather than picking up some faddish ideas that have already been exhaustively examined by the other disciplines? (The whole question of the Law as Lag must be addressed. The study of law is only a derivative discipline. The law is always referring to another field of study — economics, psychology, or the philosophy of something or other. To use an analogy, if one is training a student to be a general medical practitioner, it will be necessary for that student to learn about the nervous system, blood circulation, and the nature of cellular structure. It will also be necessary to become observant of bodily appearance, understand a patient's state of mind, and have some inkling

of professional ethics. It is not part of medical education to devote most time and mental energy to philosophical investigations about bioethics, the implications of DNA, or the meaning of life although, of course, these must be addressed.)

The legal scholar will not make great intellectual breakthroughs by having epochal thoughts about political philosophy. It is much more likely that legal scholarship would flourish if law professors were prepared to go beyond case analysis (and the worst sort of third-rate evolutionary history) and start to think about the *legal* problems of property or contract or crime. It is not impossible to give serious thought to legal issues and to go beyond mere analogy and distinguishing. Instead of dwelling upon decisionism, dialogism, and objectivism, it might be a good idea for legal scholars to remember that their semi-discipline is LAW. If they want to write in the abstract about liberalism, literary criticism, or whatever, will they please change departments? We do not need second-rate and second-hand notions about literary criticism or political theory. There *are* good studies on legal theory relating to legal problems. I would suggest as an example George Fletcher's *Rethinking Criminal Law*, which makes good use of history, philosophy and, surprise, legal theory.

The first thing that should be done for legal scholarship would be the abolition of at least three-quarters of the law reviews. The remaining quarter should only be allowed to survive if they agree to be properly refereed so that the articles will have some intellectual respectability. Law reviews are the largest vanity press in existence. It would also help if the editors were given the petty cash to buy a gross of bluepencils so that the articles were shortened by at least fifty percent and the footnotes by seventy-five percent. There is no discipline in legal writing. No other scholarly pursuit I know of would abide those gasbag 100 page efforts by young legal academics who allegedly write articles but are really preparing book reports on works by anthropologists, political scientists, social theorists, lit crit types, or philosophers. (It is remarkable how infrequently they refer to historians.) They seem to be reinventing the intellectual wheel. Perhaps the young academics cannot be blamed for their prolixity because they have been very badly trained. What were they taught when they were 'brilliant' law students? They prepared good summaries so that they could get As on 100 percent examinations. When they were editors of the law review, they nitpicked their way through 7000 footnotes and they were experts on style and uniform citations. What they did *not* learn was synthesis. One wonders why. Is it the state of teaching? Do law professors simply mouth off and infrequently show a toughness of mind that would encourage rigorous thinking? Perhaps this is a sign of the nature of legal culture. Most of it is lore rather

than law. The culture encourages teachers to train the students for jury addresses rather than the kind of discussion one would hope to find in a faculty seminar. Is the answer that the law is essentially anti-intellectual? Can we only talk about the philosophy of law in an Arts department or in an optional law school seminar class populated by seven students?

The profligacy of so-called legal scholarship should not be over-emphasized, but it is time for the law schools to re-examine their present institutions. If the law professors want to be scholarly, they should start at home, and in that environment, they might make some progress in their intellectual development. It will not happen if they decide to lead an even more schizoid life than at present. It is relatively easy to talk philosophically about the law when one isolates it from the exigencies of everyday subjects such as civil procedure or the law of property. Law professors must become scholarly in their own discipline, which does not necessarily mean they must be insular. It means that they must try to make sense out of their own discipline, teach the students to synthesize and not write excessively prolix articles that simply tack on extra-legal materials.

I noticed that the symposiasts made somewhat derogatory (or at least patronizing) remarks about the work of the law reform commissions. A good study is yet to be done on the work of provincial and federal law reform commissions. They have carried out different roles. The provincial bodies have been preoccupied with black letter law, doing housekeeping to make the lawyers' task a little easier. There has been very little of the scholarly nature in the work of the Ontario Law Reform Commission, although I would suggest that the Sunday Observance study and the Privacy studies were hardly black letter and took a broad historical, ethical, and psychological approach to those problems.

If we want to do interdisciplinary research, it would be a good idea to investigate the person years of academic labour that have been put into paid work for law reform commission work during the last twenty years. We could examine the type of research that was done; what control or input the academics had on the subjects to be 'reformed' or the direction that the research took; to what extent was the research dictated by political fiat and expediency; what criteria governed selection of researchers; did the researchers have a free hand to map their research strategies? Such a study would be an instructive lesson in political theory.

If we now turn to the federal law reform commission, it is surely very near-sighted to suggest that the work of the Canadian Law Reform Commission is not a scholarly enterprise. I cannot speak of the Commission's work on criminal procedure or administrative law but I do

know something about the criminal law programme and the euthanasia and meaning-of-death studies. Law teachers who lament the state of scholarship should read *Our Criminal Law* because it is one of the finest pieces of legal writing on criminal law. Its greatest merit is that it is a very good piece of synthesis.

I may be a very poor example of the new 'scholarly' academic lawyer, but I cannot imagine what else could be said after reading *Our Criminal Law*. What would a reputable criminologist say? Would he talk about Marxist theories of law withering away and criminal law being a capitalist tool to persecute the proletariat? The document *Our Criminal Law* throws down a challenge to those of you who want to produce scholarly research. What would you say about your particular area of law and how would you say it any more economically and eloquently than the authors of *Our Criminal Law*? What political theory would you inject into this formulation to make it more 'scholarly'? You may say, yes, it is a good description of the legal thought relating to criminal law but it is so vague. Where, you protest, is the application of such philosophy to the practical problems of criminal law? The answer is found in *Our Criminal Law: The General Part*. In that report of the L.R.C.C. you will find a rational description of the criminal law and the theory behind the system of criminal justice.

Finally, the whole question of a 'scholarly' approach to the law is dependent on the need to protect Canadian legal culture. I do not want to adopt the mantle of Robin Matthews but someone has to make a protest (or at least a statement) about the lack of Canadian content in the discussion of legal scholarship. I find it very sad that young scholars in Canada are so insensitive to the local cultural scene that they are prepared to embrace any ideas that are spawned in Cambridge, Mass. without giving much thought to their application to the Canadian situation. This idolatry of the U.S. Legal God is a mindless one and it takes little account of the Canadian society and of Canadian history. Instead, those Canadian scholars who want to be so scholarly are spending all their time examining the entrails of a U.S. constitutional goat. Isn't it a little strange that these well-educated Canadians want to spend all their time worshipping the U.S. Constitution or at least the oracles found mostly on the Eastern Seaboard of the U.S. who can divine the meaning of the eighth or the fourteenth amendments? Have those Canadian scholars who are interested in the *Charter of Rights* given any thought to the peculiarly Canadian aspects of our legal culture? Do they know anything about the way in which Canadian legal culture developed? Is it culturally real to talk about a U.S. constitutional document when one is addressing the descendents of the Loyalists, the Red Tories of Ontario, or the peculiar experience of the Western provinces?