

Floccinaucinihilipilification or an Evaluation of Legal Education

Graham Parker

Osgoode Hall Law School of York University

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Citation Information

Parker, Graham. "Floccinaucinihilipilification or an Evaluation of Legal Education." *Osgoode Hall Law Journal* 8.2 (1970) : 201-213.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol8/iss2/2>

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FLOCCINAUCINIHILIPILIFICATION

Or An Evaluation of Legal Education

GRAHAM PARKER*

The scene is the living room of one of the law professors at Osgoode Hall Law School. Many of his colleagues have gathered for a cocktail party and general get-together. The party has been going for an hour or so and everyone present is feeling relaxed after a few drinks.

PROFESSOR I (who is the Host):

Let's call upon Tom to do his impressions.

There is general agreement, except from Tom, that everyone would like to hear Tom do his famous impressions of past and present colleagues and 'characters' of the law school. After much mumbling and feigned reluctance, Tom (who is better known to the students as Professor II) starts out. . . .

PROFESSOR II

Because we have our wives here, I should help them a little in the guessing game by giving a little background information. My first impression is of a gentleman who was not born or trained in this country and who might be said to be mentally middle-aged; I seriously doubt if he has ever been any younger than that. Imagine that we are sitting in a committee room at Osgoode and the faculty is discussing first year grades.

Mr. Dean, in accordance with your instructions, I have, Mr. Dean, reread the examination paper of candidate number 1046 and have reached a decision. I might add with respect, Mr. Dean, that I have only reached this decision, after not inconsiderable thought and reflection. The student has written a set of examination answers which reflect some limited ability but he appears to have totally misconceived the question on promissory estoppel in contracts relating to leaseholds for periods in excess of fifteen months. He does discuss the so-called policy issues at some length but he has failed to cite the leading case of *Tompkins v Witherspoon* [1958] A11 E.R.318. In the question on the rule in *Shelley's Case*, he only covered five of the eleven issues raised. Nevertheless, he has made an effort but, Mr. Dean, with respect, I must report that, on due re-consideration, I have only been able to raise his grade by half a mark. This makes his grade 47½ but to save the Registrar any undue problems in collating the percentages, I am prepared to raise his grade to 48.

PROFESSOR II continues:—And how about this one? This guy is not quite as conservative.

*Professor of Law, Osgoode Hall Law School, York University.

I have allowed the fifty-nine students in my second year course to grade each other. I am pleased to announce that the results are most heartening and reflect new viability in legal education. Fifty-six students have A's and three have C+.

Here's one I have not perfected yet. I overheard him in the common-room last week during morning coffee. I might add that he is not quite as progressive as the last one.

My papers in Mercantile Paper were most disappointing. If I had my way I would have failed nearly all of the dumb bastards. Some of the so-called best students were disappointed in their grades but they gave very waffly answers and no doubt thought that they could hoodwink me with all that *policy* stuff.

I am sure you will know the next one. I have been practising this one for a long time. I have heard his voice often enough in faculty meetings. He is not exactly an ancient because he is on the sunny side of forty but with our young faculty he might seem like a middle-aged colleague.

I agree with the curriculum changes, Mr. Dean, and with your aims for this law school. We want an enriched program and more flexibility in the course offerings. I think the semester system is an excellent innovation but I must remind you, Mr. Dean, that sixty hours for my course is not a reasonable allocation of man-hours. This subject is a basic first-year course involving difficult concepts and, if I may be permitted to add, concepts which provide the groundwork for many second and third year courses. Therefore, I must insist that this course must remain at 120 hours.

Now, this next one is a little older and I think he might be a little more conservative.

I am in agreement with the options program so long as the courses in corporation law, taxation and mortgages remain obligatory.

HOST: No matter how we slice it, we always end up talking shop even if it is hilarious for most of us. But before you decide to "do" me, Tom, what about some of the students?

PROFESSOR II: O.K. First I should like to recall an interview we have all had with a first year student who has flunked a first year course in the Christmas examinations. He is seeking the professor's advice about whether he should stay in law school.

Uh, I-er, ya know, I wanna to do something relevant, I wanna, y'know, communicate with people, y'know and help them, y'know with their problems, like.

I suppose that is a little unkind but I am starting to develop a defence mechanism against those students who bombard me with "y'know" all the time. I simply interject all the time by saying "No, I don't know".

I have composed a little scenario in three acts. You could call it *The History of Law School Government*.

ACT I: A student leader is sitting in faculty council. The date is October, 1968.

I think the students have a right to be consulted on curriculum changes. I would like to propose a motion that a student be allowed to sit in on the Curriculum Committee.

ACT II: Same location. Date: April, 1969.

Students have a right to a full say in the hiring of new faculty members, not only in terms of their suitability but also in terms of the course requirements of the school.

ACT III: Same location. Date: March, 1971.

I can see no reason why a so-called "student" member of the Faculty Council could not be elected Dean of this Law School by a democratic vote of the Council. I realise that there is a heavy burden of administrative detail but surely course credit could be given for these duties.

HOST: Thanks, Tom. I certainly do not want to turn this party into a faculty seminar but quite a few of your colleagues seem to be bristling with things to say although that is not very unusual for law professors. Can I get anyone another drink?

PROFESSOR III:

Tom, that was all very humorous but we do have a problem on our hands. What we need is more rigour. We need more rigorous analysis. How can they call themselves lawyers if they have not learned rigorous analysis. The only way to increase the content of rigorous analysis is to increase the coverage of course material.

PROFESSOR IV (who is a young man, new to law teaching and the law school):

What do you mean by rigour?

PROFESSOR III:

Well, rigour is an ability, a lawyer-like ability, to analyse cases (and other materials) with a view to imparting, and receiving, lawyer-like skills. (As an aside) And then to grade bloody hard.

PROFESSOR V:

What is all this talk about rigour? I thought the case method solved all these problems? The student is not bored by lectures and he can learn case analysis, just as an appellate advocate does, and this teaches lawyer-like skills.

PROFESSOR VI:

Just between you, me and the gatepost, I don't like case-method. I think all these young guys who come from the Yale - Harvard - Columbia - Berkeley league think that it is the easy way to teach. Sure, it is the easy way to teach if you are master of your subject and you have prepared your "unrehearsed" questions about the cases for six hours before each class. I am too lazy to do that amount of preparation particularly when the majority of the students are unprepared.

PROFESSOR VII:

That may be the problem. We all get downhearted because we do not live and work in some sort of academic Camelot. We are not Fellows at Oxbridge. And unlike Yale, our students are not chosen from two hundred million. In fact our choice is made from about half of Ontario.

PROFESSOR VI:

That is not the only problem. We are not getting the best students. Before the World War II, there were only 2 professions but now there are all sorts of disciplines and plenty of scholarship money for guys to finish their masters or doctorates in mathematics, engineering, sociology, history or political science, particularly the last three. Our students are the rejects of the graduate schools or guys who could not make up their minds or whose mummies wanted a professional in the family.

PROFESSOR VII:

Or the student himself wanted the security and status of a profession.

PROFESSOR VI:

Some people believe that we attract rule-oriented, rigid people who like the know-it-all bully role of the lawyer.

PROFESSOR V:

We cannot go out and attract the best students to this law school even if we think it is the best. There is no scholarship money. If we wanted a crash hot law school, then we should have limited our enrolment to one hundred students but the province pays for this place and they want us to produce lawyers and I mean produce.

PROFESSOR VIII: (The progressive Tom introduced earlier)

There is no magic in numbers. That is all bull. You need to build a community. If we cared enough about people and about making this a viable relevant institution, then we could make a workable school of two thousand students. I am sick and tired of all this talk about alienation, anonymity and all that. We could do it. We need coffee in the mixing area, we need open common rooms, we need free discussions, open-ended classroom periods, and

then we could have a community which was relevant. We could forget about all this constipated course credit, grade averages business. Why don't you guys just leave your doors open occasionally and talk to the students.

PROFESSOR III:

I am sick to death of all this business about being excellent and equal. These men (and they are not little boys) and women — have to go into the market-place, they have to work under pressure. I have been on that Petitions Committee for two years and I am sick of those snivelling excuses about virus infections, fiancées pregnant, mom's kicking up a fuss because he wants to marry outside the faith, because he gets nervous in exams, etc., etc., *ad nauseam*. I don't want to say "in my day" and all that but these guys must be tested and we are failing to do that.

PROFESSOR VIII:

Who in the hell says that you have some god-given right to "test" these guys and don't say the Admissions Committee because their criteria are just as much of a cop-out as you are. Who says that it is not just as important to test them to make sure that these guys relate to other human beings, that they are honest and not sucked into all this corrupt capitalistic "I-want-to-be-a-tax-lawyer-and-make-a-million" crap.

PROFESSOR IX:

I think we could learn a lot by making the law school curriculum more geared to a humanistic or cultural philosophy. I think that we can learn many valuable lessons from Legal History. . .

PROFESSORS I THROUGH VIII (in unison):

Will you shut up!

UNIDENTIFIED VOICE (off stage, as it were, as the guests leave the party):

We have to look at the big picture. We need to be tough-minded. Yes, that is what we need. I realise that we are all over-extended and are in danger of exhausting our psychic energies but. . .

The voice trails off as the front door shuts and the Host and one of the Professors (whom we shall simply call Guest) are the only one remaining.

GUEST:

Thanks for allowing me to stay on for dinner. I had wanted to talk with you.

HOST:

It's a pleasure. I wanted to have a discussion with you. We never seem to have any time for a quiet discussion with all that talk at Osgoode

nowadays. And those Council meetings! Do you know that we took two hours yesterday to decide just two items. The Christmas examinations will end no later than December 20 next year. I forget the other item; something about the faculty common room switching from Chase & Sanborn to Maxwell House coffee. It was at least as important as that.

GUEST:

That is why I opted out of those meetings. I am so sick of people talking about viability, relevance and viable alternatives. Perhaps our colleagues in psychology could explain why a collective stupidity seems to take over those faculty meetings. Sorry, I mean Council meetings.

HOST:

I don't think that either of us could be labelled reactionaries. At least I know that I do not want to go back to the "good" old days when we had a completely compulsory curriculum and half the courses were taught by practitioners who lectured two hundred students in Room 102. The Dean those days could not have done without the downtowners, mind you. Only a fool would suggest that the law school has not improved. But where are we going?

GUEST:

Do you remember those long debates about affiliation with York? At least the debates seemed long those days but they were nothing compared with the participatory democracy of today. I was a neutral in those debates because I had only just been appointed to faculty but there seemed great heat generated by both sides. The downtown crew kept talking about the values of being near the courts and the virtues of close associations with the profession.

HOST:

What close associations? With the exception of the Benchers who taught Trusts and Evidence or whatever, I did not see that crew of partisans bringing in their colleagues from Bay Street to enrich the courses in Mortgages or Taxation, or having seminars in Advanced Torts.

GUEST:

Let me finish. I think you are right and the two other well-known law schools which stayed downtown, Sydney and Northwestern, have not been very happy examples. They are both good law schools but the feeling seems to be that they would have been better on campus.

You will remember that the pro-York group kept talking about intellectual climate and inter-disciplinary cross-fertilization. I would hardly say that that has succeeded.

Host:

I think you are being just a little unjust. We have quite a few cross-appointments and we have an enriched curriculum. The students are not forced to do all those black-letter bread-and-butter courses. Those who want them can still do them and probably do opt for corporation law, tax, or whatever they are called.

GUEST:

Sure, we have an enriched curriculum but how many people want to study *Ethopian Air Law*, *Comparative Civil Rights*, or *Child Psychology and Family Conflict in Cabbagetown*? I want some enrichment in the law school but what is the place supposed to be? A post-graduate school of grab-bag social sciences or is it a place which trains lawyers for a profession?

Host:

Well, some of your colleagues say that we can and are doing both.

GUEST:

I would like to think so but if we keep hiring guys to teach "The Theory and Organization of Rent-Strikes" and "Water Resources in Underdeveloped Countries", there is no one left, and no money left, to teach first year subjects and to teach them well.

Host:

You may have a point there. I don't necessarily agree entirely about the "frill" courses but I think students must be well-grounded in the basic first year subjects and some guy just out of graduate school cannot master the case-method or the subject matter.

GUEST:

Exactly, but I have not finished my beef. I think that we are losing sight of our objectives. I was talking with a doctor the other day. He is a specialist and a very intelligent man and, in addition, his wall was covered with residency certificates and specialist diplomas. He told me that when he graduated from medical school (about fifteen years ago), he had never actually used a suture. You know, I mean he had never stitched anyone up. I was staggered to hear this because I thought Abraham Flexner's survey of medical education in the nineteen-twenties had put the medical schools on the right track.

Host:

Let's not open up the whole can of worms about specialization and all that.

GUEST:

I don't intend to but I do get tired of my former students griping about the irrelevancy of their legal education and how they learned more in their one year of articles than in three years of law school.

Host:

But that law student is talking about something equivalent to a medical student not knowing how to fill out a prescription or not being good at psyching out a patient.

GUEST:

But that is the exact point I am trying to make. No, don't get me wrong. I am not suggesting we should become a plumbing school but I am suggesting that most of legal practice is very routine and probably boring. I think our law school is trying to turn out two sorts of lawyers. The first is the activist, knee-jerk, paranoid civil-rights, swinging liberal lawyer who thinks that all his cases will be fights against big city developers or sadistic cops. The other is the brains-truster in corporation, tax or mortgage work who will be grabbed by the biggest firms on Bay Street. That accounts for all the teacher's pets at the top of the class (and a few long-hairs in the middle of the class who stimulate or flatter the professor or who are very active in law school politics). I would like to know what is happening to the great silent majority of practitioners. I mean those relatively bright or decent guys who say little in class, who get turned off because they do not make a B average in their first year and decide, as the cons say, to do their time quietly but who will end up practising off Bay Street on the Danforth and in Orangeville, Oshawa or Kenora. What are we doing for them to prepare them for the mundane practice of everyday law?

Host:

But you are hung up on averages. You keep talking about B averages as if there were some magic in a number. I think we should get away from the tyranny of numbers and prepare an all-round law student no matter what he intends to do with his life.

GUEST:

I am *not* hung up on numbers. The young men and women I am talking about are in the top 40 as well as in the bottom 40. They are simply people who want a profession. Harry Arthurs, I hope, is telling them something about professional responsibility but that is not enough. I want to prepare them for practice. They have had two to four years fooling around with sociology, psychology, Eng. Lit., history and all that stuff. They have had their liberal arts. They want to be prepared for a career. They don't need another three years of waffle. I am supposed to be a scholar and so are you and I am not saying that I want to teach filing, office systems and how to search a title but I may be saying that I don't want these people taking up the time of the professor of jurisprudence.

HOST:

I don't think you know what you want.

GUEST:

You may be right and I think that's what's wrong with legal education. I get tired of deans, and others, talking about the law school's responsible role for training leaders for tomorrow, etc., etc. This type of speech has taken over from those "glory-and-majesty-of-the-common-law" bar dinner speeches of High Court Judges.

I am simply asking for a little bit of market research. Just for a moment, let's put aside the question of student democracy and teaching methods. Instead, let us ask 1) how many lawyers do we need for practice (not as administrative assistants to the Minister of Justice or the President of Rio Tinto but people to service the public as lawyers). 2) where are these lawyers needed 3) given the fact that there are two or three types of practice, what do these lawyers do (a) on Bay St. (b) in the suburbs or middle-sized cities and (c) in rural areas?

HOST:

Can I interrupt you at that point. I think you have omitted one vital question. If you are talking about M.D.s I think we could get somewhere in this debate because there are X number of babies born and Y number of old folk to look after and Z number of hospitals to be filled, but lawyers' work is not as essential as those medical jobs. Why don't you start by asking how many jobs are essentially professional and should remain as monopolies for lawyers. I might be persuaded if you told me that you wanted to do a cost-efficiency report on legal work and you came up with a recommendation that conveyancing was a straight con, that many tasks presently done by lawyers were better (and perhaps more quickly) done by accountants, trust companies, etc.

GUEST:

I am getting round to that. My point is that there is no sense in training hundreds of students in esoteric law and sociology if they are not needed. Perhaps there are two alternatives which we should consider. They may be Utopian but then we are not meant to be practical, are we? First, we need to develop para-legal personnel and to give them much of the routine work. The profession is actually using these people already and are charging the public as if all the work were being done by professionals. The system should be formalised and the savings passed on to the public. Secondly, we should stop a lot of this pseudo-academic approach to law for about two-thirds of the class and they should be able to become lawyers with basic professional skills.

HOST:

I don't think you know what you mean by basic professional skills. I can see what you are getting at and I suspect that you don't want us to reach

the stage which the doctors have reached — where after 6 years, the M.D. has only basic training and then spends another 6 years becoming a specialist.

GUEST:

You're right; I don't know what I mean by "basic professional skills" and that is part of the work I would like to see done. You see, we may even be kidding ourselves as early as first year. There is an awful lot of sophisticated legal theory and policy in first year and it may be irrelevant (that word again!). We keep on talking about appellate law and about difficult or fascinating points of law which are the exceptional cases and most of us tell the students that the routine matters are too easy to have good teaching time wasted on them. The students get everything backwards. We teach them the rule in *Rylands v. Fletcher* and the *theory* of civil procedure and then in third year, if ever, we start seminars in trial practice or whatever. In these seminars, which are no doubt excellent, they learn how to become top-flight tort lawyers. That may be just fine for a few students but many are incapable of appreciating all that expertise and it is useless to them anyway.

HOST:

You want to turn the whole LL.B. course into one long Bar Admission Course. That is taking us back to Osgoode Hall Law School in 1948 or 1938 or sometime.

GUEST:

I may be doing that but I think we have to do it because we are wasting resources if we don't. I think we have to face the fact that there should be two types of qualification. There should be a basic minimum practising requirement which could be achieved within 4 years out of high school with one or more years training in law offices. There could also be an academic course for those who may want to practice but also want a cultural background in law and some academic training in law. At the moment, the law schools in Canada have all wanted to be instant Harvard, or perhaps in our case, instant Yale, and you cannot do it. If we had very high admission standards and could cut off at our ideal level, that would be fine but all the schools are expected to fill every seat which was paid for by the taxpayers.

HOST:

I think you are in serious danger of being labelled an intellectual snob. You want an elitist approach for the people you think are worthy of your wisdom. That will not be accepted by most students today.

GUEST:

O.K., to avoid that label I am prepared to give all students a year of cultural law — legal history, legal writing, survey courses in torts, contracts, etc. — and then a group of sub-professionals can be carved off and they can

have trade training. These people who are siphoned off do not even need a B.A. as a pre-requisite as far as I am concerned. If they decide they want more training, let them come back and have further study in a full LL.B.

HOST:

I think you can see the problem which you have raised and yet I think the logistics of your last idea are overwhelming. Why not make an honest man of yourself and the profession, and go for straight specialist training.

GUEST:

But you have forgotten the fact that I don't know what specialist training is and I don't know what the average lawyer does all day. If we reach a stage where a lot of work is taken away from the lawyers *qua* lawyers, then that will be dandy but I cannot say at this stage what you are talking about. I just don't know. If it makes you feel better, I will compromise. I would be prepared to go along with the following plan. I want (and need) a plan because we seem to be arguing in circles and one of the reasons for this circularity is that the academics don't really know what the practitioners do and *vice versa*. This is improving to some extent because at last we are attracting to the law school bright young practitioners who were successful in practice and who could "do" but nevertheless decided to "teach".

Perhaps we should minimise the pre-law requirement or organise our own pre-law program. This means we might attract more not less bright young men. We could have a combined B.A.-LL.B. in four or five years. Preferably four years. This means that there would be a cultural background for every lawyer. They could do psychology, sociology, constitutional history, political science, etc. and then have two years of law, one of basic concepts of torts, contracts, etc. (or rights, obligations, I don't care what you call them) and then in the second year they could choose from a whole range of subjects such as commercial law, family law, taxation, etc. Then they could go into a year or two of practical training rather like internship. The teaching at that stage would be integrated with the time spent in the office. It would be very different from the present system, where the students spend 12 months as office boys and five months in the Bar Admission Course where they are taught an awful lot of stuff they either don't want to know or already know. They seem to hate the present Bar Admission Course because they are treated as if they were back in primary school, some of the teaching is great but most of it is awful and they have these silly little exams all the time.

If a student wants to continue, he can take one of two directions; he can either do a cultural course in urban planning, transportation, criminology, etc. or he could look into advanced practical problems. The latter would make use of very competent practitioners either part- or full-time on faculty.

I think this system would take some of the flatulence out of the present second and third years and we would have better practitioners because of it.

HOST:

I don't think you will ever sell it to the public or the profession. You

are trying to stratify the profession and that is running counter to the temper of the times.

GUEST:

I think the law of supply and demand will answer your objection. There will only be limited places for the people with the additional qualifications and the law school must be very tough about accepting students for the advanced work. The big firms will get to know of the obvious ability of these advanced students and the firms will wait for these men. The system will sell itself.

HOST:

But what about your para-professionals?

GUEST:

Their training can be undertaken by community colleges. I know that I am going to end up with a referral system from the para-professional and the general practitioner but I see no alternative.

HOST:

What about staffing. You are going to require more staff.

GUEST:

Actually it will require less, not more. If we cut out a lot of the wastage in second and third years, then we can have better teaching experiences in small groups in the advanced courses and, I hope, some of these senior men will be encouraged to take first year perspective courses.

HOST:

You win on that one and yet I have the feeling that you have not answered the problem. Holmes once said that the practice of law was just as much a matter of mastering an art as learning law.

GUEST:

But I think that is the point of my scheme. The first year of law (and the preceding pre-law subjects) would give the cultural background we need for all lawyers. Professor Derham has recently said that you can be fairly sure that the most knowledgeable man in Greek is the senior Professor of Greek but the senior Professor of Law is not necessarily the best lawyer. I do not believe that we can teach a lot of law. I think we can only produce good or potentially good lawyers. I think that the first year must inculcate and can only inculcate some basic skills and these skills have nothing to do with intricate knowledge of tax laws. We can only teach relevance and an ability to marshal facts and prepare a good argument. We do little else and I think we have sold our legal writing program very short. I think we need biblio-

graphical and research skills. The students desperately need writing and research skills and training in the arts of persuasion.

Host:

I hope you are right. I get the feeling sometimes that many of our students are not interested in the law. They are only interested in using a law office or law practice as a launching-pad for making money. That they want to be businessmen. I think this is a prostitution of the law.

GUEST:

I think we must reach a stage where many of these people who are glorified realtors and accountants must make up their minds about the practice of the law and must not be allowed to make money under false pretences.

Host:

Yet that is a very short-term view because I think the profession will have to rethink lots of things — not just the conveyancing monopoly. I think we will soon reach the stage where we have condominiums of professionals. The idea of a lawyer being a partner of an architect, an engineer, a town planner, an economist, or an accountant must come very soon. But it is rather late tonight to embark on that big subject.

* * *

AUTHOR'S NOTE:

The editors asked me to add a conclusion but of course, there is no conclusion. The above scenario (which I intend to sell to the Canadian Broadcasting Corporation as a television series to be called *The Jurisprudes*) is not an answer. It is a starting point and I will be delighted if students, faculty and practitioners want to join issue and talk about relevant details or viable alternatives.

Despite some objections from the editors, I was determined to retain my title. I am not sure if floccinaucinihilipilification is the longest word in the English language but, if readers use their digits they will discover that it has one more letter than antidisestablishmentarianism. That is not the reason for choosing this title. The word is, if you will excuse the expression, relevant — it means “the action or habit of estimating as worthless”. The doubtful might care to consult the Oxford English Dictionary, volume iv, p. 337.

The classical scholars in our midst will notice that it is a compound word, dating back to an eighteenth century Latin grammar at Eton College, containing a number of Latin words which signify very little.

