

The Peter A. Allard School of Law

Allard Research Commons

Faculty Publications

Allard Faculty Publications

2006

Educating the Total Jurist?

W. Wesley Pue

Allard School of Law at the University of British Columbia, pue@allard.ubc.ca

Follow this and additional works at: https://commons.allard.ubc.ca/fac_pubs



Part of the [Legal Education Commons](#), [Legal History Commons](#), and the [Legal Profession Commons](#)

Citation Details

W Wesley Pue, "Educating the Total Jurist?" ([forthcoming in 2006]) 8 *Journal of Legal Ethics* 208.

This Working Paper is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

Educating the total jurist?*

By W. Wesley Pue,
Nemetz Chair in Legal History and
Professor of Law,
University of British Columbia

Wpue@interchange.ubc.ca

Abstract of Paper

This paper discusses a discontinuity between the ways in which legal education has historically sought to reconstruct the soul of lawyers-in-training and the contemporary conceit that legal education can be "value-free".

A modified version of this paper was published as: "Educating the total jurist?", (2006) 8 *Journal of Legal Ethics*, 208-221.

Biographical Note on Author

W. Wesley Pue is Associate Dean (Graduate Studies and Research) and Nemetz Chair in Legal History at the Faculty of Law, University of British Columbia. His research interests relate to legal history and colonialism, policing and the rule of law, and legal education. Recent publications include *Lawyers and Vampires: Cultural Histories of Legal Professions* (Oxford: Hart Publishing, 2003) (co-edited with David Sugarman); *Pepper in our eyes. The APEC Affair* (Vancouver: University of British Columbia Press, 2000); *Misplaced Traditions: British Lawyers, Colonial Peoples*, special issue, 16 (1) *Law in Context*, 1999 (Guest edited with Robert McQueen); and *Lawyering for A Fragmented World*, Symposium issue, (July/ November, 1998) Vol. 5 Nos. 2/3 *International Journal of the Legal Profession* (Guest editor). He serves as general editor for the Law and Society book series of the University of British Columbia Press (<http://www.ubcpress.ca/>)

* This article is developed from a paper presented at the extraordinary workshop convened by Carlos Rivera Lugo. Sponsored by the Onati Institute for the Sociology of Law, *Tendencias Alternativas En La Enseñanza Del Derecho /Alternative Trends In Legal Education*, brought together legal educators from the English and Spanish language worlds to focus on the perils and

|
potentials for legal education. I am indebted to Professor Rivera Lugo and other delegates at the workshop for the privilege of exploring ideas about legal education with them.

What ethical sensibilities should law schools seek to inculcate in aspiring lawyers?

This question is, of course, tantamount to pedagogical heresy.¹

Much contemporary thinking about legal education proceeds on the basis of powerful, though largely unspoken, assumptions that training for a career in law should primarily involve the transmission of technical know-how. In this view education is thought to involve the transmission of a sort of mechanical expertise more or less completely divorced from larger questions of ethics, morality or the lawyer-citizens' duties within a larger civil society. The educational project comes to be seen quite deliberately as an undertaking to prepare part-only of the jurist: communicating knowledge alone while leaving the development of moral judgment to take place elsewhere. Or, not at all.

It was not always thus. The common lawyers who designed the forms and structures of education we have inherited were obsessed with matters of ethical and moral judgment. A desire to instill a moral sensibility in apprentice lawyers weighed heavily in their thinking about legal education everywhere in the common law world, giving rise to the programmes, schemes, and imaginings that provided templates for contemporary university legal training. Legal education has, more often than not, deliberately sought to "construct" a human subject. This has frequently been the explicit mission of educators resolved to form their charges into "citizens" worthy of leadership. With surprising consistency, law teachers have sought to devise pedagogical strategies aimed at constituting or remaking the entire human subject - constructing, as it were, a total jurist. They have done so in order to advance good for its own sake, but also as a prophylactic measure designed to protect against the mere half-lawyer. We live in the shadow of their fears that inadequately socialized but legally trained individuals, schooled in law's techniques but not its values, carry the power to do great damage both to "law" and to the society of which it is part (see, for example, McGillivray; Pue, 1989, 1995a, 1995b, 1999a, 1999b, 2000, 2001, 2003)

This paper has three objectives:

1. to illustrate a variety of contexts in which the construction of a "total jurist" has been viewed as *the* essential purpose of legal education.
2. to identify the relative lack of similar discourses surrounding ethical sensibilities, moral values, or citizen-formation in contemporary times.
3. to note some seemingly unlikely converges of perspective that are apparent in contemporary critiques of higher education.

Legal education as "citizen formation"

Starting, as all common lawyers must, in the United Kingdom, let us consider the evidence of two eminent British lawyers who appeared before Parliamentary committees in the mid-nineteenth century.

C.H. Whitehurst, Q.C., testified before the Inns of Court Commission in his then-capacity as Treasurer of the Middle Temple.² "Some of the very best and first advocates at the English Bar, were no lawyers", he said, emphasizing that "they were very ignorant of Law". More than legal knowledge was needed for, he said, "[t]he Profession must be looked at, not as a mere profession of jurisconsult, to advise" (Whitehurst, 1854).

In so remarking, Whitehurst was not confessing a sort of shameful, dirty secret of the sort best uttered only amongst intimates and *sotto voce*, at that. Though it strikes our generation as very odd indeed, he clearly took pride in the observable legal ignorance of England's leading advocates. Certainly, a particular form of *cultural* attainment possessed by "the very best ... advocates at the English Bar" seemed important to him. It was not, curiously, knowledge of law as such that mattered. The traits most valued involved something other than mere rote learning of legal rules or procedures. Whitehurst's vision of a well-rounded barrister - the total jurist - was of a man (inevitably) whose role involved more than advising on the state of the law, whose attainments

involved something greater than understanding the mechanics and knowing how to pull the levers of the legal system. Odd as it seems a century and a half later, Whitehurst's comments reflected a sort of commonsense view of legal professionalism of his age.

His views carried the authority attaching to his position as a leading member of the barristers' branch of England's divided legal profession. An eminent solicitor, Sir George Stephen, expressed a similar professional vision in testimony before the 1846 Committee on legal education:

It is quite impossible to define, within a narrow compass, the nature of a solicitor's business; it extends to anything, it extends to everything; the fact is, that we are, as professional men, entrusted to a very great extent with the confidence of gentlemen; we are entrusted to a very great extent with the most sacred matters connected with the families of gentlemen. It often happens that the protection of their honour and their character, and of course, of their property, is left to our zeal and our integrity; and where we are brought into this confidential and habitual intercourse with men of every class in society, the highest as well as the lowest, I think that it is most important that the *Profession should be so educated as to be qualified for carrying on that intercourse as gentlemen themselves*; but I apprehend that that qualification cannot be attained except by *educating them as gentlemen*, with much greater attention to *their general endowments and information* than is at present the case. (Stephen, 1846, as quoted by *Select Committee*, 1846, xxxv-xxxvi)³

Read hastily, it is easy to miss the import of this passage (and innumerable others like it). The language is archaic, the sentiment embarrassing, rendering it easily dismissible as only so much excess verbiage, empty rhetoric, signifying little. "Verbiage", however, is rarely "excess" in such contexts. These were well-chosen words, deeply laden with cultural resonances. Solicitors' work was wide, not "narrow". It was "professional" (involving judgment not mere task completion), and involved "confidence". They worked for "gentlemen" (a word occurring four times in this short passage), on affairs involving "sacred matters", and "families", "honour", "character," and "property". Much depended on "zeal" but also, it is important to note, on zeal's counterweight: "integrity". The "highest" class of "men" was affected by the quality and trustworthiness of solicitors. Because Victorians took both their education and their notions of "gentlemanliness" seriously (e.g. Pue, 1999b), all of this connoted much about education and the construction of the

solicitor as a moral subject. “[L]aw”, Stephen said, “forms about the least part of the duty of a solicitor in a large practice.” (Stephen, para. 1966)

Individuals who thought about legal education in the British Diaspora shared much with their counterparts in the United Kingdom. Lawyers in the settler colonies and Dominions were however called upon to articulate widely shared assumptions about “Britishness” including British professionalism, British lawyering, and British legal education with a degree of precision and clarity of thought not normally required at “home”. In the mainland United Kingdom, embedded traditions and established channels of cultural authority rendered unthinkable an array of social, political, and professional possibilities that were distinctly open to consideration in colonial settings and new lands. Colonial legal professions responded, in part, by articulating their professionalism with a degree of clarity and precision that was rarely necessary at the Imperial centre.⁴

Nearly seven decades after the 1846 Committee on Legal Education, an eminent British Canadian lawyer articulated a vision of lawyering that overlapped significantly with Sir George Stephen’s. Speaking in 1913 to the Calgary Bar Association, Ira MacKay asserted that:

The lawyer's office is unquestionably the most important office in the community, and that for the obvious reason that the lawyer is really the only man in the community who really makes it his business to understand the delicate and complex organization of government and law by which the community directs its activities for common ends. The state itself is an edifice constructed solely out of legal material. It is literally made of law. (MacKay, 1940-42, 115)

The expressive context of early twentieth century British North America generated a language of professionalism subtly different from MacKay's English predecessor. The emphasis on “business” and “community” connotes, perhaps, a somewhat greater pull toward utilitarian justifications than Stephen had felt necessary. The difference, however, is one of nuance only: in both formulations the lawyer provides a unifying force, standing at the center of community life. MacKay asserted that lawyer’s were required to mediate between the centrifugal tugs of client interest (Stephen's

"zeal) and the centripetal urges of legality (Stephen's gentlemanly "integrity"). Adopting a stance that recalls Durkheim's emphasis on the integrative function of professions, McKay asserted that the "state itself" depended on lawyers' adeptness in navigating these difficult shoals - not just once-off in moments of crisis but everywhere, always. To do this a lawyer had to be knowledgeable about law and legal procedure, to be sure, but also about the values infusing both British law and the civilization that had spawned it. In short, an education fit for "gentlemen" was needed, not merely training in the law's minutiae.

Elsewhere in Canada, the sojourning English law teacher, R. W. Lee, expressed similar views in a series of articles published at the end of the Great War. Competence alone was insufficient because the total jurist was more than a merely competent functionary. The duty of legal educators was, accordingly, to develop in students "a sense of professional honour and of civic duty; legal education should be directed to producing not only competent practitioners, but men who by their wise and sympathetic handling of the problems of our national life, will add to the dignity and influence of the great profession of the Law" (Lee 1919, 141; see also Macdonald 1990). Law school should instill no less than "the vision of a divine justice transcending the imperfections of human justice...., enlarging "the mental horizon" and quickening "understanding". There was no room to confuse education in law for rote learning or for a pedagogy that aimed only at exhaustive memorization of legal taxonomies or rules (Lee 1916 114).

As the twentieth century dawned, British Canadian lawyers counted upon law school to contribute to the project of Dominion state formation. By carefully selecting and educating the right sort of gentlemanly lawyer, they hoped to save Dominion and Empire alike from disintegration in the face of seemingly overwhelming centrifugal forces. Class, ethnic, religious, and racial divisions, regionalism, the incomplete project of expropriating territory from the Dominion's First Nations, and the huge challenges presented by Canada's enormous geographic

extent presented daunting challenges to social and political integration. The men who created Canadian legal education anew considered a *proper* understanding of law to be synonymous with a series of underlying knowledges, beliefs, faiths, or understandings regarding economy, public administration, constitutionalism, and corporate behaviour, amongst others.

James Aikins, for example, was a distinguished Canadian, an ardent professional reformer, and, undoubtedly, the most important promoter of legal education in early twentieth century Canada. He founded the Canadian Bar Association and served as its President until the year before his death. When the University of Manitoba Law School opened in 1914, he called upon lawyers to "create a sentiment and ideals among the people with whom you come into contact which will place them upon a higher level and justify your influence." Lawyers were to be "leaders in thought, promoters of the intellectual and moral development", who would serve nation and Empire alike (Aikins, 1914 at 1190). Law school should teach "law in a big way,"⁵ and promote "profound knowledge" (ibid., 1188-1189). The object was to provide an education directed toward moral development of the whole student, the total jurist. Aikins expressed contempt for "smartness" unencumbered "by any other knowledge than the latest edition of the Digest, the last Consolidated Statutes, and a text book on some particular branch of the law" (ibid., 1188). Such knowledge would empower zeal, to be sure, but without providing the necessary enhancement of integrity. Consequently, when case-method legal instruction was introduced, it was implemented as a means of instilling virtue and was viewed as an integral *moral* component of legal education (Pue, 1999a).

Australian legal educators, too, reflected the common British consensus that legal education *had to involve* ethical education and training for citizenship. Like their Canadian and "home" British counterparts, they placed great emphasis on Britishness, British traditions, rectitude, and the supremacy of the law (see, for example, Manning, at 23). In 1933 one of the founders of the Law Council of Australia, John G. Latham, developed themes familiar to Canadians, emphasizing the

virtues of lawyers, their potential for service to the community, and the noble ideals which he thought the profession had always stood for "in a British community" (Latham, 1933 at 18; See also: *Australian Law Journal*, 1927, 1935). Future Australian Prime Minister Robert Menzies thought that preservation of "civilization" in Australia rested on "the purity and the independence of justice". In his view, every lawyer had "a properly vested interest in maintaining that purity and that independence" (Menzies, 1936, at 25). L.O. Martin, Minister of Justice for the State of New South Wales, thought the professions carried a special responsibility to preserve "legal authority in British communities" (Martin, 1933, at 20).

It is unsurprising that leading Australian legal educators sought to create forms of education consonant with these moral missions (its character as a moral mission nested within Imperialism will be apparent). Law teachers such as Jethro Brown, Samuel Way, W. E. Hearn, and John Salmond all subscribed to a version of the prevailing common sense. Hearn, the University of Melbourne's first Dean of Law, stressed the need to teach students the gentlemanly (though practically useless) subjects of Roman Law and Jurisprudence as a sort of inoculation against the corrupting influence of practice. In language similar to Aikins' call to teach law in a "big way", Hearn asserted that the "undue regard to petty details and to mere machinery" which preoccupied lawyers' day-to-day lives threatened to produce "neglect of those great ends which these details and the machinery were meant to subserve" (as quoted in Campbell, 48). Legal education, obviously, had to be directed first and foremost to the "great ends". This tradition persisted under Hearn's successors at the University of Melbourne and was actively promoted Dominion-wide (generally, Campbell; See also Bailey; *Law Institute Journal*, 1929; Frame; Roe; Castles, Ligertwood and Kelly; Dixon; Peden).

In “British” Africa too, similar languages have been employed in “visioning” legal education. Lord Denning, probably the most important English jurist of the twentieth century, spoke on “Legal Education in Africa” in 1961, a time when British decolonization was well under way. Law was presented as a prized cultural attainment, in his talk, which was sub-titled, “Sharing Our Heritage”. Law, for his Lordship, was not merely about arcane rules, obscure statutes, dusty cases, and procedural knowledge, but also about “the spirit of the profession”. This, Denning said, involved “frankness, fairness, honesty, courage and the recognition of one’s duty to the Court and client.” Again, integrity (“duty to the Court”) was proffered as counterbalance to zeal (duty to the client). The “greatest value” was attached to “those hidden things that are learned by the contact of mind with mind and spirit with spirit” (Denning, 148). Though a homeland “Brit” holding forth on what would be good for colonials is hardly a fair representation of what Africans themselves thought, Denning’s influence cannot be gainsaid. The legal profession has commonly been freighted with moral duty by African leaders and lawyers. Kenneth Kaunda, for example, stressed the importance of a lawyers’ “training and experience” to working “out solutions to the social and economic problems of society...” and called upon lawyers to “use their knowledge and skills not just for the benefit of their client, but for the advancement of the whole society” (Kaunda, as quoted in Thomas). Though it would be absurd to assert that Zambia, Nigeria, Zimbabwe/Rhodesia or South Africa is “just like” Canada or England (as it is nonsense to assert England and Canada are “just like” each other), common themes deserving of fuller exploration do seem emerge.⁶

What, then, of “American” legal education? Despite its exceptionalist conceits, the United States is a common law country, an offshoot of the British Empire, and a member of the larger cultural community once fondly designated “the English Speaking world”. The United States, too, is a British Diaspora land. Accordingly, many leading USA figures have held understandings of lawyering and the proper ambit of legal education close to those of their

counterparts amongst the “home” British and the Dominions. As elsewhere, the stakes were considered high. Henry St. George Tucker (names don’t get much more British than that) famously commented in 1905 that “The profession of the law is [sic] more potential for good than any other profession, excepting the Christian ministry, and in some respects more powerful for good than even that high profession. Its power for evil is correspondingly great” (as quoted in Cohen, 1916, at 151). C.A. Boston, Chair of the American Bar Association's Legal Education section expressed the view that the goal of legal education was to educate "jurists rather than mere lawyers". This was necessary because "a jurist seeks to conform law to current ideas of moral rectitude, while a lawyer is too prone to perpetrate existing monstrosities of artificial wrong" (Boston at 1091).

Such sentiments would not have been out of place in Australia in the 1930’s, Winnipeg in 1914, or London in 1846. They were widely shared in the USA. The eminent legal scholar, James Willard Hurst, for example, thought legal education should temper technical "know how" with cultural understanding. His ideal law graduate would combine doctrinal knowledge, interdisciplinary ability, and moral character. S/he was to be deeply indoctrinated in essential truths concerning law and the conditions of freedom in the Anglo-United Statesian tradition (see Pue, 2000). Julius Cohen's 1916 work, *The Law: business or profession* was part of this tradition and, as Robert Gordon points out, similar themes run continuously through decades of thinking about USA legal education (Gordon).

Contemporary Legal Education’s Moral Sensibilities: A New Philistinism?

Though a complete history of ideas about legal education in the common law world is beyond the scope of this paper, the above examples point to a surprisingly strong and enduring relationship between ideas about morality on the one hand and programmes of legal education on the other. In noting this, I make no claim as to the “essence” of early twentieth century common law legal education as it was practiced or as it was experienced by students. The vigour and

persistence of rhetorical strategies and aspirational languages that now seem so very alien is noteworthy in itself.

Though history and culture are tricky terrain, most readers will detect an enormous disjunction between views such as these and the “feel” of contemporary legal education.⁷ “Morality” at some point went out of fashion, leaving utility as the only credible measure of educational aspiration. The contemporary rhetoric of the legal academy is much more squarely centred on training for success than on “education” for a moral life or even a cultured one. Official utterances ranging from law school mission statements to Deans’ addresses are replete with references to “excellence” as if that is a goal in itself, or to the primacy of “business law”, or to the usefulness of a degree from XYZ law school for career “success” (McQueen). Languages focused on ethics or morality, much less on tempering “zeal” with “gentlemanliness” or “integrity” are virtually non-existent.⁸ The reasons behind this discursive discontinuity are opaque. No doubt, they are enormously complex. The *relative* lack of discourses surrounding ethical sensibilities, moral values, or citizen-formation in legal education has, however been widely noted by common law scholars.⁹ Some of that scholarship hints at causation.

Julian Webb, for example, has suggested that “‘Law’ as a discipline has built up a relatively substantial and formally coherent internal epistemology, in which... ethical knowledge has played little part.” (Webb, 1998, 137) John Flood believes that contemporary English culture rejects “the values of education in favour of short-term mechanical skills that enhance pragmatics at the expense of ideals” (Flood, at 149), while Harry Arthurs evocatively characterizes contemporary Canadian legal education as “So Near to Wall Street, So Far from God” (Arthurs, 2001a). Similarly, the University of Toronto’s Denise Réaume, describes legal education as having been reduced to a “dry, technocratic endeavour, cut off from intellectual currents in the rest of the academy” (Réaume, 2001; see also Rochette and Pue). Susan Boyd, though hopeful for the future, has

puzzled over the corrosive effects of neo-liberalism on Canadian legal education (Boyd, 2005), while Adriane Howe reports that in Australia “intellectual restraints” which are “assumed to be imposed by economic rationalism” produce an impoverished legal education reduced to “narrowly defined technicist criteria” (Howe, at 274). The result, Ian Duncanson says, is a new philistinism, characterized by “the conviction that ‘to be useful, knowledge must be closely related to some commercial activity’ ... Legal studies conceived ‘as a critical theoretical enterprise’ or as a local form of ‘critical, creative and curiosity-driven scholarship’ no longer has much of a future at a university where ‘corporately inspired vocationalism’ and ‘excessive technicality’ reign supreme” (Duncanson, as quoted in Howe, at 275).

Legal education does not, of course, happen in a vacuum. Most perceptive observers point to larger cultural currents that shape and form what happens in university law schools. The late twentieth century was characterized by the ascendancy and dominance of a strong ideological current that trashed many of the operating assumptions of the social welfare state and its precursors. Mischaracterized as “neo-liberalism”, this ideology bears little relationship to earlier forms of liberalism. It is particularly noteworthy for its *unconstrained* endorsement of self-interest (something the mainstream liberal tradition never advocated) and for the attempt to divorce both economics and public policy from matters of ethics (again, never contemplated as a serious possibility by nineteenth century liberals or conservatives, for example).¹⁰

Legal education has been carried along with the flow of these larger ideological currents. In some cases this has happened directly and deliberately but it is more often an indirect consequence, occurring almost imperceptibly as a neo-liberal mentalité, itself mutating in the course of its global travels, warps both the states and the universities within which law schools exist. Here is how Australian legal scholar Margaret Thornton assesses the interplay of forces:

... the university as we know it has reached the end of its usefulness and the very idea of knowledge has been turned upside down and inside out. ... While the ‘grand narrative of

the University, centred on the production of a liberal, reasoning subject, is no longer readily available to us', new incarnations are being fashioned by the state. These include the model of the liberal subject as consumer, a model that is also reshaping the citizen. The loyalties that animated the citizen in the past are being replaced with new forms of bonding arising from the pursuit of individual economic interests. (Thornton, 6, citing Readings, page 9)

Universities have eagerly sought both to implement and to capitalise on the aims of the state by accepting the role of primary trainers of new knowledge workers. Law schools are being encouraged to mass-produce service-oriented professionals by offering technocratic, skills-based courses, which satisfy the admitting authorities but accord scant regard to the university's traditional *raison d'être* of dispassionate inquiry. The result is that there is a real danger of returning legal education to the 'trade school' mentality of the past. The legal academy will be further impoverished by academics teaching and researching only in those areas adjudged by administrators to be "for the good of the institution", or in other words teaching and research which will bring in the dollars'. As the cost of research is shifted to business, funded research is more than likely to be restricted to consultancies with their instrumental and predetermined outcomes. (Thornton, 10-11)

Similarly, philosopher John Ralston Saul has complained that we have allowed the development of "a university community that does not teach the elites to rise above self-interest and the narrow view", the "self-interest and the narrow view that comes so easily in a world of professional corporations" (Saul at 71). The result, he fears, is that universities are increasingly focused on "teaching most people to manage not to think.... The teaching of transient managerial and technological skills is edging out the basics of learning" (Saul at 15).

Contemporary Legal Education: Toward A New Jerusalem?

At least two ruptures are apparent: a rupture *in* values, and a rupture regarding the importance *of* values. Though one certainly can slip into the other, they are not the same and the first does not logically lead to the second. Neither are their consequences for education identical.

The *particular* values articulated by individuals such as Menzies (Australia), Aikins (Canada), Tucker (USA), Stephens (England) or Denning (for Africa) are not widely appreciated in polite society today. These individuals strike us as elitist, exclusionary, classist, ethnicist, and imperialist. Often Christianist, they have been widely criticized for that and have also frequently understood to be anti-Semitic and racist (eg. Watson Hamilton; Auerbach; Foster). None of this

proved acceptable in the cultural ethos of the decolonizing era that followed the war against the Nazis. Language invoking "British" values, "Christian" duty, and "gentlemanliness" connote much that proved unacceptable after 1945. As western culture began to reappearise its working premises, the *particular* values of earlier generations of professional leaders were widely repudiated (or simply found embarrassing) in the second half of the twentieth century.

This rethinking stopped short of where it should have. The rejection of *particular* values combined with an increasing awareness of value pluralism to produce a second, less easily explained, rupture. Although a reinvigorated and creative discussion of matters of value, morality, and authority *might have* emerged from the creeping recognition of the great violence perpetrated in the name of hitherto largely unquestioned traditions, the mid-twentieth century took a rather different turn.¹¹ Its central conceit became belief in the possibility of acting, studying, and teaching in a determinedly value-neutral fashion. The displacement of questions relating to "values" - not, now, merely temporarily so as to facilitate the completion of some mundane task, nor as an intellectual discipline, a sort of thought-experiment, called into aid in social science investigation, but as *an attainable ideal* - characterized the mid-twentieth century turn.¹² Conventional legal educators, came to assume - and, more rarely, to articulate - the view that law is a merely technical knowledge or intellectual attainment that can and should be taught without attempting to relate it to thinking about "morals" or "values" or "spirits" - much less souls.

This, of course, is an conjurer's trick. All human activity connotes meaning and is, thus, inescapably value-laden. Perceptive observers of cultural trends affecting universities have long been aware of this. They have noted too that "interest" lurks behind assertions of value-neutrality and that, for better or worse, even those who fancy their own pedagogies, educational schemes, or professionalism to be "value-free", cannot avoid promoting some values while marginalizing others (see, eg., Thompson, 1970).

Strong criticisms have been directed at the value choices that are secretly imported into an ostensibly value-free education. Though often advanced by the cultural left, such analyses have emerged from points on the cultural "centre" and "right as well - one thinks of John Ralston Saul and Allan Bloom, for example. Legal education's hidden curriculum has been said to provide training for hierarchy and indoctrination in so-called "neo-liberal" capitalist values. It is also said to be pervasively infused with very particular understandings of masculinity and femininity, race, and imperialism. (See, for example, Kennedy, Frug, Wilkins). In short, even "value-neutral" education manufactures "souls" albeit, perhaps, not always of our liking. This can happen, of course, even where educators earnestly believe themselves to be engaged in a morally neutral pedagogy.

Curiously, some prominent legal educators are hopeful that a return to a more self-aware legal education lies just around the corner. The Faculty of Law at New York University finds redemption of a sort in the challenges and opportunities of "globalization". The rationale behind that faculty's Global Legal Studies programme is intriguing (Hauser). The Dean who oversaw implementation of the programme, John Sexton, argued that increasing awareness of the reality of globalization would spark creativity, in part by chipping away at the complacency which sustains a narrowly technocratic legal education:

As we bring the perspective of a broader spectrum of cultures and legal systems and peoples into the core of legal education, it will create explosive changes in pedagogy and even in the way we teach. It will reveal the foolishness of infallibility and ... encourage a search for different kinds of solutions. Even solutions that seem very fine in a particular context, when tested in other contexts will have to be calibrated. That's a good thing, because then you might learn something through the calibration that feeds back into the initial context as well. So I think that the *experience* of legal education is going to be very different because of the reality of globalization.

Not the least because students will be in classes where they're hearing different viewpoints. I think this is connected deeply, by the way, to the diversity agenda. broadening the spectrum of conversation and the voices that are heard, on bringing different viewpoints into the conversation. To the extent that one brings a more global view to each problem one studies at the core, even in the canon, it will have the same impact. (Sexton)

Canada's Harry Arthurs also finds reason for optimism, albeit somewhat more guardedly. In his view, "globalization and neo-liberalism" produce a "creative tension" that will spark "the energy, the intelligence, the social commitment, ultimately the optimism of Canadian law schools" so as to produce "an alternative vision of a more just state and legal system." "Law schools", Arthurs says, "may not be able to change the world, to transform the law or even to save the soul of the profession. But perhaps, just possibly, they can change themselves" (Arthurs, 2001b, 54).

Conclusions

Although the language employed varies from place to place and time to time, legal professionals and legal educators have traditionally put much emphasis on the importance of developing moral or character qualities through legal education. "Gentlemanly education" has sometimes been the preferred motif. Similar ideas have sometimes been invoked through reference to providing "cultural training in law", or training for "citizenship", or of nurturing "moral rectitude", or Britishness, or creating a particular "spirit" or "soul" of professionalism. However articulated, the common thread has been a belief in the powerful cultural agency of lawyers *and* a commitment to shaping their innermost beings so as to produce the sort of professional likely to make positive contributions to the larger community.

Notwithstanding its heritage, contemporary common law legal education accords little importance to anything beyond the most narrowly technical knowledge. The moral mission of educating "total jurists", of thoughtfully contemplating the ways in which legal education ("value neutral" or not) constitutes the human subject has given way to other, less self-aware, forms of training. Such, it seems, is what the market demands.

Noting these historical shifts raises obvious questions concerning the lessons to be derived from history. Extraordinarily complex questions of historiography, philosophy, and social theory lurk hereabouts. For the present it suffices to note three ironies. First, forms and structures of legal

education that were originally *designed* specifically so as to produce right-thinking neophyte lawyers have transmogrified into the opposite: technocratic training seemingly calculated to knock the moral stuffing out of anyone. Secondly, irony is to be found in the fact that, most critical commentary on the moral silences of legal education to emerge in the English language during the past 30 years or so has originated from disparate positions on the "cultural left". Feminists, critical race theorists, Marxian scholars, and "critical legal scholars", for example, have loomed large. They wear the mantle previously borne by men whose Imperialist, masculinist, and Christianist values would horrify them. Third, an obvious point bears noting. The ethical agenda of legal education derives its particular textures from the moral currents of the larger society within which legal educators live. Just as the moral compass of western societies is at present dramatically up for grabs (Eberly), so too is the future of legal education. Legal educators, however, as "bit-players" in these larger transformations will have little impact on the outcomes, even in their own domain. *Which* values will be accorded a hearing in the future is as much an open question as is the question of *whether* legal education will, once again, aspire to educate "total jurists", not merely mechanics of law.

For the present, mainstream law schools are centred on the task of training for a "corporately inspired vocationalism", a sort of professional corollary of "Enron professionalism" (see: Ackland; Knight; Business Week; Pitt; Schwartz).

And, whatever the alternatives may be, *that* gives cause for concern.

- Ackland, Richard 2002 "Old professionalism gives way to self-interest", *Sydney Morning Herald*, April 26, 2002; <http://www.smh.com.au/articles/2002/04/25/1019441283023.html> [accessed September 2, 2002]
- Adewoye, Omoniyi 1977 *The Legal Profession in Nigeria, 1865-1962* (Ikeja: Longman Nigeria, 1977)
- Aikins, J.A.M. (1914) "Formal Opening of the Manitoba Law School, Inaugural Address to the Students by Sir James Aikins, K.C., M.P.", 34 *Canadian Law Times* 1183-1190.
- Arthurs, Harry 2001b "The State We're In: Legal Education in Canada's New Political Economy", 20 *Windsor Yearbook of Access to Justice*, 35-54.
- Arthurs, Harry W., 2001a "Poor Canadian Legal Education: So Near to Wall Street, So Far from God", (2001) *Osgoode Hall Law Journal* 381.
- Auerbach, Jerold. 1976, *Unequal Justice" Lawyers & Social Change in Modern America* (N.Y.: Oxford University Press, 1976)
- Australian Law Journal, 1927 "An Australian Law Association", (1927) *Australian Law Journal*, 184-185.
- Australian Law Journal, 1935 "Current Topics. Law Council of Australia - Legal Convention" (1935) 9:7 *Australian Law Journal*, 245
- Bailey, K. H. 1929 (Dean, U. Melbourne Faculty of Law), "University Law Course" (1929) III *Law Institute Journal*, 168-169 (letter explaining relationship of "cultural", "professional" and "arts" components of the curriculum)
- Baker, G. Blaine, 1983 "Legal Education in Upper Canada 1785-1889: The Law Society as Educator" in David H. Flaherty, ed., *Essays in the History of Canadian Law: Vol. II* (Toronto: Osgoode Society, 1983), 49-142.
- Bloom, Allan. 1987, *The Closing of the American Mind* (New York : Simon and Schuster, 1987)
- Boston, C.A. (1914) "Some Neglected Fields in Legal Education. Address of Chairman. Delivered before the Section of Legal Education of the American Bar Association at Washington, D.C., Oct. 20, 1914", 34 *Canadian Law Times* 1081-1094.
- Boyd, Susan B., "Corporatism and Legal Education in Canada" 14(2) *Social & Legal Studies* (2005), 287-297.
- Business Week 2002 "Special Report - The Enron Scandal - One Big Client, One Big Hassle: Vinson & Elkins' heavy reliance on Enron is now a potential liability for the law firm" January 28, 2002; http://www.businessweek.com/magazine/content/02_04/b3767706.htm [accessed August 1, 2005]
- Campbell, Ruth 1977 *A History of the Melbourne Law School, 1857 to 1973* (Melbourne: Faculty of Law, University of Melbourne, 1977).
- Castles, Alex, Andrew Ligertwood and Peter Kelly, 1983 *Law on North Terrace, 1883-1983* (Adelaide: Faculty of Law, University of Adelaide, 1983)
- Cohen, Julius Henry 1916, 1924, *The law : business or profession?* (New York : Banks Law Publishing Co., 1916); Rev. ed., 1924. (New York, G. A. Jennings Co. 1924)
- Denning, Lord 1961 'Legal Education in Africa. Sharing Our Heritage' (1961) 58 *Law Society Gazette* 147-148, 148.
- Dixon, Marion 1992 *Looking Back: A short history of the UWA Law School, 1927-1992* (Perth: University of Western Australia, 1992);
- Duncanson, Ian (1997) "The Ends of Legal Studies" 3 *Journal of Current Legal Issues* <http://webjcli.ncl.ac.uk/1997/issue3/duncan3.html> [accessed August 1, 2005]
- Eberly, Don, (ed.) *Building a Healthy Culture: Strategies for an American Renaissance* (Grand Rapids: Wm. B. Eerdmans Publishing, 2001)
- Evans, Adrian, "The Values Priority in Quality Legal Education: Developing a Values/ Skills Link through Clinical Experience" (1998) 32 *Law Teacher*, 274-286.

- Fish, Stanley, "Why We Built the Ivory Tower", *New York Times*, May 21, 2004.
<http://www.nytimes.com/2004/05/21/opinion/21FISH.html?ex=1086165317&ei=1&en=270d38a3b9d86665>
- Flood, John, 1999, "Legal Education, Globalization, and the New Imperialism" in Fiona Cownie, ed. *The Law School – Global Issues, Local Questions* (Aldershot: Ashgate/Dartmouth, 1999) Ch. 6, 127-158.
- Foster, James C. 1986, *The Ideology of Apolitical Politics: Elite Lawyers' Response to the Legitimation Crisis in American Capitalism, 1870-1920* (Port Washington, N.Y.: Associated Faculty Press, 1986)
- Frame, Alex 1995 *Salmond: Southern Jurist* (Wellington, 1995);
- Fraser, Robert L., 1992 "All the privileges which Englishmen possess': Order, Rights, and Constitutionalism in Upper Canada", in Robert L. Fraser, ed., *Provincial Justice: Upper Canadian Legal Portraits from the Dictionary of Canadian Biography* (Toronto: The Osgoode Society, 1992)
- Freedman, Monroe H. 1966 "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" 64 *Michigan Law Review*, 1469
- Frug, Mary Joe. 1992 *Postmodern Legal Feminism* (N.Y.: Routledge)
- Gagnier, Regenia, *The Insatiability of Human Wants: Economics and Aesthetics in Market Society* (University of Chicago Press, 2000)
- Gordon, Robert W. 1995 "The case for (and against) Harvard" 93 *Michigan Law Review* 1231-60.
- Harrington, John A. and Manji, Ambreena, (2003) "'Mind with Mind and Spirit with Spirit': Lord Denning and African Legal Education" *Journal of Law and Society*, Vol. 30, pp. 376-399.
- Hauser Global Law School Program, New York University School of Law,
<http://www.nyulawglobal.org/MessagefromDirector.htm> (accessed August 1, 2005)
- Howe, Adrian 2000 "Law out of context (or who's afraid of sex and violence in legal education)", 25 *Alternative Law Journal* (December 2000), 274-278.
- Kaunda, K 1970 'Address to the Law Society of Zambia', 24th April 1970.
- Kennedy, Duncan. 1998 "Legal Education as Training for Hierarchy", in David Kairys, Editor, *The Politics of Law: A Progressive Critique* (3rd edition) (N.Y.: Basic Books)
- Knight, W.H. 2002 "Dean's Column: Noses in the Air" February 4, 2002,
<http://www.law.washington.edu/LawSchool/new/deancol/01-02/02-04-02.html> [accessed September 2, 2002]
- Kronman, Anthony T. 1993, *The Lost Lawyer: Failing Ideals of the Legal Profession*, (Harvard University Press, 1993)
- Latham, John G. 1993 "Duties and Opportunities of the Legal Profession in Australia", (1933) *The Australian Law Journal*, 15-18.
- Law Institute Journal, 1929 "Reviews and Notices", "A Defence of Jurisprudence" 1929 III *Law Inst. J.*, 178 (account of a pamphlet from U. Melbourne on the inaugural address of the Chair in Jurisprudence).
- Lee, R.W. (1916) "Legal Education, Old and New, III", 36 *Canadian Law Times* 109-115
- Lee, R.W. (1919) "Legal Education: A Symposium", 39 *Canadian Law Times*, 138-141
- Macdonald, R. (1990) "The National Law Programme at McGill", 13 *Dal. L.J.* 211.
- McGillivray, Anne, " 'He would have made a wonderful solicitor': Law, Modernity and Professionalism in Bram Stoker's *Dracula* in W. Wesley Pue and David Sugarman, eds., *Lawyers and Vampires: Cultural Histories of Legal Professions* (Oxford: Hart, 2003), 225-267.
- MacKay, Ira, (1940-42) "The Education of a Lawyer" [speech delivered Dec. 1913, to the Third Annual Meeting of the Law Society of Alberta] *Alberta L.Q.* 103-115.
- McQueen, Rob, "The Nike Law School (or) Branding and its Discontents in Legal Education" (paper delivered at W G Hart Legal Workshop 2001, *The Changing Work And Organisation Of Lawyers:*

- Educational Implications*, 26-28 June, 2001, Institute of Advanced Legal Studies, University of London) (http://ials.sas.ac.uk/events/docs/wgh01_abstracts.pdf) (abstract accessed July 29, 2005)
- Manning, H.E. 1933 "Fraternity of the Bar", (1933) *The Australian Law Journal*, 23-25. (Address to the First Conference of Australian Legal Societies, 1933)
- Martin, L.O. 1933 "The Methods of Protecting the Public and the Legal Profession Against Defaulting Solicitors", (1933) *Australian Law Journal*, 18-21.
- Menzies, R. G. 1936 AG, Commonwealth, reply to toast at banquet, "Supplement to the Australian Law Journal – Australian Legal Convention, 1936", 1-112, at 25 (Supplement to Volume 10, *Australian Law Journal*)
- Nkrumah, K. 'Legal Education in Africa' (1962) 6 *Journal of African Law* 103-108.
- Peden, J. B. 1933, "Legal Education" (1933) *Australian Law Journal*, 25-28.
- Pitt, Harvey L. 2002 "Public Statement by SEC Chairman: Remarks at the SEC Speaks Conference" U.S. Securities and Exchange Commission, Washington, DC February 22, 2002. <http://www.sec.gov/news/speech/spch540.htm> [accessed September 2, 2002]
- Pue, W. Wesley 1989. "Guild Training versus Professional Education: The Department of Law at Queen's College, Birmingham in the 1850's" (1989) 33 *The American Journal of Legal History*, 241-287
- Pue, W. Wesley 1995a. "Common Law Legal Education in Canada's Age of Light, Soap and Water" in *Canada's Legal Inheritances*, Symposium Issue, edited by W. Wesley Pue and D. Guth, (1995) 23 *Manitoba Law Journal*, 654-688
- Pue, W. Wesley 1995b. *Law School: The Story of Legal Education in British Columbia* [Vancouver: Continuing Legal Education Society of British Columbia & Faculty of Law, University of British Columbia, 1995] (xxvii + 285 pages)
- Pue, W. Wesley 1999a. "'The disquisitions of learned Judges': Making Manitoba Lawyers, 1885-1931", in Jim Phillips and G. Blaine Baker, eds., *Essays in the History of Canadian Law: In Honour of R.C.B. Risk* (Toronto: Osgoode Society, 1999), 825-914
- Pue, W. Wesley 1999b. "British masculinities, Canadian Lawyers: Canadian legal education, 1900-1930", in *Misplaced Traditions: The Legal Profession and the British Empire*, Symposium Issue, 16(1) *Law in Context*, 1999 (guest edited by Robert McQueen and W. Wesley Pue), 80-122
- Pue, W. Wesley 2000. "Locating Hurst", in "Engaging Willard Hurst: A Symposium" 18:1 *Law & History Review*, 2000, 187-195
- Pue, W. Wesley 2001. "Planting British Legal Culture in Colonial Soil: Legal Professionalism in the Lands of the Beaver and Kangaroo", in Linda Cardinal and David Headon, eds., *Shaping Nations: Australia & Canada, 1851-2001* (Ottawa: Institute of Canadian Studies and University of Ottawa Press, 2001)
- Pue, W. Wesley 2003. "Cultural Projects and Structural Transformation in the Canadian Legal Profession in Pue and David Sugarman, eds., *Lawyers and Vampires: Cultural Histories of Legal Professions* (Oxford: Hart Publishing, 2003)
- Readings, Bill. 1996, *The University in Ruins* (Cambridge: Harvard University Press, 1996), page 9.
- Réaume, Denise G. (2001) "Rethinking the Laissez-Faire Law Curriculum: Fostering Pluralism and Interdisciplinarity" (unpublished conference paper, *draft* of Spring 2001)
- Rochette, Annie and W. Wesley Pue, 2001 "'Back to Basics?' University Legal Education and 21st Century Professionalism" 20 *Windsor Yearbook of Access to Justice*, 167-190
- Roe, Michael, 1977 *William Jethro Brown, An Australian Progressive 1868-1930* (University of Tasmania Occasional Paper 7, 1977);
- Sachs, Albie 1973, *Justice in South Africa* (Berkeley: University of California Press)
- Saul, John Ralston, 1997 *The Unconscious Civilization* (Concord, Ont. : House of Anansi Press, 1995)
- Schwartz, John 2002 "Questions From Congress for Enron's Law Firm" *The New York Times*, March 12, 2002 <http://foi.missouri.edu/congquesenron.html> [accessed September 2, 2002]

- Select Committee on Legal Education 1846 *Report from the Select Committee on Legal Education; together with the Minutes of Evidence, Appendix and Index* (House of Commons)
- Sexton John. 2000 "Legal Education, Today & Tomorrow", *Green Bag*, <http://www.greenbag.org/Sexton.pdf> [accessed August 1, 2005]
- Simon, Jonathan. 2000 "Megan's Law: Crime and Democracy in Late Modern America" 25:4 *Law and Social Inquiry* 1111-1150.
- Stephen, Sir George, 1846. Testimony to *Select Committee on Legal Education*, (ibid), 144-158.
- Sugarman, David, "Legal Theory, the Common Law Mind and the Making of the Textbook Tradition." In *Legal Theory and Common Law*, edited by William Twining, 26-61 (Oxford: Basil Blackwell, 1986)
- Thomas, P. 1971 'Legal Education in Africa: With Special Reference to Zambia' (1971) 22 *Northern Ireland Legal Quarterly* 3-37, 4.
- Thompson, E. P. 1970 *Warwick University Ltd.: industry, management and the universities* (Harmondsworth, Penguin, 1970)
- Thornton, Margaret, 2001, "Among the Ruins: Law in the Neo-Liberal Academy" 20 *Windsor Yearbook of Access to Justice*, 3-24.
- Watson Hamilton, Jonette, "Metaphors of Lawyers' Professionalism" (1995) 33 *Alberta Law Review* 833
- Webb, Julian, "Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education", (1998) 25 *Journal of Law and Society*, 134-150.
- Whitehurst, C.H. 1854, Treasurer of the Middle Temple, Evidence before the *Inns of Court Commission*, 524.
- Wilkins, Robert Kerry. 1987 "The Person you're Supposed To Become": The Politics of the Law School Experience" 45(1) *University of Toronto Faculty of Law Review*, 98.

- ¹ For example, Stanley Fish, a bete noir of USA legal education generally considered to be of the cultural left, issued a retirement broadside warning against universities taking up the mission of ethical education: Stanley Fish.
- ² The English legal profession is divided into two "branches". A solicitor's branch is commonly understood (though not entirely accurately) as engaging primarily in the paperwork of law, while the Bar or "barristers' branch" is commonly understood (again, not entirely accurately) as a profession of courtroom advocates. The "Bar" is regulate by four professional bodies (the "Inns of Court") and all barristers must belong to one or other Inn. The four Inns of Court are Middle Temple, Inner Temple, Gray's Inn and Lincoln's Inn. The head of each Inn is designated the "Treasurer" not, as is commonly the practice in other organizations, the "President".
- ³ The first attempt to implement a programme of legal education responding to the 1846 committee was Charles Rann Kennedy's law teaching at Queen's College, Birmingham: see Pue, 1989. cf. Sugarman on Oxford's redefinition of legal education in subsequent decades.
- ⁴ For this reason it is not surprising that the Law Society of Upper Canada (Ontario) was the first "modern" legal profession in the British Empire. Fascinating accounts are provided by Baker and Fraser.
- ⁵ "bigness" in legal learning, implied: (i) "a broad study of subjects which are more or less connected with the law"; (ii) concern with "the highest interests of man in practical affairs"; and (iii) "dignity of moral feeling and profound knowledge." Aikins, at 1187, 1188
- ⁶ Similar sentiments were expressed by Ghana's first president: K Nkrumah. See also Adewoye; Sachs. I am grateful to John Harrington and Ambreena Manji for sharing with me their outstanding work on Africa and to Chidi Oguamanam for teaching me about the legal profession in Nigeria.
- ⁷ Though not expressed in these terms, Anthony T. Kronman's, *The Lost Lawyer: Failing Ideals of the Legal Profession*, (Harvard University Press, 1993) captures something of a sense of the discursive gap that exists between contemporary and preceding languages of professionalism.
- ⁸ Explicitly Christian law faculties in the United States stand outside of the mainstream in this regard. Pepperdine University Law Dean Kenneth W. Starr, for example: "At our best, we are ever disciplining and training ourselves in what, at its best, is a helping, caring profession. The mission of Pepperdine calls upon all of us in the community – students, faculty, administrators and staff, and friends of the law school – to be of genuine service in building and encouraging. At our best, we will be effectively trained instruments of peace, as the beautiful prayer of St. Francis captured and conveyed." (<http://law.pepperdine.edu/visitors/deansmsg.jsp>) (accessed July 29, 2005). The University's Mission statement reads: "Pepperdine is a Christian university committed to the highest standards of academic excellence and Christian values, where students are strengthened for lives of purpose, service, and leadership." (<http://www.pepperdine.edu/welcome/about/>) (accessed July 29, 2005)
- ⁹ In noting a relatively lack of discourse around morality as a central component of legal education I do not for a moment suggest a total absence. In addition to the explicitly "moral" agenda of Christian law schools in the USA, scholars often insist on the importance of a values-aware legal education. See, for example, Adrian Evans, and Julian Webb.

- 10 Curiously, the larger "conservative" house within which neo-liberals reside often endorses moral crusades against "criminals" or unwed mothers, while zealously arguing that questions of ethics and morality have no place in the corporate boardroom, or in state policies concerning worker safety, environmental standards, business conduct, trade, or economic regulation. But that is another story. On the criminal justice side see Jonathan Simon's (2000) work on governing through crime
- 11 Whereas legal *scholarship* often addressed matters of value, ethics, and moral choice the *teaching mission* of most law schools, most of the time, flowed in opposite directions and did so in a context in which profit-generating "usefulness" became the primary criteria of legal professionalism in the larger world.
- 12 In the common law world a high-water mark of sorts for the vision of lawyers as agents for their clients, unencumbered by moral concern, was marked by Freedman's brilliant if disturbing article "Professional Responsibility of the Criminal Defense Lawyer" (Freedman, 1966).