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BOOK REVIEW

INSIDE THE LAW: A COMMENTARY ON CANADIAN LAW
PROFESSORS, by JOHN S. MCKENNIREY.

(Copyright, 1983, Minister of Supply and Services Canada) Ottawa:
The Information Division of the Social Science and Humanities Research
Council of Canada, 1983. Pp. viii + 133.

The May, 1983 edition of *University Affairs*, the journal of the Association of Universities and Colleges of Canada, added contrasting and familiar claims of essential function to the debate heating up about the present and future roles of the universities in Canada. Larkin Kerwin, President of the National Research Council, stated that, "Research defines the university. Research is more basic to the university than even teaching, than even public service, research lies at the university's core, so that the very phrase 'university research' is a tautology."¹ While one can be grateful for the inclusion of the word "even" with respect to teaching and public service, the message is clear, though the last phrase especially seems to overlook the degree to which, in recent years, a great deal of research has found homes other than the universities. Later in the same issue, James Downey, President of the University of New Brunswick, in an opinion piece entitled, "The University as Court Jester," argued:

In a liberal democratic society, the *essential* purpose of the university is not to carry out research, nor even in the conventional understanding of the term, to teach, but to furnish a critical commentary upon the assumptions, beliefs, values, knowledge, and technologies that inform and support the social order. To this end research and teaching may be essential means, but they are not the essential essence. Other institutions and agencies carry out teaching and research, and some do so quite effectively. What makes the universities different is the reason why they do so.²

The "other institutions and agencies" will no doubt be grateful for the compliment, but if "to furnish a critical commentary" can be regarded as a brand of public service on the part of the universities and the notion is not entirely daft then in both claims, teaching clearly comes last, or at best second in significance. That fact must be considered somewhat odd when one considers that it is from teaching that the present-day university receives most of its predictable income and stability. To anyone who has been around the university world for any length of time, these claims and their supporting arguments are familiar. And into this maelstrom, almost innocently, comes the law and its academic personae.

*Canadian Law Professors*³ is one of five reports of the Consultative Group on Research and Education in Law, a group established and financed

¹ *University Affairs*, May 1983, at 2.

² *Id.* at 9.

³ McKennirey, *Canadian Law Professors* (Ottawa: Social Sciences and Humanities Research Council of Canada, 1982).

by the Social Sciences and Humanities Research Council of Canada. The other titles in the series are: *Canadian Law Faculties*,⁴ *Profile of Published Legal Research*,⁵ *Sources of Support for Legal Research*,⁶ and the final summary and analysis, *Law and Learning*.⁷ An initial caveat is that *Canadian Law Professors* should not be read in isolation from the final report, *Learning and the Law*, and perhaps not separately from the other three.

The authors of *Law and Learning* state that, "The Council was anxious to understand why applications from the legal academic community for research funds, graduate and leave fellowships and other programs did not conform to patterns in other disciplines."⁸ A jaundiced veteran of similar applications to the Council might reasonably wonder why, in these days of financial austerity, the Council is not pleased that there is one area of academic life to which they do not have to say no as frequently as to others. However, to stop there would be to underrate a quite fascinating study of "academic law" that has resulted from that unexpected curiosity.

Regional consultations, invitations for briefs, interviews, and questionnaires were among the methods used to gather the data. Some disappointment at the enthusiasm of response from the law professoriat is expressed on more than one occasion, suggesting that the interests of the investigators were somewhat ahead of, or at least apart from, those of the population under investigation. *Canadian Law Professors* begins:

We hoped to uncover something of the prevalent ethos as regards research among Canadian law professors; their research training and capabilities; the occupational, funding, and reward factors that affect their research orientation and productivity; and the relationship of research to their role as teachers — which is, after all, the traditional concept of the law professor's job. In sum, we were interested in exploring the present context in which legal research is undertaken by Canadian law professors.⁹

In the case of this study, the method used was a questionnaire distributed through the Deans of the law schools to the entire academic population. Returns were between fifty and sixty per cent, depending upon which total of full-time professors is accepted. The Report examined the responses meticulously with respect to biases that might have resulted from self-selection of respondents and makes a convincing case for their absence. Still, in such an identifiable population with so dedicated a system of distribution, one might wonder about a response rate of less than two-thirds. Perhaps that is one reason for the sense of disappointment that pervades the two reports.¹⁰

⁴ McKennirey, *Canadian Law Faculties* (Ottawa: Social Sciences and Humanities Research Council of Canada, 1982).

⁵ Janisch, *Profile of Published Legal Research* (Ottawa: Social Sciences and Humanities Research Council of Canada, 1982).

⁶ McKennirey, *Sources of Support for Legal Research* (Ottawa: Social Sciences and Humanities Research Council of Canada, 1982).

⁷ Consultative Group on Research and Education in Law, *Law and Learning* (Ottawa: Social Sciences and Humanities Research Council of Canada, 1983).

⁸ *Id.* at v.

⁹ *Supra* note 3 at i.

¹⁰ *Supra* notes 3 and 7.

The information reported is a mixture of factual data and opinion, all of it interesting. In profile, the average professor of law in Canada today is male (eighty-nine per cent), a Canadian citizen (eighty-nine per cent), relatively young (the median age is thirty-eight years) and completed his first law degree about ten years ago. The degree was taken in Canada (seventy-five per cent). He pursued an undergraduate degree in one of political science, economics, English literature, history or philosophy. Very few of the present group of professors studied psychology or sociology, or any other discipline as an undergraduate. Following that, he or she was trained in law (96.3 per cent) and one in five continued on to a doctorate. It is difficult to tell how long he has been teaching, or what might have preceded the teaching, other than the pursuit of the undergraduate and law degrees. There is, however, interesting information regarding career expectations: only (sixty per cent) of the respondents indicated a present intention of remaining in academic life and only a tiny percentage, even of those who do report being content with their salary (twenty-nine per cent), intend to stay, despite the fact that 50.5 per cent of the population are full professors. Most believe they would do much better financially in other areas of the law.

A substantial proportion both of those who yearn for other pastures and of those who seem to prefer academic life engage heavily in consulting and part-time work (seventy-eight per cent), which brings them presumably into constant contact with those other pastures and their financial and professional rewards. When asked, however, why they chose academic life at all, they report satisfactions arising from contact with students, academic life style (never defined) and research. The last statement, in company with other information to follow, perhaps accounts for the slight bewilderment expressed by the author throughout the Report.

Throughout the Report there are found some consistent differences between common law and civil law professors, but they do not seem to bear sufficiently on the principal issues to be included in this review.

With respect to professorial behaviour, teaching, which includes a heavy concentration on the preparation of teaching materials, including materials for continuing legal education, dominates the lives of the professors. Seventy-eight per cent report that forty per cent plus of their time is devoted to teaching, despite the fact that only some thirty-five per cent engage in the supervision of graduate students. Self-initiated research involved ten per cent plus of the time of sixty-one per cent of the population, while the same amount of time was directed to commissioned research by only fourteen per cent. "In terms of significant blocks of time the figures for this 'externally oriented' work [commissioned research, continuing legal research, law for the layman, etc.] are small in comparison to those for 'purely academic' work."¹¹ Seventy per cent report that at least fifty per cent of the research in which they engage is directly related to their teaching and the most frequent kind of research involved is of the doctrinal character. Interdisciplinary approaches involve only about one-third of the respondents, and even fewer are involved in collaboration with other disciplines. Other than the production of teaching materials,

¹¹ *Supra* note 3 at 35.

which is substantial, the professors are not big publishers, though the younger ones have established a better record of publishing than their elders.

We now realize the expansion of knowledge consists in continually revising and reinterpreting our explanatory constructs, as new data and more complete theories emerge. The term research means doing this purposefully; seeking better understanding through the review, rediscovery, reinterpretation and revision of current knowledge.¹²

The investigator listed ten major areas of possible research and asked the respondents to indicate those that described their work. Dominating the present interests is doctrinal research (90%) with historical following (56%), and after those two, transnational comparisons (42%), theoretical (40%), empirical methodologies (25%) and non-empirical interdisciplinary (25%). It would have helped to understand the significance of this information somewhat if examples had been given for each of the categories. In fact, anecdotal material throughout would have improved the Report immensely, particularly examples of work of which the investigators approved. About one-third of the professors report that they have changed their emphasis since they began teaching and that most of the change has been away from the dominant preoccupation with doctrinal research. What emerges clearly is a very uneven coverage of the lexicon of desirable research selected by the investigator.

In terms of financial support, what is equally significant is that the needs of the professors for their research are modest, and they apparently have a range of sources to which to apply. Experience does suggest that this modesty, in the face of a certain predilection of the granting agencies for the grandeur of megaprojects, may be one of the reasons for the confusion of expectations, opinions and behaviours that is to be found in this section of the Report.

The professors report a remarkable range of audiences for whom they write, or at least whom they try to reach, from the conventional audience of other scholars to be reached through conventional journals to judges and practitioners, scholars in other fields, students and the general public. In addition, a shift to even broader audiences in recent years is reported. The Report speculates as to whether depth of research can be served with such wide, dispersed and varied audiences. It does not seem concerned with the problem that preoccupies so many of the traditional disciplines, that depth is often at the expense of intelligibility and dissemination, a price frequently lamented by scientists of various stripes and interests. Surely it would be intolerable for that circumstance to engulf the academic wing of the law.

The professors conclude their responses with what seem to be quite admirable intentions for their students. While some conclude that they are simply producing practising lawyers, many indicate additional qualities that they would like to see their graduates exhibit, such as understanding the function of law in society. They are silent, a significant silence in the context of this Report, about whether they believe they encourage research interests in the law among their students; that is, with respect to the degree to which they are reproducing themselves. However, they have encouraging ambitions for the mixture of competent practice and thoughtful professional behaviour which they would like their graduates to exhibit.

What is to be made of all this? There are not many so thorough and inclusive studies of a body of university academics as is presented in these five

volumes. Presumably, these same university men and women have yet to have the last word. In the meantime, some observations from outside might be helpful. Some speculation on the purpose or even the point of the studies might be in order. It seems evident that this research itself is of the "partis pris" character. A position was taken, or if one prefers, an hypothesis was advanced, and data assembled. By and large, the absence of a total determination to "argue by favourable cases" is very encouraging. It does contribute to some bewilderment throughout.

The academic "virtue," or at least a version of it, of the law professoriat is in question. The hypothesis advanced is that they do not do "much" or "enough" research. Implicit are two distinct questions. Is there enough legal research being done in Canada? The conclusion with which the investigators began is clearly in the negative. Consistent and convincing evidence is offered in this Report and in the summary document of vast areas needing attention.

How it is to be decided that enough is being done is a complicated process, not confined to the law. Presumably, given the "knowledge" orientation of the present century, there will be found no field of thought and exploration where everyone would agree that the research is sufficient or even more than necessary. One might, I suppose, argue that present-day governments, with their stinginess towards universities, have indeed decided that there is a quite sufficient volume of research being undertaken, indeed more than for what the public wishes to pay. But that is another argument. What is clearly apparent here is that an *a priori* decision has been made by the investigators that there is an insufficient volume of legal research being conducted at present in Canada.

The second question is whether the existing law professoriat does enough research. If the answer is yes, then the solution is simple: increase their number and the volume will at least approach the satisfactory level. The unstated expectation of the Report, to the extent it is fair to suggest it, is that the existing body of professors do not do sufficient research, or perhaps also implicitly they do not do enough research of the right kind. Certainly there is a clearly stated bias in favour of interdisciplinary research and of other types of which there is minimal interest among the professors.

This introduces two further questions. By what standard does one judge the activities and interests of a group of academics, and on what grounds are those standards based? Here we can quarrel with some of the inferences of the Report. The implied comparison is with academics in other formal disciplines, most notably the social sciences. This appears to be the model against which the law professors are to be measured. Is this reasonable, or should the comparison be with the other professional schools in the university? The length of time that law has been taught in the Canadian university, the character and presumed interests of the student body and the stated purposes of the law school itself, would suggest that a fairer and more productive comparison would be with faculties of medicine, business, social work and education. Their histories in the university, and their basic missions, would appear to be more comparable. This might, of course, reopen the endless argument over the legitimacy of such schools in the university at all, an argument that may deserve reopening. But law professors should not have to carry the battle alone and, more importantly, it ought not to be entered surreptitiously into a review of their academic virtue.

Despite the secondary importance attributed to teaching in the opening quotations, it is the present lifeblood of the university and, under those conditions, students and their interests will more effectively determine the character and activity of a faculty than any other single influence. While other faculties at the undergraduate level may be interested in at least two objectives, reproducing themselves by enticement of able students into graduate work and academic careers, and providing a general education, the professional faculties are bound to develop and to produce competent practitioners. One of the clearest messages of the Report is that the legal professoriat as devoted to the pursuit of that objective, at least in their own views, as any body of academics could possibly be. The linking of their consultation, their production of teaching materials, for which they receive little or no remuneration, and their apparent determination to remain in touch with or on top of practical developments in their field, paints an admirable portrait of responsible teaching. Would greater engagement in research of the kind championed by the instigators of the Reports contribute to maintaining or improving that objective? Their reply that about fifty per cent of the research they now do contributes directly to their teaching is open to interpretation.

The second issue in this area is with respect to how should the interests of a professional group of academics, in terms of the research they do, be influenced, determined or judged? While an independent group of their professional peers is free to establish any ideal pantheon of necessary and valuable research, again, one can ask the grounds for such choices. Are the academics to be faulted for not distributing themselves evenly over all those areas? The usual way of steering research in any society, including this one, is that various bodies established by other than professional concerns commission specific research and pay reasonably well to have it undertaken. The very low level of participation by the law professors in commissioned research is a surprise. With the variety of law reform commissions, and indeed the very accumulative nature of the law itself, it is hard to believe that there is not more opportunity to do commissioned research. Perhaps the research associated with those commissions, and with the complicated legal decisions is done predominantly by legal researchers who are not to be found in universities. The law may not be the only realm of exploration that has moved out of the universities on a large scale in recent years. Still, the type of research for which the investigators yearn has not been produced. If the professors cannot be tempted or even seduced by large commissioned grants, and if they prefer to initiate their own research, usually on a modest scale, then in what way are they to be criticized in their academic behaviour? Or, more importantly, who should influence them into broader and more various areas, and how should it be done?

One suspects that it is mostly a matter of time. The presence of law professors in the university is relatively recent. There has not been much time for them to be affected or influenced by university style.

In terms of greater collaboration, a matter of much greater importance than style, it would have been helpful, and may still be, if some attention had been paid in the Report to where collaboration exists, to how useful it is and to the factors, other than simply individual energy and curiosity, that have encouraged it.

The professional schools ought to contribute to the university, to its faculties as well as to its students, varying and competing models of how

knowledge is related to practice, and what competence really means. It is quite possible that instead of concluding, as a result of this study, that there is somehow something missing from the activities of the law professors, instead of imposing, uncritically perhaps, an irrelevant model drawn from faculties of the university engaged in other pursuits; we should wonder if the law professors do not present a very good model that deserves to be copied elsewhere. It may be that the relationship between research and the practice of law, taken in its widest sense, is somewhat different than is the case in physics or philosophy, and that the goal of increased research needs to be reconsidered and arrived at in slightly different ways. A recent article in the magazine section of the *New York Times*, entitled, "The Trouble with America's Law Schools"¹³ criticizes the law schools entirely on the basis of bad teaching. "On one side, it's a practical education; on the other side, it's a liberal arts education and in part, I think, they do both poorly,"¹⁴ says a third year student. "They don't teach you how to be a lawyer very well and the theory is incredibly shallow."¹⁵ Interestingly enough, research is written off by one professor: "The law is an amazingly large and important system in the country. It deserves a focus of study. It simply does not get it in the law schools. The vast bulk of this research is not done by law professors, not understood by law professors, not even treated in class by law professors."¹⁵ What remains unclear from this, and the Canadian studies, is the degree to which, and in what manner, different types of research contribute, or would contribute, to better teaching.

The position taken by this reviewer could be either sustained or dismissed if we knew the degree to which the obvious commitment of the professoriat to teaching results in good teaching and in graduates who exhibit the characteristics that the professors devote much time and effort to nurturing. What are we to make of the fact that in this five volume study, there was no attempt to consult present students, or graduates? One would have thought that the era of production-centred instruction had ended, but perhaps not in the law.

Presumably the battle has yet to begin and that it will dominate common rooms and learned societies and professional meetings for some time to come. One hopes that the Report will not be ignored, but that its premises will be reconsidered and some additional conclusions will be reached.

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¹² *Id.* at *ii*.

¹³ *New York Times*, magazine section, May 22, 1983 at 20.

¹⁴ *Id.* at 25.

¹⁵ *Id.* at 29.

