

1999

British Masculinities, Canadian Lawyers

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Citation Details

W Wesley Pue, "British Masculinities, Canadian Lawyers" 16:1 (1999) *Law in Context* 80.

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British masculinities, Canadian Lawyers:

Canadian legal education, 1900-1930

a modified version of this paper was published 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

February 8, 1999

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Reflecting on the first eight decades of Ukrainian settlement in the Canadian prairies, Methodius Nychka recalled that

The Anglo-Saxon majority in this area seemed quite hostile to the Slavs. They regarded them as people capable only of low servile manual tasks. Anglo-Saxons considered themselves the masters of this country, the country which they hoodwinked from the Indians. Our people, although poor, conquered this Canadian soil, not through war, but through tireless, stubborn toil. They dried out swamps, bridged roads, built railroads, cut down forests. Our pioneer slowly rooted himself into the new land, tamed her wild nature, made her cultivable, fertile.²

This passage serves as a valuable reminder of the central place perceptions of ethnicity have played in the history of western Canada. Its metaphoric construction of colonization as sexual conquest remind us too that cultural presuppositions about masculinity and gender infuse narratives of colonization and settlement.

Improbable though it may seem, I wish to explicate the relationship that existed in the minds of elite reformers of the Canadian legal profession between the Socratic method of legal education and the effective colonization of Canadian space. It matters that their deliberations concerning legal education took place in a context within which assumptions regarding ethnicity, masculinity, class, progress, and colonization constituted common sense.

1) Introduction

²Nychka, M. (Rev.), OSBM (translated by Rev. G. Siermachewsky) "Mundare Yesterday and Today" in Fr. S. Yakymyshyn, et al., eds. (1969) *Mundare Yesterday and Today*. Toronto: Basilian Press 97-156 at 109.

Though ultimately part of a much larger story concerning the processes of "civilization" and of the incorporation of foreign spaces and diverse peoples alike into the Canadian polity, my immediate focus is the mundane internal affairs of a particular legal profession. I am concerned here with developments during the first third of the twentieth century, and especially with the decade and a half starting in 1914. This is the period in which legal education's cultural role in state formation came into sharpest focus as the cultural movements surrounding lawyering took institutional form in a new, "national" organization. The Canadian Bar Association (CBA), which met for the first time in 1914,³ provided a vehicle through which professional visions could be expressed, particular matters debated, reports issued, and plans laid for the implementation of reforms.

The Canadian Bar Association was (and is) an entirely voluntary elite institution. It has never played any formal role in the governance of Canadian lawyers and is closer in spirit to gentlemen's clubs than to regulatory bodies on the model of either the late nineteenth century English Inns of Court⁴ or the provincial Law Societies ("integrated Bars") which exist in each

³ I ignore here a pre-history of the *idea* of creating a national bar association which included a failed initiative originating in Nova Scotia in the late nineteenth Century.

⁴ The qualification in this sentence is important: the English Inns of Court were in no respect proto-type regulatory bodies in the modern sense until well into the nineteenth century. See *e.g.* Pue, W.W. "Lawyers & Political Liberalism in 18th & 19th Century England" in L. Karpik & T. Halliday, eds. (1997) *Legal Professions and Political Liberalism*. Oxford University Press 239-302; Pue (1990) "Moral Panic at the English Bar: Paternal vs. Commercial Ideologies of Legal Practice in the 1860's", 15 *Law and Social Inquiry* 49-118; Pue "Trajectories of Professionalism: Legal Professionalism after Abel" in A. Esau, ed. (1991) *Manitoba Law Annual, 1989-1990*. Winnipeg: Legal Research Institute 57-92 [reprinted from (1990) 19 *Manitoba Law Journal* 384-418].

common law Canadian jurisdiction.⁵ Existing within civil society, the Association's ethos is that of volunteerism and public service, not "regulation" in the ordinary sense of the word. One feature hitherto largely overlooked by Canadian legal historians is important: the prime movers in Canada's key moment of lawyers' professionalization were Western Canadian - and especially Manitoban - lawyers.⁶ During the period addressed in this paper *all* major initiatives in professionalization of Canadian lawyers originated in the prairie west. An important part of this story, the cultural forces propelling Canada's slow twentieth century drift toward full-time

Each of the Inns resisted taking on the character of anything resembling a "regulatory" body well into the twentieth century. See Pue (1991) "Becoming `Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada", 20 *Manitoba Law Journal* 227-261 [also published in D. Gibson & W. W. Pue, eds. (1991) *Glimpses of Canadian Legal History* Winnipeg, Man.: Legal Research Institute, Univ. of Manitoba 237-277]; Abel, R.L. (1988) *The Legal Profession in England and Wales*. Oxford: B.H. Blackwell.

⁵ For histories of Canadian law societies see: Moore, C. (1997) *The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997*. Toronto: University of Toronto Press.; Gibson, D. & Gibson, L. (1972) *Substantial Justice: Law and Lawyers in Manitoba, 1670-1970*. Winnipeg: Peguis Publishers; Watts, A. (1984, 1986) *History of the Legal Profession in British Columbia, 1869-1984*. Vancouver: Law Society of British Columbia.

⁶ See Pue "Becoming Ethical", *supra* note 4; Pue (1995) "Common Law Legal Education in Canada's Age of Light, Soap and Water" in *Canada's Legal Inheritances*, Symposium Issue, 23 *Manitoba Law Journal* (edited by W. W. Pue with D. Guth) 654-688; Pue "'The disquisitions of learned Judges': Making Manitoba Lawyers, 1885-1931" in J. Phillips and G. B. Baker, eds. (1999) *Essays in the History of Canadian Law: In Honour of R.C.B. Risk* (forthcoming). Toronto: Osgoode Society & University of Toronto Press.

professional law schools, has been overlooked by historians whose gaze is directed elsewhere - typically Toronto or Halifax, sometimes Montréal.

The suggestion that some significant connection exists between modes of qualification for legal practice on the one hand, and issues surrounding colonization, empire, and culture on the other is, admittedly, somewhat counter-intuitive. Bearing in mind, however, Gauri Viswanathan's urging that educational history needs to be understood not just in terms of institutional growth or curriculum development but also within its "expressive context",⁷ two contexts become important in relation to early twentieth century Canadian legal education. First, it is important to appreciate the centrality of law in imperial processes. Secondly, I wish to point to some reasons why Canada's full incorporation of the west seemed problematic in the first third of the twentieth Century. The ways in which the problems of Empire were understood by influential British Canadians are centrally important.

After lightly sketching-in these contexts, I briefly describe significant developments relating to professional qualification which took place in the prairie west during the decade and a half starting in 1914. Finally, early twentieth century Canadian lawyers' understandings of the relations between legal education, colonization, and governance of Canada's space are described.

2) Law and Empire

⁷ Viswanathan, G. (1989) *Masks of Conquest: Literary Studies and British Rule in India*. N.Y.: Columbia University Press at 4.

It may indeed be the case, as Césaire has it, that the "decisive actors" in colonization were not missionaries, judges, lawyers, or teachers but, rather, "the adventurer and the pirate, the wholesale grocer and the shop owner, the gold digger and the merchant".⁸

Nonetheless the ideological or discursive universes which enveloped Imperial expansion required some level of self-justification. Imperial apologetics, always, was more than mere propaganda, myth or illusion. It consisted, loosely and to varying degree, of belief in the inevitability of "progress", "scientific" racism, confidence in the inevitability of "progress", commitment to a "civilizing" mission, and an intense sense of moral obligation to bear the "White Man's Burden". Members of the "Round Table Movement", to take but one early twentieth century example, shared "a belief in the political wisdom of the British and their system of government. Many believed the British had a duty and a moral responsibility to educate 'the backward peoples' of the world to an understanding of the British system."⁹ Such attitudes, commonplace within Empire's mentalité, were neither empty rhetoric nor a false consciousness cynically put about in service of material ends.

⁸ Césaire, A., excerpt from "Discourse on Colonialism", as reproduced in P. Williams and L. Chrisman, eds. (1994) *Colonial Discourse and Post-Colonial Theory: A Reader*. N.Y.: Columbia University Press 172-180 at 173.

⁹ Kendle, J. (1975) *The Round Table Movement and Imperial Union*. Toronto: University of Toronto Press at xv.

Imperialists often thought of themselves as transmitting great gifts to the world.¹⁰ Foremost amongst these were technology, Christianity, rational social organization, law, progress, and liberty. Each of these elements of "civilization" was significant. Such notions were not neatly severable one from the other, nor even analytically distinct in any rigorous fashion and any attempt to place them in rank order of importance is futile. English "law", to take but one example, was widely thought to be infused with Christian principles, and was considered the essence of liberty, the principle foundation for rational social order and, hence, the key to "progress".¹¹ It was also

¹⁰ Fitzpatrick, trenchantly, has described imperialists as conceiving of law as a "gift we gave them": Fitzpatrick, P. "The Desperate Vacuum: Imperialism and Law in the Experience of Enlightenment" in A. Carty, ed. (1990) *Post-Modern Law: Enlightenment, Revolution and the Death of Man*. Edinburgh: Edinburgh University Press 90-106 at 99; cf. Fitzpatrick, P. (1992) *The Mythology of Modern Law*. London: Routledge 107-108.

¹¹ An intriguing account of mid-nineteenth century English attitudes toward their constitution and "progress" ("the major metanarrative beyond politics at this time") is provided by Joyce, P. "The constitution and the narrative structure of Victorian politics" in J. Vernon, ed. (1996) *Re-reading the constitution: New narratives in the political history of England's long nineteenth century*. Cambridge: Cambridge University Press 179-203 at 189.; The religious underpinnings of law, even in the United States of America, is discussed in Siegel, S. (1995) "Joel Bishop's Orthodoxy", 13 *Law and History Review* 215-259. See also LaPiana, W.P. (1994) *Logic and Experience: The Origin of Modern American Legal Education* N.Y.: Oxford University Press at 55 ff. LaPiana's views are critiqued by R.W. Gordon on the grounds that the books of the period reveal only a small role for natural law reasoning: Gordon, R.W. (1995) "The Case For (and Against) Harvard", 93 *Michigan Law Review* 1231-1260, at 1251-52. With respect this seems to overlook the possibility that religious thought, albeit not worn on the sleeve, might influence legal writing - in precisely the same way that Gordon asserts that the categories of classical legal thought came to pervade all legal thinking, even by those who were not sympathetic to the project in the first place (1244-1245). If all law can be "ideological", then all law can be "religious" too.

however considered the cornerstone of secular rationality: nineteenth century bourgeois Europeans as diverse as Sir Henry Maine, Max Weber, and Karl Marx perceived some relationship between legal form, social progress, capitalism, and economy.¹²

Though the growth of cultural studies, post-colonialism, and related intellectual interests has cut a wide swath through scholarship, analyses of the role of law in the imperial project are not as plentiful as one might hope. This is the more curious perhaps in light of the many, obvious, and intersecting roles law plays in relation to colonialism. Martin Chanock has aptly observed that law is the cutting edge of colonialism,¹³ while Sally Merry accords law "central" place in "the colonizing process".¹⁴ Both within metropolitan states and amongst their colonial outposts, law is simultaneously an exercise of force, "schoolmaster",¹⁵ a cultural arena, referee as between

¹² See *e.g.* Corrigan, P. & Sayer, D. (1985) *The Great Arch: English State Formation as Cultural Revolution*. Oxford: Basil Blackwell. See especially "Afterthoughts" 182-208 for a useful discussion of major sociologists. On Maine, see Diamond, A., ed. (1991) *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*. Cambridge: Cambridge University Press.; Cocks, R. (1988) *Sir Henry Maine; a study in Victorian Jurisprudence*. Cambridge: Cambridge University Press.

¹³ Chanock, M. (1985) *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia*. Cambridge: Cambridge University Press at 4.

¹⁴ Merry, S.E. (1991) "Law and Colonialism", 25 *Law and Society Review* 889-922 at 891.

¹⁵ Sachs, A. (1973) *Justice in South Africa*. Berkeley: University of California Press at 43.

commercial interests, discursive field, legitimating device, focal point of resistance, disciplinary technique, ideological state apparatus, shaper of souls, and semi-autonomous social field (no doubt among many others). More specifically, "law" or some notion of it is clearly central to British identities, to Anglo-American self-image.¹⁶ It certainly seems plausible that the contributions of Anson or Dicey or Langdell have had more profound impact on twentieth century Anglo-American cultures and their Imperialist legacies than F. R. Leavis or Joseph Conrad or even William Shakespeare. No such position could be sustained however from any random literature review or citation count in scholarship on post-colonial or cultural studies themes.¹⁷

¹⁶ Social historians have been especially good at putting these matters on the intellectual agenda: Thompson, E.P. (1993) *Customs in Common: studies in traditional popular culture*. NY: The New Press.; Hill, C. (1996) *Liberty Against the Law: Some Seventeenth Century Controversies*. London: Penguin Books; Hay, D., Linebaugh, P. & Thompson, E.P. (1975) *Albions Fatal Tree: Crime and Society in Eighteenth Century England*. London: Allen Lane.; Romney, P. (1989) "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture", *7 Law and History Review* 121-174.

¹⁷ The relationship of law to imperial ambitions is however increasingly recognized by lawyers, historians, and others seeking to understand the momentous changes that precipitated or followed upon European colonial expansion, and the various processes caught under the rubric of "decolonization". See e.g. Harris, D. (1998) *The Legal Capture of British Columbia's Fisheries: A Study of Law and Colonialism*. LL.M. thesis (unpublished): University of British Columbia.; Merry, S.E. (1991) "Law and Colonialism", *25 Law and Society Review* 889-922; Foster, H. (1990) "Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859", *34 Am. J. Leg. Hist.* 1-48; Chanock, M. (1985) *supra* note 13; MacKenzie, F. (1990) "Gender and Land Rights in Murang'a District, Kenya", *17 The Journal of Peasant Studies* 609-643; MacKenzie, F. (1986) *Land and Labour: Women and Men in Agricultural Change, Murang'a District Kenya*. Ph.D. Dissertation: University of Ottawa.; Moore, S.F. (1986) *Social Facts and Fabrications: Customary Law on Kilimanjaro, 1880-1980*. Cambridge: Cambridge University

A leading post-colonial legal scholar, Peter Fitzpatrick, has argued that enlightenment European law actively defined itself in *opposition* to the "other".¹⁸ Western law and, for our purposes, British law in particular, makes peculiar claims to secular rationality, in presumed contradistinction to the laws of the "other". Native law may amount only to "Khadi" justice. It may be irrational, inconsistent, corrupt, unwholesome, biased, unpredictable, founded on superstition or charisma, parochial, incompetently administered, primitive, and unreliable. British law, however, defines itself *against* these. It represents itself as the accumulated wisdom of the ages, the pinnacle of civilization, the summit of liberty, and the reconciliation of freedom with order. Superior even to the laws of other European peoples, British law has often appeared to its subjects as the key to "progress". A common juridical terrain resting on "a rational method, a unified science and an exact language" (misappropriating here Rorty's words¹⁹), British law was thought of as a very special social tool uniquely capable of transcending the fragmenting and destructive centrifugal forces of religion, class, ethnicity, and locality. From within British

Press.; Fitzpatrick, P. (1989) "Crime as Resistance: The Colonial Situation", 28:4 *The Howard Journal* 272-281; Fitzpatrick, P. (1983) "Marxism and legal pluralism", 1:2 *Australian J. of Law and Soc.* 45-59; Banner, S. (1996) "Written Law and Unwritten Norms in Colonial St. Louis", 14 *Law and History Rev.* 33-80; Thompson, E.P. *supra* note 16; Loo, T. & McLean, L., eds. (1994) *Historical Perspectives on Law and Society in Canada*. Toronto: Copp Clark Longman Ltd.

¹⁸ Fitzpatrick (1992) *Mythology*, *supra* note 10.

¹⁹ Rorty, R. (1986) *Philosophy and the Mirror of Nature*. Oxford: Blackwell at 1063, as cited in Duncanson, I. (1997) "Cultural Studies Encounters Legal Pluralism: Certain Objects of Order, Law and Culture", *Can. J. L. & Soc. / Revue Canadienne Droit et Société* 115-142 at 122 ff.

Imperialism the common law appeared to offer a truly transcendental secular rationality.²⁰ This not inconsiderable gift could not however be distributed as one offers loaves to the hungry, shelter to the homeless, or blankets to the freezing. Rather, it had to be carefully transported, implanted, and nurtured in foreign soils. Awkwardly, not all peoples were immediately pre-adapted to appreciate the liberties, freedoms, and progress British law held out to them. Recalcitrant individuals and entire populations often failed to even perceive the superiority of British ways over their own superstitions and rituals - failed to understand that "[u]niversal becoming is the prerogative of the West".²¹ In early twentieth century Canada, knowledge of the intrinsic superiority of British ways, the virtues associated with British law, and confidence in the transformative vision of Empire virtually *defined* respectability.

The task of transforming unruly peoples around the world into civilized individuals capable of assuming the privileges, rights and responsibilities of self-governance was the central mission of Empire. Complexly, British justice was both a tool used to achieve this result and the desired end itself. "Law" and Britishness were co-extensive, the apex of cultural evolution. "Law", like "English literature", studies sought nothing less than the transformation of souls.²²

²⁰ The character of law's engagement with the Enlightenment project is developed and critiqued in Fitzpatrick "Desperate Vacuum", *supra* note 10. See also Fitzpatrick *Mythology*, *supra* note 10.

²¹ Fitzpatrick *Mythology*, *supra* note 10 at 41.

²² See *e.g.* Viswanathan *Masks of Conquest*, *supra* note 7 at 55-56; Duncanson, I. (1997) "The Ends of Legal Studies" *Web Journal of Current Legal Issues* [<http://webjcli.ncl.ac.uk>]; Duncanson "Cultural Studies", *supra* note 19 .

With this object in mind, British law itself became transformed. The lines between state and civil society blurred as law intervened in areas previously relatively untouched by The State writ large. A reworking of administrative structures and court systems²³ was accompanied by the development of assorted "*regulatory agents* who are charged with an array of functions ranging from the collection and recording of information, inspection, surveillance, reporting, initiation of enforcement action, and a host of other activities."²⁴ The central object of law became

²³ Chunn, D.E. (1992) *From Punishment to Doing Good: family courts and socialized justice in Ontario, 1880-1940*. Toronto: U. of T. Press.; Chunn "Maternal Feminism, Legal Professionalism and Political Pragmatism: The Rise and Fall of Magistrate Margaret Patterson, 1922-1934" in Pue, W. & Wright, B., eds. (1988) *Canadian Perspectives on law and society: issues in legal history*. Ottawa: Carleton Univ. Press.; Chunn "For God, Country, and the Public Purse: 'Liberal' Politics and the Campaign for Family Courts in British Columbia, 1939-1945" in H. Foster & J. McLaren, eds. (1995) *Essays in the History of Canadian Law: British Columbia and the Yukon*. Toronto: U. of T. Press and Osgoode Society 423-456; McLaren (1988) "Maternal feminism in action-- Emily Murphy, Police Magistrate", 8 *Windsor Yb Acc. Just.* 234-51.

A number of the "institutional histories" contributed to *Canada's Legal Inheritances*, *supra* note 6, touch on these issues. See also Smandych, R. & Sacca, K. (1996) *The Development of Criminal Law Courts in Pre-1870 Manitoba* in "Manitoba Law Annual", Symposium Issue, ed. Esau, A., 24 *Manitoba Law Journal* 201-257 and the sources cited therein.

²⁴ Hunt, A. (1993) *Explorations in Law and Society: Toward a Constitutive Theory of Law*. N.Y.:Routledge at 316.

"regulation" in the sense of "preserving and shaping something and not merely suppressing it..."²⁵ Science, law, bureaucratic rationality, Britishness, masculinity - all in peculiar and varying mixes with religious faith - guided "repeated attempts by those who would manage the areas of legality and culture to establish a single coherent order based on the certainty of knowledge, the conventions of mankind, or the unique inheritance of a national culture."²⁶

Peculiar features of Anglo-American North America rendered it particularly problematic, almost ungovernable in principle. The differences between places where status claims based on class, race, or other ascriptive traits are tolerated (or, minimally, taken for granted as social facts) and newer, "settler" societies, like Canada and the U.S.A. where class claims did not enjoy immediate legitimacy, where class relations had not yet congealed, where ethnicities interacted unpredictably, are profoundly important. De Tocqueville's well-known observations that lawyers were the only available "counterbalance to democracy" in the United States and that the "legal

²⁵ Valverde, M. (1991) *The Age of Light, Soap and Water: Moral Reform in English Canada, 1885-1925*. Toronto: McLelland & Stewart at 33.

²⁶ Duncanson "Cultural Studies Encounters Legal Pluralism", *supra* note 19 at 117. On the relation of law and science see Fitzpatrick "Marxism and Legal Pluralism", *supra* note 17 at 54-55; Sugarman, D. "'A Hatred of Disorder': Legal Science, Liberalism, and Imperialism," in P. Fitzpatrick, ed. (1991) *Dangerous Supplements*. London: Pluto at 34-67. On the inter-mixing of religious and "scientific" thought see Cook, R. (1985) *The Regenerators: Social Criticism in Late Victorian English Canada*. University of Toronto Press.; Valverde, *supra* note 25.

spirit" was uniquely adapted "to neutralize the vices inherent in popular government"²⁷ develop from this insight. In adopting this well-known formulation De Tocqueville vocalized a "common sense" about the governance of the New World which most of Anglo-America's respectable classes shared. Well before De Tocqueville's travels, Ontario's Archdeacon John Strachan had noted the impossibility of establishing a fully British constitution in the absence of a landed aristocracy (impossible to establish in the Canadas) and he too had hoped that lawyers would fill the constitutional void. Early plans to develop a college of law at Toronto's Osgoode Hall, loosely modelled on the English Inns of Court were similarly directed toward socializing a legal elite and shaping "their students into learned and honourable members of their gentlemanly profession."²⁸ For both observers the socialization of lawyers provided a key to social well-being.

3) Canada & the Prairie West, 1900-1930

²⁷ De Tocqueville, A. (1988) *Democracy in America* (Trans. by G. Lawrence; edited by J. P. Mayer) N.Y.: Harper Perennial at 268.

²⁸ Moore, C. (1997) *The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997*. Toronto: U. of T. Press at 88, 67-98. See also Baker, G.B. (1986) "The Juvenile Advocates' Society, 1821-26: Self-Proclaimed Schoolroom for Upper Canada's Governing Class," Canadian Historical Association, *Historical Papers*, 1985. Ottawa: Canadian historical Association at 74-101.

Canada, an American nation²⁹, presented peculiar problems of governance. "British," though distant from the British Isles, "in" but not entirely "of" North America, Canada's place within Empire and continent has never been lacking in ambiguity.

In 1913 a U.S.A. observer recorded that "[t]hose who really are at the head of local affairs" in Canada "echo, practically unanimously, the sentiment of Sir John A. Macdonald: 'A British subject I was born; a British subject I will die!'"³⁰ In many important ways however (population density, climate, landscape, availability of cheap land, social diversity, class structure, and the sheer extent of space, to name just a few) "Canadian society resembled American rather than British society...."³¹ Canada's Britishness, subjected to considerable pressures, was actively, creatively, and constantly renegotiated. The powerful influence of the republic to the south should never be underestimated. Smith has pointed to pervasive cultural influences from the United States and speculated that this had a profound effect on the transformation of Anglo-Canadian culture over the nineteenth century. Early in that century "British culture and civilization was the *élan vital*. The job of those in the wilderness was to unleash its power as quickly and fully as possible." By the start of the twentieth century however even staunchly British Canadians (it bears emphasis that "Britishness" was *the* hallmark of respectability) had come "to view themselves not as the

²⁹ See Smith, A. (1994) *Canada - An American Nation? Essays on Continentalism, Identity, and the Canadian Frame of Mind*. Montreal: McGill-Queen's University Press.

³⁰ Goodrich, J.K. (1913) *The Coming Canada* Chicago: A. C. McClurg & Co at 300.

³¹ Romney, *supra* note 16 at 122.

agent of an Old World culture charged with civilizing the New, but as beings uplifted and restored by their New World environment whose duty it was to regenerate the Old."³²

Of particular importance in the dual mission of "civilizing the New" and "regenerating the Old" was Canada's own imperial expansion. Canada embarked upon its own version of "manifest destiny" in 1869 when Britain ceded the Northwest Territories to the Canadian parliament (then representing only Ontario, Quebec, Nova Scotia, and New Brunswick). Prime Minister John A. MacDonald's "National Policy", sought, inter alia, to incorporate a vast new northwestern space into its territory. The clear intent was to develop the west in "the interests of `Old Canada' ... and Canadian policy was oriented around the plan to "establish a new `investment frontier' that would open the west and enrich the east in one fell swoop."³³ Canada's incorporation of the Hudson's Bay Company territories and the former colonies of British Columbia and Vancouver Island became the story of Ontario's colonial ambitions. In this confident era English Canadians had few doubts about their ability to rise to the considerable challenges involved. At century's end they

³² Smith, A. "American Culture and the Concept of Mission in Nineteenth-Century English Canada" in Smith *An American Nation?*, *supra* note 29 at 31. See also Berger, C. (1970) *The Sense of Power: Studies in the Ideas of Canadian Imperialism, 1867-1914*. Toronto: U. of T. Press. Canadian culture had also long been influenced strongly by immigration of people from the democratic and un-British American republic. P. Romney has done an admirable job of capturing southern influences on Ontario legal culture in the early nineteenth century in Romney, *supra* note 16.

³³ Friesen, G. (1987) *The Canadian Prairies: A History*. Toronto: U. of T. Press at 162.

were confident in their ability to incorporate the west, develop their economy, improve on inherited traditions and - soon, they thought - lead the Empire.

Confidence was an indispensable asset. The challenges were profound. Planting British civilization required massive investment in infrastructure and institutions - but the prior condition on which all else rested was the European settlement of the region. This was a considerable challenge. The area which forms the contemporary prairie provinces of Manitoba, Saskatchewan, and Alberta alone covers some 750,000 square miles (larger than the combined area of Germany, France and Spain in Europe or the U.S.A. states of Texas, New Mexico, Arizona and California - or nearly 1/4 the size of Australia)³⁴. Faced with a need for huge numbers of immigrants and the ever-present threat of U.S. annexation, the Canadian government actively sought immigrant settlers in unorthodox places. Policies established by Clifford Sifton, Manitoba Member of Parliament and federal Minister of the Interior from 1896 to 1905, transformed Canada. Though Sifton shared common assumptions that "blacks, Italians, Jews, Orientals, and urban Englishmen ... would not ... succeed on farms", his department otherwise actively encouraged a wide and diverse range of non-British to immigrate. An enormous influx of Eastern Europeans followed. Sifton's waves of immigrants transformed prairie Canada. Population growth was explosive.³⁵

³⁴ Figures taken from Friesen, *ibid.*, at 5 for the prairie west; and from World Atlas 3 and U.S. Atlas 3 (1991-1992) *The Software Toolworks Atlas Pack MPC*. Software Toolworks.

³⁵ See generally Friesen, *supra* note 33. Some aspects of this history are covered in Gibson & Gibson's ground-breaking study *Substantial Justice*, *supra* note 5. On Clifford Sifton see also "Time Links, Sir Clifford Sifton", <http://timelinks.merlin.mb.ca/refernc/db0053.htm>. See also Bumsted, J.M. (1992) *The Peoples of Canada: A Post-Confederation History*. Toronto: Oxford Univ. Press.

Now, the attempt to *instantly* recreate the culture, institutions and ethos of another place is inherently problematic. On the one hand, this influx of settlers illustrates the that "... the promise of the west became the promise of Canada".³⁶ At a cultural level, Canada's "National Policy" was driven by people "who sought to reproduce" in the West "what they believed to be the best characteristics of Eastern Canadian life." More precisely, "their intention in Western Canada was, if not to create a new Jerusalem, at least to build a better Ontario."³⁷ Sifton's immigration policies, however, rendered the region ethnically diverse, polyglot and altogether quite "unBritish" and "unOntarian". At the outbreak of the First World War nearly half of the region's residents had been born in another country. Previous prairie residents (who traced their origins variously to First Nations, Métis, French, Québécois, British, United Stateser, or Icelandic ancestry) had been joined by Germans, Poles, Scandinavians, Ukrainians, Hutterites, Mennonites, Jews, Doukhobors, Ontarians, Maritimers,³⁸ and more British and "Americans", amongst others. Huge ethnic block settlements developed. Even today a "little Ukraine" stretches almost uninterrupted from just north-west of Winnipeg to the outskirts of Edmonton. The ethnic map of the rural prairies, past

³⁶ Friesen, *supra* note 33 at 340.

³⁷ Macleod, R.C. "Canadianizing the West" as excerpted in Francis & Palmer, eds. (1992) *The Prairie West: historical readings*, 2d ed. Edmonton: Pica Pica Press 225-238 at 226.

³⁸ i.e., residents of Canada's Atlantic provinces: Nova Scotia, P.E.I. and New Brunswick (Newfoundland had not yet joined the Canadian confederation).

and present, reveals a pattern of sizable, discrete, often barely overlapping ethnic block settlements. A trip through the region in 1920 (or even in 1960) took the traveler through extensive areas where English was rarely spoken. T.C. Byrne reported that in 1937 "knowledge of Ukrainian [was] as indispensable" in east central Alberta "as French in Quebec or English in Ontario".³⁹ Icelandic, Cree, German, Dakota, Ukrainian, Sarcee, Polish, French, Swedish, Dene, Dutch, and Russian, amongst others predominated in other areas. In 1931 only about 50% of the population of the prairies claimed "British" origins.⁴⁰

The cities too were transformed. Winnipeg, the region's railway centre and metropolis, looked across the Red River to western Canada's historic French capital of St. Boniface. An impressive French Catholic cathedral faced-off across the river from Winnipeg's commercial

³⁹ Byrne, T.C. (1937) *The Ukrainian Community in North Central Alberta*. University of Alberta: M.A. thesis (unpublished) at 41.

⁴⁰ For discussions of prairie ethnicity and settlement patterns see Dawson, C.A. (1936) *Group Settlement - Ethnic Communities in Western Canada*. Toronto: Macmillan.; Friesen, *supra* note 33 at 242-273; Eggleston, W. (1937) "the People of Alberta" *XV Canadian Geographical Journal* 212-222; Hull, V.L. (1965) *A Geographic Study of the Impact of Two Ethnic Groups on the Rural Landscape in Central Alberta*. Univ. of Alberta: M.A. thesis (unpublished); Jackson, W.H. (1970) *Ethnicity and Areal Organisation among French Canadians in the Peace River Region, Alberta*. University of Alberta: M.A. thesis (unpublished); Kaye, V.J. (1964) *Early Ukrainian Settlements in Canada, 1895-1900*; Kaye "Three Phases of Ukrainian Immigration" in Y. Slavutych, R.C. Elwood, V.J. Kaye, & J.M. Kirschbaum, eds. (1967) *Slavs in Canada* Vol. 1 36-43; Stibbe, H.L.P. (1967) *The Distribution of Ethnic Groups in Alberta, Canada, According to the 1961 Census*. Univ. of Alberta: M.Sc. thesis (unpublished); Stubbs, G.M. (1965) *The Geography of Cultural Assimilation in the Prairie Provinces*. Oxford University: D.Phil. thesis (unpublished).

centre, providing striking visual reminder of Britishness's tenuous hold on this part of Empire.

Winnipeg's explosive growth⁴¹ produced an urban centre unlike any other in British North

America. To arrive at Winnipeg's Canadian Pacific Railway Station was to enter

...an international bazaar: the noise of thousands of voices and a dozen tongues circled the high marble pillars and drifted out into the street.... this was not a polite and ordered society but rather was customarily described as Little Europe, Babel, New Jerusalem, or the Chicago of the North.⁴²

Social diversity was manifest in innumerable ways throughout the region. In town and country alike the institutions and customs of different communities engaged with each other but remained distinct: shops, trade, recreation, news media, associational life, and religion were, to varying degree, ethnically and/or linguistically segregated. So too, expectations regarding the way business should be conducted, marriages formalized, interpersonal disputes resolved and children raised varied with ethnicity and community. A multitude of "informal" legal regimes occupied this new Canadian space, even in its urban core. Sometimes alternative legalities were barely "informal" at all. Many First Nations communities remained significantly self-governing, living in accordance with their own norms, values, political structures, and legal systems long after the

⁴¹ 241 in 1871, 3,700 in 1874, 26,000 in 1891, 42,000 in 1900, 90,000 in 1906, 150,000 in 1913, and 179,087 by 1921. (Figures from Bumsted, *supra* note 35 at 75; Gibson & Gibson, *supra* note 5 at 113; Friesen, *supra* note 33 at 274; Bumsted (1994) *The Winnipeg General Strike of 1919: An Illustrated History*. Watson Dwyer Publishing at 10; Artibise, A.F.J. "Boosterism and the Development of Prairie Cities, 1871-1913" in Artibise, ed. (1981) *Town and City: Aspects of Western Canadian Urban Development*. Regina: Canadian Plains Research Centre 209-235, as excerpted in Francis & Palmer, eds., *supra* note 37 at 516.)

⁴² Friesen, *supra* note 33 at 243.

colonial state formally asserted authority over them.⁴³ The same was true of most immigrant communities. Long after the Canadian state fancied itself as having asserted effective legal control over its territory, Doukhobors and Mennonites, for example, enjoyed territorial integrity, shared language, religion, ethnicity and distinct economic structures. Both groups were surprisingly resilient in sustaining "legal" systems which governed almost all aspects of life. They did so without deference to the Canadian state or its norms.⁴⁴ Issue after issue, time after time, and place after place, leaders of diverse communities across the prairie region worked to preserve their "nationality". Religious organizations, alongside more secular forms of association, provided institutional habitats in which informal law flourished. A dense associational life existed oriented, variously, around gender, ethnicity, religion, interests, politics, sports, labour, economics and class.

⁴³ See, for example, James Youngblood Henderson's contribution to *Canada's Legal Inheritances*, *supra* note 6. For an extraordinary study on the complex relations between first nations peoples and the state's police during the early twentieth century see Loo, T. "Tonto's Due: Law, Culture and Colonization in British Columbia" in H. Foster & J. McLaren, eds. (1995) *Essays in the History of Canadian Law: British Columbia and the Yukon*. Toronto: U. of T. Press & Osgoode Society 128-170; also reproduced in C. Cavanaugh & J. Mouat, eds. (1996) *Making Western Canada: Essays on European Colonization and Settlement*. Toronto: Garamond Press 62-103.

⁴⁴ See *i.e.* Peters, J. (1985) *The Waisenamt: A History of Mennonite Inheritance Custom*. Steinbach, Manitoba: Mennonite Village Museum. Dick, H. (1993) *Lawyers of Mennonite Background in Western Canada Before the Second World War*. Winnipeg: Legal Research Institute.; McLaren 'Creating "Slaves of Satan" or "New Canadians"? The Law, Education, and the Socialization of Doukhobor Children, 1911-1935' in *Essays in the History of Canadian Law*, *supra* note 43 at 352-385.

One significant manifestation of civil society took place at the intersection of class, politics, and work. The combination of utopian spirit and rapid change proved fertile ground for both trade union activity and radical politics. Irritated by more or less conventional issues, urban workers flexed their muscle toward the end of the War. A burst of radicalism "more pervasive in the west than in the rest of Canada or North America" occurred.⁴⁵ Mounting labour discontent produced a modestly impressive strike in Winnipeg in 1918 and the Western Labour Conference of March 1919, culminating later that spring in the "Great Winnipeg General Strike". This marked a turning point in Canadian history. From May 15 to June 23, 1919 Winnipeg was virtually shut-down. Necessary services continued only at the sufferance of a Strike Committee and members of the respectable classes feared that effective governance of one of the Empire's great industrial cities had been usurped by working class radicals bent on revolution, threatening everything respectable British Canada stood for.

Winnipeg and Canadian elites viewed the strike "as a pivotal moment in labour-capital relations, not just for Winnipeg but for the nation and the continent. Huns, Bolsheviks, aliens - in short, revolutionaries - were threatening to destroy their dreams."⁴⁶ The coincidence of Bolshevik

⁴⁵ Friesen, *supra* note 33 at 358.

⁴⁶ Friesen, *ibid.* at 361.

For a useful review of historiography and of previously unexplored archival records relating to the Winnipeg General Strike see Kehler, K. & Esau, A. (1990) *Famous Manitoba Trials: The Winnipeg General Strike Trials - Research Resource*. Univ. of Manitoba, Legal Research Institute. See also Mitchell, T. (1993) "'To Reach the Leadership of This Revolutionary Movement': A. J. Andrews, the Canadian State and the Suppression of the Winnipeg General Strike", 18 (2) *Prairie Forum*; See also Bumsted *The Winnipeg General Strike*, *supra* note 41; Bercuson, D.J. (1990)

revolution in Russia with labour radicalism amongst an ethnically diverse working class in Canada persuaded respectable British Canadians that labour's discontent manifested a foreign disease. One Police Magistrate remarked upon the "large extent" to which "Bolsheviki ideas are held by the Ruthenian, Russian and Polish people, whom we have in our midst..."⁴⁷ Such views held firm despite the demonstrable fact that labour's leadership was resolutely British.

The great strike provided dramatic focus for those concerned about the future of British civilization in this "new" land, but the concerns it brought to a head had been long developing. British Canadians' understandings of the problems of governance in the west drew upon a tradition which included De Tocqueville and Strachan, combined, distressingly, with growing xenophobia and severely corroded faith in the assimilative power of Britishness. The Canadian West represented an especially unruly space whose peculiar challenges to the advance of British civilization had reached crisis-point. Though the immediate crisis, the 1919 strike, was "solved" by the deployment of armed force in support of the State's order, respectable opinion knew well that political power does not grow from the barrel of a gun.

They perceived that the "last frontier" in domesticating unruly populations is the regulation of psychic space. Modernity's urge to control, regulate, domesticate, confine and to render all

Confrontation at Winnipeg: Labour, Industrial Relations, and the General Strike (rev'd ed.). McGill-Queen's.; Mitchell (1995/96) 'Repressive Measures', 3.2 & 4.1 *Left History* 133.

⁴⁷ as quoted in Bumsted, *A Post-Confederation History*, *supra* note 35 at 67. [Original source: D. Avery "The Radical Alien and the Winnipeg General Strike of 1919" in Bumsted, ed. (1986) *Interpreting Canada's Past II*. Toronto: Oxford Univ. Press at 222-239].

humanity predictable played itself out in Western Canada in a series of attempts to remake the individual.⁴⁸ Respectable British Canadians had long felt that, without discipline from within or (as necessary) imposed from without, the individual was a "mob in miniature", a cancer which threatened the body politic, society at large and, ultimately, *civilization* itself: "an individual without character ... was a miniature mob: disorganized, immoral, and unhealthy as well as an inefficient member of the collectivity."⁴⁹ Canada's "founding fathers sought to create a 'Moral Dominion' premised on strong central government, individualism, hierarchical social relations, capitalism, self-discipline, and family patriarchy."⁵⁰

It was within this context, developed by men who shared such background assumptions that Canadian legal education took shape in early twentieth century prairie Canada.

4) Law & Empire: Canada, circa. 1919

Not surprisingly, British Canadian lawyers shared the commonplace assumptions of the respectable classes regarding Britishness, civilization, the progress of Empire, and the challenges it faced.

⁴⁸ See Pue "Revolution by Legal Means" in P. Glenn, ed. (1994) *Contemporary Law 1994 Droit contemporain*. Montreal: Editions Yvons Blais 1-30.

⁴⁹ Valverde, *supra* note 25 at 27.

⁵⁰ Loo, T. & Strange, C. (1997) *Making Good*. U. of T. Press. Ch. 1.

For them law was both end and means of Empire. Speaking to the Canadian Bar Association in Winnipeg shortly after the General Strike, Winnipeg lawyer, Manitoba Lieutenant-Governor, *and* Canadian Bar Association President James Aikins, expressed the hope that socialism, anarchy, Bolshevism, and other similar "recrudescences of an old disease"⁵¹ would be utterly destroyed, as anathema to "Law". Tellingly, his notion of "Law" was inseparable from conceptions of Britishness, Christianity, and "civilization". The "fundamental British principles" which he thought constituted the distilled essence of law included "protection of person and property, fair and prompt trial of offences and disputes by a system of qualified Judges, of advocates and juries, freedom of religious worship, of speech, of press, of assemblage, government of people by themselves and indeed all those things which pertain to our civilization, a civilization which rests upon Christianity."⁵² Choosing his words carefully, Aikins explained that "state paternalism" (socialism) was unBritish, unChristian and, hence unlawful in the true sense of that term. It was, he said,

... an endeavour to rest everything upon law or government, overlooking the fact that for Canadians the law should fix the minimum demands of social and business duties, and that all requirements between that and the perfect law of liberty should be left to the enlightened conscience and Christian character of the individual. If, in the ultimate, Christian democracy rests upon the moral character of its citizens, clearly the

⁵¹ Aikins, J. (1919) "Address of the President" (Canadian Bar Association" Presidential Address), 39 *Canadian Law Times* 537-548 at 539.

⁵² Aikins (1920) "The President's Address", 56 *Canada Law Journal* 308-325 at 310.

first aim of all law should be to develop the highest type of human entity, and as far as is consistent with the rights of others leave him unfettered in thought and action.⁵³

These remarks reveal much. Theorists have pointed to the existence of a theoretical infrastructure which binds particular visions of law to "national" and imperial projects.⁵⁴ Aikins' comments illustrate that such linkages are no mere theoretical conceit. They were at the forefront of thought amongst one influential sort of British colonial lawyer in the early twentieth century.

Bolshevism was, no doubt, also in his mind as this Winnipeg lawyer delivered his speech.⁵⁵ Other local deviations from "British" social organization would also have been of concern, however, for the distance between prairie society and proper principles of social organization would have seemed immense. In identifying contemporary political and social visions as manifestations of an "old disease" Aikins sought to consign them to history's trash-can. Particularly out of place in the "New World", perhaps, such notions were anachronistic, the enemy of progress. So, Aikins believed, the course of history had decreed. This formulation disposed simultaneously of Marxian communism but also of Christian communism such as that of the prairie

⁵³ Aikins, *supra* note 51 at 543.

⁵⁴ See especially, Fitzpatrick, *Mythology*, *supra* note 10 at 111-118.

⁵⁵ James Aikins' close personal assistant, E.H. Coleman, travelled with the White Russian forces, documenting first-hand account of encounters with Bolshevism in a pamphlet published on his return.

regions' Mennonites, Hutterites, and Doukhobors and of the collective sharing of wealth and resources customary in many first nations communities.⁵⁶

Disease is a powerful metaphor. Aikins, like other leading figures of his day, perceived of "society", "nation", or "state" as analogous to a natural organism. Properly cared for, appropriately disciplined (just as the individual had to limit alcohol consumption, regulate diet, control sexual urges, and exercise regularly), the organic state could grow and thrive, expand in size in proportion to its destiny ("manifest destiny" in the U.S.A., "lebensraum" for Nazis, the "National Policy's" designs of westward and northward expansion in Canada), and provide well for all its parts.⁵⁷ As

⁵⁶ See e.g. Cole, D. & Chaikan, I. (1990) *An Iron Hand Upon the People*. Vancouver: Douglas & MacIntyre.; J. McLaren has addressed clashes between Doukhobor and British Canadian cultural values in "The Doukhobor Belief in Individual Faith and Conscience and the Demands of the Secular State" in McLaren & H. Coward, eds. (1999) *Religious Conscience, the State and the Law: Historical Contexts and Contemporary Significance*. Albany: State University of New York Press. "Family" sharing, presumably, remained acceptable but only if family was taken to be a nuclear family amputated from the extended kinship lines - which have served to organize many sorts of human society other than the one Aikins sought to advance. See also Esau "Communal Property and Freedom of Religion: Lakeside Colony of Hutterian Brethren v. Hofer" in McLaren & Coward *Religious Conscience* 97-116 and J. [Sakej] Y. Henderson "The Struggle to Preserve Aboriginal Spiritual Teachings and Practices" 168-188.

⁵⁷ In retrospect we can appreciate that their views were midway on an intellectual trajectory which culminated in Nazi geo-politic. Muir, R. (1975) *Modern Political Geography*. London: MacMillan Press. discusses the scholarship of Friedrich Ratzel (1844-1904), Kjellen, and Nazi geopolitician Haushofer, concluding that Nazi geopolitics was "an amalgamation of the organic state notions of Ratzel, Mackinder's global system and heartland thesis, macro-regionalism, post-war paranoia and the supposed German right to *Lebensraum*" (6). It is noteworthy that, despite repeated attempts to treat geopolitics as a German corruption of science, the work of British scholar Halford Mackinder (founder of Geographical studies at Oxford University) was central to

an organism however, states like individuals, were susceptible to disease. Bad ideas, bad people, immoral individuals were like bacterial invasions, open sores or cancers. None could be tolerated; any, however seemingly insignificant, could become fatal to the organism as a whole.⁵⁸ Medical science, informed by germ theory and rapidly developing surgical techniques, provided a host of analogies whose relevance to social policy seemed commonsensical.

If law was to be used to shape the highest human entity, it is clear that Aikins understood the desirable end-product to be rather like the ideal-typical moral, Christian, Britisher (or, more likely, *British-Canadian*). Britain, British commerce, British technology, British government, British law, and British Empire represented a sort of end-point in the history of human progress: any future progress would develop from the British base-line, not in contradiction of it. The 1990's are not the first time when people fancied themselves at the end of history.⁵⁹ Taken together then, this lawyer's professional speech draws upon and reinforces many of the conceptual underpinnings of colonialism including a "racial" hierarchy which located the British (and, only then, other north-western Europeans) above others, a preference for Protestantism over Catholicism [and *certainly* of Christianity over other religions - hence, a judgment *against* Confucianism (and, Confucians),

Nazi geopolitical thought. Such ideas, their reliance on biological metaphors, and their relation to social Darwinism were, simply, "in the air" at this time.

⁵⁸ The rhetoric, language, and policies around eugenics in Canada are but one dramatic manifestation of this conception of the state. See McLaren, A. (1990) *Our Own Master Race: eugenics in Canada, 1885-1945*. Toronto: McClelland & Stewart.

⁵⁹ Fukuyama, F. (1992) *The end of history and the last man*. New York : Free Press.

Judaism (and Jews), Hinduism (and Hindus), First Nations spirituality (and unassimilated First Nations peoples), etc. Aikins' world-view was premised on a belief in the inevitability of progress and, concomitantly, the necessity of destroying - albeit, perhaps, "creatively" - those who would not embrace its promise. Policies of assimilation, social control and - ultimately - destruction of the unassimilable flowed from these assumptions about the course of history, as did a subsidiary belief that good government required potentially invasive moral regulation. Outside of this intrusive realm however competitive capitalism and laissez-faire individualism were believed to be the *only* acceptable principles for social organization.

Expressed with unusual clarity and coherence, perhaps, Aikins' views were nonetheless commonplace. They are noteworthy here in two respects. First, Aikins offered these views not as abstract social theory or in defence of Imperial policy but rather in explanation of his vision of "law". The law/ not-law distinction, as H.L.A. Hart reminds us,⁶⁰ is culturally defined and Aikins' comments illustrate the clarity and specificity with which elite British Canadian lawyers once understood these matters. Whereas late twentieth century understandings of law tend to be formal, processual or functional, Aikins' conception was substantive as well. There was a *substantive content* in his notions of "law" as well as procedural commitment to due process and the formal requirements of the Rule of Law. Aikins' reflections on "law", Bolshevism, and labour unrest, are thoroughly imbricated with assumptions concerning morality, immigration, ethnic diversity, citizenship and the assimilation of aboriginal peoples. Human culture does not come neatly packaged in severable bundles. Neither does law. Though our intellectual positions about such topics are typically presented in falsely tidy bundles, it is important to recall always that the

⁶⁰ See Fitzpatrick, *Mythology*, *supra* note 10 at 116.

connections, the legal and linguistic slippages or points of connection between them are, perhaps, more important than the particular features of each taken on its own.

The second noteworthy point is simply this: though Aikins' views may have been unremarkable they were expressed here not as one private citizen to another but by the Lieutenant-Governor of Canada's "keystone" province *in his capacity as President and leader of the Canadian Bar Association*. They bespoke an understanding of "law" backed by the leading institution of lawyers' professionalization in Canada at that time. Such notions constituted both a "respectable" common sense about matters social or political *and* the sine qua non of legal professionalism. The "expertise" of lawyers, in short, was understood as *a cultural attainment, over and above the presumed narrowly specialist knowledge of the words of dead judges, the texts of statutes, legal procedures or law office forms*. The "true lawyer" was an entirely cultural product never to be confused with individuals who had merely mastered a certain examinable knowledge or practical "know-how".⁶¹ The package, emphatically, was British, gentlemanly, Christian, and within the economic/political mainstream.

5) Legal Education & Cultural Attainment

Now, how was the future "cultural attainment" of lawyers to be ensured and how did that connect with service to law and empire in early twentieth century Canada?

It is in the context of such considerations that the meteoric rise and fall of the Manitoba Law School from 1914 to 1930 needs to be considered. Much overlooked in histories of legal education in Canada, this period was in fact a crucial formative era. Current models of legal

⁶¹ See Pue "Common Law Legal Education", *supra* note 6.

education were first developed at this time, most fully in Manitoba. Manitoba's legal profession was the first in Canada to require full-time attendance at a University-affiliated law school for a significant portion of its novitiates and the first to seek to abolish qualification by apprenticeship. Their's was the earliest formal endorsement *by an organized legal profession* of what is known in Canada as "cultural" legal education (conventionally understood in curriculum terms, involving subjects such as public international law and legal history).⁶² Manitoba's Law School, created as a partnership between the Law Society of Manitoba and the University of Manitoba, moved rapidly to raise admission requirements. It was the first in the Dominion of Canada to make the "case method" (teaching law through study of decided cases) central to its programme.⁶³ Such initiatives, endorsed by a number of legal and academic commentators across the country during this period, were carried furthest and fastest by the Manitoba Law School.⁶⁴

⁶² See Willis, J. (1979) *A History of Dalhousie Law School*. Toronto: University of Toronto Press.

⁶³ I have developed these points in more detail in Pue "Common Law Legal Education", *supra* note 6 at 654-688; and "The disquisitions of learned Judges", *supra* note 6.

⁶⁴ Twice identified as the best law school in Canada by by the Carnegie foundation, the Chair of the Canadian Bar Association's Committee on Legal Education also identified the Manitoba Law School as a model the rest of Canada should imitate. See "Carnegie Foundation, Annual Review of Legal Education, 1926, 1927", (1923) 8 **Proceedings, Canadian Bar Association** 387; Gibson & Gibson, *Substantial Justice*, *supra* note 5 at 248-249.

Though at the forefront, the school was not off on a lark of its own. In this period new university law schools were also founded at the University of Saskatchewan and the University of Alberta, new professional schools of law begun in Regina, Vancouver and Victoria, and significant changes in staffing, curriculum, pedagogy or entrance requirements implemented at Osgoode Hall, McGill, Dalhousie and the University of New Brunswick.⁶⁵ The intent behind all such reforms was to turn out lawyers who would understand law and lawyers' professional functions in ways consonant, roughly, with views such as those of James Aikins and his peers (who called their own views "ethical").

This involved reformers in attempting to restrict legal education to individuals pre-adapted by class background, ethnicity, or in some other way, to the mental world of their professional leaders. Aikins' long-time ally in educational reform, H. A. Robson, approved the "pious fraud" by which one U.S.A. law school deployed increased admissions standards with the hidden objective of

⁶⁵ I have lightly touched on these developments and referenced the literature in (1995) *Law School: The Story of Legal Education in British Columbia*. Vancouver: Continuing Legal Education Society of British Columbia & U.B.C. Faculty of Law (also "published" at: <http://www.law.ubc.ca/handbook/history/school.html>); "The disquisitions of learned Judges", *supra* note 6; "Common Law Legal Education", *supra* note 6. See also R. Macdonald (1990) "The National Law Programme at McGill", 13 *Dal. L.J.* 211; J. Willis, *History of Dalhousie*, *supra* note 62.; D.G. Bell (1992) *Legal Education in New Brunswick - A History*. Fredericton, University of New Brunswick.; P.M. Sibenik (1990) "Doorkeepers: Legal Education in the Territories and Alberta, 1885-1928", 13 *Dal. L. J.* 419; B. Bilson (1998) "'Prudence Rather than Valor': Legal Education in Saskatchewan 1908-1923", 61(2) *Saskatchewan L.R.* (Special Issue in Honour of Prof. W. H. McConnell) 341; C. I. Kyer & J.E. Bickenbach (1987) *The Fiercest Debate: Cecil A. Wright, the Benchers and Legal Education in Ontario, 1923-1957*. Toronto: Osgoode Society.

detering men of "an undesirable class" from entering the profession.⁶⁶ To similar effect, Aikins argued that only those possessing "the qualifications of mind and character" which could be formed into true lawyers should be permitted to begin legal studies.⁶⁷ Given the right student intake and the right form of legal education, it seemed that the appropriate character-molding process could be assured. In such circumstances it was assumed that law schools could not graduate anything less than appropriately socialized gentlemen lawyers.

Laws' Embodiment/ Law's Integrative Functions

Before turning to address the forms of education they had in mind, one more connection must be made. That relates to the connection between what lawyers thought - or what sort of men they were - and the law's integrative functions. At century's end it is difficult to perceive any connection at all between, for example, a belief that the substantive law should be anti-Bolshevist, British, or whatever and an educational mission aimed at the pre-selection and gentlemanly socialization of lawyers. This is because *our* habits of thought intrude, creating the sense that a conceptual Berlin Wall of sorts exists between positive law (what the law is) and the personnel of the legal system (who the lawyers are). Separating these, we imagine that the substance of the law exists independently of the actions, values, or thoughts of lawyers. In *our* world it seems logical to assume that law is made by judges and legislatures but that ordinary lawyers are more or less irrelevant to the state of the law. Our culture perceives lawyers as value-neutral mechanics of

⁶⁶ Memo, Robson to MacLean, April 22, 1914. [University of Manitoba Archives, UA20, Box 10, Folder 5].

⁶⁷ Aikins "1919 Presidential Address", *supra* note 51 at 546.

legality, picking bits of law off neatly arranged parts-shelves and sticking the parts where they need to go in order to serve the client's objective best interest.

If it seems to us that there is no connection between "law" and "lawyers", however, it may be that it is we who suffer from too simple-minded a notion of law and law-work alike. In sharp contrast, the generation who developed the template for modern Canadian legal education were fully aware of law's embodiment: that it has no meaning whatsoever other than that which is absorbed, reflected by, and exuded from lawyers. MacKay thought that "[t]he law is what the consensus of legal opinion in the community believes it to be, first the judges, next the lawyers, and finally the mass of intelligent laymen who direct the organized activities of the state."⁶⁸ LAW writ large is not self-enacting, does not implement itself, controls no one, influences nothing. MacKay's understandings were near to what we now think of as legal pluralism (though he assigned greater urgency to bringing "one law" into being than most contemporary legal pluralist scholars consider necessary or desirable). The real law - living law - existed, he thought, in consensus of opinion. Without professional consensus both case-law and statute were mere abstractions ("Statute law is as much a creation of the judiciary and the lawyers as case law"⁶⁹). Hence, British law was brought into place not by assertions of sovereignty or legal reception but

⁶⁸ I. A. MacKay (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 at 108. See also J.C. Gray's 1883 observation that "the opinions of judges and lawyers as to what the law is *are* the law" (as quoted in Gordon "Case For Harvard", *supra* note 11 at 1239.

⁶⁹ MacKay, *ibid.* at 108.

rather as part of daily routine whenever lawyers acted. Its values were inculcated in the community at large as lawyers went about their work, participated in community life, generally acting as stabilizing influences in all their multitudinous individual formal or informal, big or small, legal interventions. Early twentieth century legal reformers believed that order, community, State were the cumulative result of just such infinite, repeated, micro-level interventions:

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.⁷⁰

Clearly, if the state is made of law and "law" is made of professional "consensus", then it matters tremendously not only what lawyers know in their minds but also what they know in their hearts.⁷¹ This mattered deeply. Informed gentlemen of MacKay's era felt that a consensus of legal opinion was necessary in order to "create the state; allow it to perish and peace, good order, and good government must perish with it."⁷² Professional consensus, in short, was the condition precedent to everything they held dear.

⁷⁰ *Ibid.* at 115.

⁷¹ Contemporary scholarship is returning to a focus on similar understandings, albeit motivated by rather different concerns. See the essays collected in Pue, ed. (1998) *Lawyering for A Fragmented World*, 5: 2/3 *Int'l J.L.P.*

⁷² MacKay "Education of a Lawyer", *supra* note 68 at 115. There are cross-border parallels that are interesting and deserving of further exploration. These include the American Law Institute's

Clearly, the geographic and cultural circumstances of early twentieth century Canada - huge spaces, a diverse and under-socialized population - militated against the development of professional consensus.⁷³ Professional consensus, indispensable yet seemingly incapable of spontaneous generation, had to be consciously transplanted, nurtured and developed if British civilization was to flourish in this new land (as Europeans considered it). Crudely (and admittedly taking something of a shortcut through the logic of elite Canadian lawyers) if the imminent demise of "peace, good order and good government" was the problem, then legal education was the answer.⁷⁴ Only the creation of the right kind of law schools could ensure a "uniform standard of legal opinion," a "professional consensus of opinion and a professional esprit de corps."⁷⁵

This aspect of the twentieth century's quest for legal education has not been subjected to any sustained analysis. One suspects similar concerns and processes must have been at play in the

Restatement projects which "supposed that disinterested legal minds could identify a core of national common law principles that rose above both variations in state law and mere politics." This and similar views suggest an integrative or state-formation function of the legal profession, albeit not as explicitly as amongst the Canadian professional reformers. See Gordon "Case for Harvard", *supra* note 11 at 1235 (source of quotation; referencing LaPiana *Logic and Experience*; See also G. E. White (1997) "The American Law Institute and the Triumph of Modernist Jurisprudence", 15:1 *Law & History Rev.* 1-47.

⁷³ MacKay, *supra* note 68 at 107-108.

⁷⁴ *Ibid.* at 110.

⁷⁵ *Ibid.* at 110-111.

United States and probably also in other "British Diaspora" lands.⁷⁶ If so, however, understandings such as MacKay's, Aikins' and Robson's have been largely overlooked, possibly squeezed out of historical studies developed within other conceptual "frames".⁷⁷ There are hints

⁷⁶ For an historiographic review of literature on the concept of a British Diaspora see P. Lyon (1982) "On Diasporas - the Jewish, the British and Some Others: A Note" in *The Diaspora of the British*. Univ. of London, Institute of Commonwealth Studies, Collected Seminar Papers No. 31 at 72-80. The notion has recently been developed in legal history by P. Karsten (1998) "Cows in the Corn, Pigs in the Garden, and 'the Problem of Social Costs': 'High' and 'Low' Legal Cultures of the British Diaspora Lands in the 17th, 18th, and 19th Centuries", 32 *Law & Soc. Rev.* 63-92.

⁷⁷ Predominantly the "frames" of "trait theory of professions, market control theory (and its "jurisdictional" cousin), ethnic discrimination. Leading literature working these veins include R.L. Abel (1995) "Revisioning Lawyers" in Abel & P.S C. Lewis, eds. *Lawyers in Society: an overview*. Berkeley: Univ. of California Press 1-38; M.S. Larson (1977) *The Rise of Professionalism: A Sociological Analysis*. London: Univ. of California Press; Abel (1988) *The Legal Profession in England and Wales*. Oxford: B.H. Blackwell; Abel (1989) *American Lawyers*. N.Y.: Oxford Univ. Press; Abel & Lewis, eds. (1989) *Lawyers in Society, Volume Three: Comparative Theories*. Berkeley: Univ. of California Press; H. Arthurs, R. Weisman & F. Zemans "Canadian Lawyers: A Peculiar Professionalism" in Abel & Lewis, eds. (1988) *Lawyers in Society, Volume One: The Common Law World*. Berkeley: Univ. of California Press at 123 - 185; J.S. Auerbach (1976) *Unequal Justice: Lawyers and Social Change in Modern America*. New York: Oxford.; A. Abbott (1988) *The System of Professions: An Essay on the Division of Expert Labor*. Chicago: Univ. of Chicago.

For discussions of such theories and how they have influenced histories of legal education and legal professions, see Pue "Common Law Legal Education", *supra* note 6; and "Trajectories of Professionalism", *supra* note 4.

of an awareness of similar issues in some U.S.A. writing, but that is all.⁷⁸ Robert Gordon, for example, characterizes the late nineteenth-century Harvard revolution in legal education (the shift to a case-method of law teaching) as a repudiation of older models: "Law schools like Columbia and Yale at first tried to hold out against the pull of the Harvard model in order to preserve an older conception of the law school as designed to train generalist lawyer-statesmen."⁷⁹ The Canadian experience indicates however that adoption of the case method might be more accurately understood *not* as a repudiation of the lawyer-statesmen (or gentlemanly lawyer) ideal but rather as a new technique thought to be a particularly effective means of inculcating virtue in neophyte lawyers - regardless of their background.

The Manitoba Law School provides an unique access point for understanding the origins of the common law world's predominant twentieth century method of law teaching. The creators of this made-in-Canada professional school had looked closely at alternative models of legal education in both the United Kingdom and the U.S.A. They did not for a moment doubt that they were working at the forefront of legal education in Empire and Continent alike. It remains possible that they deluded themselves in this respect, that they did not understand fully what they were on

⁷⁸ See *e.g.* LaPianna, *supra* note 11; Gordon, *supra* note 11. De Tocqueville and Strachan's expectations of the legal professions (discussed above) are well-known, for example, but Aikins and Robson's generation provides greater insight into the way in which law was to work its projects in the realms of cultural and state transformation.

Though R. A. Ferguson's (1984) *Law and Letters in American Culture*. Cambridge: Harvard Univ. Press, deals with different issues in a different time, it too is suggestive.

⁷⁹ Gordon, *supra* note 11 at 1235.

about. This, however, seems unlikely. Their researches, learning, social networks, travels, scholarship, and contributions to public life suggest otherwise. It is at least as probable that their work provides a source of insight into contemporary U.S.A. developments and into the thinking and cultural presuppositions that lay behind them. The experiences of the "periphery", in other words, might illuminate the "centre".

Now, how and what did they teach? And what does that tell us about the character of early twentieth century legal education?

Case method & the political economy of law

The case method was the mind, heart and soul of the Manitoba Law School's golden age innovations. Studied, assessed, announced, promulgated, published, celebrated and taught by Manitobans in this period, it became the centre-piece for their state-of-the-art law school's curriculum.⁸⁰ This much is clear. We also know that this generation of legal reformers counted upon law school to do a tremendous work of state formation. By first selecting, then developing, appropriately gentlemanly lawyers who would, upon obtaining professional qualification, be sent out to their lives' work across the State's territory, they hoped to save Dominion and Empire from disintegration in the face of seemingly overwhelming centrifugal forces, ethnic divisions, and the rest.

One key piece of the puzzle is still missing however: how exactly did they expect the case method to achieve such important results? Where was the "magic" in studying cases?

⁸⁰ See Pue "The disquisitions of learned Judges", *supra* note 6.

U.S.A. writings, unfortunately, are not very helpful in addressing such questions. The cultural mission of legal education needs to be understood as something other than a "status project" of elite lawyers,⁸¹ more important than superior technical training,⁸² wider in import than the project of educating "lawyer-statesmen",⁸³ and greater than mere "practical training".⁸⁴ Looking backwards it is easy to assume that the case method came into being primarily because it is an excellent technique for teaching the skills in doctrinal analysis that underlie appellate litigation (if not the social sciences skills that "Brandeis Briefs" require). Viewing matters in this light, Robert Gordon has concluded that

For all the noise about how practical the case method was, it was also a decision to refuse to train lawyers for - or even to acknowledge the existence of - all the new tasks that required an understanding of statutes, administrative records and procedures, financial structures of corporations, large-scale transactional work such as mergers and reorganizations, conducting trials, drafting documents, and arguing appeals. Intellectually, the decision was an act of self-mutilation, a deliberate cutting off of 'pure' legal science from contemporary legal economics and the comparative history and sociology of law.⁸⁵

⁸¹ Gordon "Case for Harvard", *supra* note 11 at 1232-1233, 1234-1235, 1241.

⁸² *Ibid.* at 1234.

⁸³ *Ibid.* at 1235.

⁸⁴ *Ibid.* at 1236, 1242.

⁸⁵ *Ibid.* at 1260.

This, certainly, is the way the case method appears from a position in late twentieth century North America. We need to bear in mind however that the men who created Canadian legal education anew in the early twentieth century considered a *proper* understanding of law to be synonymous with a series of underlying knowledges, beliefs, faith, or understandings regarding economy, public administration, constitution, corporate behaviour, and so on. Bearing this in mind, assertions or exhortations such as the following need to be accorded central place in our efforts to understand early twentieth century Canadian legal education:

- * an exhortation to law students "not only to aspire to be the thorough lawyer, but to be the best Canadian."⁸⁶
- * informing law students that their duty was "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. You should aim to be leaders in thought, promoters of the intellectual and moral development of our young nation, so that it may become a strong and forceful leader in the Empire."⁸⁷
- * assertions that the purpose of a law school was to teach "law in a big way," promoting "profound knowledge," and creating "an inextinguishable desire to become perfect as students, ambitious to know thoroughly the law."⁸⁸

⁸⁶ Aikins, J. (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 at 1190.

⁸⁷ *Ibid.* at 1190.

⁸⁸ *Ibid.* at 1188-1189.

- * 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".⁸⁹
- * belief in the necessity of "bigness" in legal learning, implying: (i) "culture" (obtained by "a broad study of subjects which are more or less connected with the law"); (ii) a concern with "the highest interests of man in practical affairs"; and (iii) a certain "dignity of moral feeling and profound knowledge."⁹⁰
- * promotion of the view that the goal of legal education was to educate "jurists rather than mere lawyers, having in mind the thought that 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."⁹¹
- * faith that legal education could instill "the vision of a divine justice transcending the imperfections of human justice...."⁹²

⁸⁹ *Ibid.* at 1188.

⁹⁰ *Ibid.* at 1187, 1188.

⁹¹ 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 at 1091.

⁹² Lee, R.W. (1916) "Legal Education, Old and New, III", 36 *Canadian Law Times* 109-115 at 114.

- * confidence that a "scientific" approach to legal education would enlarge "the mental horizon" and quicken "understanding".⁹³
- * belief that a key duty of legal educators was 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".⁹⁴

Such observations are not atypical. Further examples could be endlessly multiplied on both sides of the 49th parallel.⁹⁵ Taking such rhetorical plays seriously and not disparagingly, another obvious question arises: how (on earth!?) did these reformers think that adopting the case method would make "better men", teach law in a "big" way, enlarge "mental horizon", instill a sense of "professional honour" or "civic duty", promote "moral" development or anything else. Looking backwards, most late twentieth century critics of legal education tend to think that the method in fact achieved rather opposite results.⁹⁶

⁹³ *Ibid.*

⁹⁴ Lee, R.W. (1919) "Legal Education: A Symposium", 39 *Canadian Law Times*, 138-141 at 141. For further assessment of Lee's contribution - including the cultural urgings underlying his attempt to establish common law education in Québec, see Macdonald, R. (1990) "The National Law Programme at McGill", 13 *Dal. L.J.* 211.

⁹⁵ for more on this see Pue "Common Law Legal Education", *supra* note 6.

⁹⁶ Thornton, M. (1996) *Dissonance and Distrust: Women in the Legal Profession*. Melbourne: Oxford Univ.; Kennedy, D. "Legal Education as Training for Hierarchy" in Kairys, D., ed. (1998)

When one looks for evidence of the case method's actual implementation in the Manitoba Law School's golden era the relationship between reformers' aspirations and their educational achievement is at first hard to discern. The first problem, simply, is that evidence as to how the method was in fact taught is in fact rather thin. There are no first-hand accounts of law teaching in this period, almost no reflections by law teachers as to what they thought they were doing, and no recollections by students as to what they felt their teachers were doing to them. There are no diaries, class notes, law students' annuals or similar materials available.⁹⁷ Three types of source exist to indicate how the method was implemented: curriculum guides (which consisted only of lists of cases), selected published casebooks, and casebooks developed for Manitoba Law School Faculty. Each source falls well short of providing what we would hope to know about the use of the case method in Manitoba. Any teacher or student knows that there can be a huge disjunction between course guides, selected books, and other documentation "reflecting" what a course is about on the one hand, and the actual teaching of it on the other. Early twentieth century Oxford, to take one example, provided an extraordinarily well-rounded education in law and policy despite a curriculum and teaching materials which, judged retrospectively, seem to indicate the narrowest

The Politics of Law: a progressive critique, 3d ed. N.Y.: BasicBooks, 54-75; Wilkins, R. (1987) "The Person You're Supposed to Become: The Politics of the Law School Experience", 45 *University of Toronto Faculty Law Review* 98.

⁹⁷ Surprisingly, more material of this sort survives with respect to the rather less prestigious, less ambitious, Vancouver Law School. See Pue *Law School*, *supra* note 65.

of "black letter" instruction: the real education came from close interaction in and out of formal teaching situations of students with instructors who were widely-read, rounded intellectuals.⁹⁸

All indications are that the actual substance of information conveyed by case teaching constituted a rather thinner gruel than one might have expected given the ambitions of its Canadian fathers. The two commercially published casebooks developed by Manitoba law teachers in this period fail by almost any late twentieth century academic, intellectual, or professional standard. Both appeared in 1916. Each was jointly compiled by J. B. Hugg and H. A. Robson - neither of whom was a bush-league lawyer by any standard. The Table of Contents for their *Leading Cases on Public Corporations* has only one substantive heading ("Leading Cases"). *Cases on Company Law* is slightly further developed. The co-editors expended little effort on creative taxonomy. Cases are presented unadorned, explained only by a brief parenthetical note indicating the principle of law addressed. One case is presented in support of each legal principle and the excerpts are brief. The volumes lack the point/counter-point presentation of inconsistent or hard-to-reconcile cases which subsequent generations take to constitute the (realist) core of the case method. There is no reference to secondary literature, no discussion of policy matters, no editorial note, comment, critique or recommended further readings. The cases reproduced were selected for the clarity with which they stated legal principles.⁹⁹ Robson and Hugg expressed their belief in "[t]he desirability

⁹⁸ I am grateful to the University of British Columbia's founding law dean, Dean George Curtis, for drawing this to my attention during the course of extensive discussions concerning the legal education he received at Oxford.

⁹⁹ H. A. Robson, K.C. and J. B. Hugg (1916) *Leading Cases on Public Corporations*. Toronto: The Carswell Co. Preface.

of placing actual cases ... before law students".¹⁰⁰ They thought it appropriate to mix cases from several jurisdictions despite variations in statutes. Each statutory scheme, they said, was undergirded by "the same solid body of general principles as expressed in a thoroughly matured jurisprudence...." Confident in the existence of an underlying *ius gentium* they considered the smallish variations of *lex locii* to be of secondary importance: "[t]he differences in the organic provisions and in the details of regulation" were, "easy to grasp".¹⁰¹ The editors explained that, by reading excerpts from actual judgments students would develop a broader "comprehension than would be indicated merely by the topic under which the case is usually cited. The disquisitions of learned Judges are more illuminating than a text writer's epitomes."¹⁰²

Let us pause here for a moment's reflection. It is precisely this confidence in the "illuminating" character of the "disquisitions of learned judges" that now seems hardest to comprehend. It should be clear that the casebooks actually developed for Manitoba's Law Students could not plausibly have been thought more illuminating than anything else available on account either of the amount of reading they imposed (slim) or the conceptual difficulty the material

¹⁰⁰ Robson & Hugg (1916) *Cases on Company Law*. Toronto: The Carswell Co. Preface.

¹⁰¹ *Ibid.* at 8.

¹⁰² *Ibid.* at 9. For a fuller discussion of these casebooks see Pue "The disquisitions of learned Judges", *supra* note 6.

presented (low). Both are rather unpretentious, even somewhat simplistic volumes: spoon-feeding efforts, really. Something else was at play.

Judicial disquisitions as medicine for the soul

What could that be? If the case books themselves were sparse, amounting to little more than structured black letter statements (the headings) backed, digest-like, with short excerpts from a single relevant case, what do they provide that a textbook couldn't? In what way could they be said to amount to anything greater than a guide-book to legal rules?

The necessity of considering questions such as these marks the gap in mentalité between our world and theirs for the answers are neither modern nor rational (in any way we would understand those terms). In sum, all that the books provided was direct exposure to the words of the judges - legal oracles. The operational logic within which these educators operated was not that of legal realism, scientific rationality or modernity. It was, rather, the rationality of culture, an "irrational" logic founded on odd notions that exposure to "great" literatures *in their original* would make not just better scholars (or lawyers) but also better people, better gentlemen, better "souls".

Why? Because the great judges of the past were both learned in law and, by definition, distinguished gentlemen. Given sufficient - and sufficiently direct - exposure, it was assumed that their greatness would rub off. There is a direct analogy between what early twentieth century Canadian lawyers thought and widely subscribed to views about the virtues of great literature. In 1960, for example, Clifton Fadiman wrote that reading the great books of the western canon made

the reader "feel buoyed up by the noble stream of Western civilization".¹⁰³ The Great Books, Fadiman said, helped make "interior life more meaningful"¹⁰⁴, "enlarged" the reader, served as "tools of self-enhancement" and "self-discovery, working mysteriously on the innermost being "like a developing fluid on film."¹⁰⁵ Good books, in short, transform the soul.¹⁰⁶

Similar presumptions were taken for granted amongst the Canadian lawyers who created twentieth century legal education. It is precisely because their understandings of the mysterious mechanisms by which a reading programme (in this case a guided reading of case law) made better men were commonly shared in the society of which they were part that they left their views on these matters largely unarticulated. Distinct parallels existed in other areas of Canadian educational and scholarly life, however, for such assumptions pervaded Canada's polite classes. John Watson, one of Canada's most influential teachers of philosophy at the turn of the century, provides one example. He believed that "if students of philosophy were to pass from a lower to a higher plane of thought they must read the classical texts for themselves. He would set his own class of more advanced students at work upon extracts from the philosophy of Kant, watch them as

¹⁰³ Fadiman, C. (1960) *The Lifetime Reading Plan*. N.Y.: World Publishing Co. at 18.

¹⁰⁴ *Ibid.* at 19.

¹⁰⁵ *Ibid.*

¹⁰⁶ See Bloom, A. (1987) *The Closing of the American Mind: How Higher Education has Failed Democracy and Impoverished the Souls of Today's Students*. N.Y.: Simon & Schuster.

they struggled with its perplexities, and give helpful instruction only when it was needed."¹⁰⁷ Just in the same way that faithfully reading the Bible's genealogies (the "begats") as part of a Bible study programme was thought by some Christians to be improving, so too their contemporaries perceived a mystical quality which attached to reading "original" sources of philosophy or law.

Religious analogies are doubly apt. First, because secular and religious learning did not then live in hermetically sealed boxes: philosopher John Watson for example has been identified as providing philosophical roots for the social gospel; James Aikins was a life-long Sunday school teacher who explicitly modelled legal education on the institutional structures of Manitoba theological colleges.¹⁰⁸ Secular and religious knowledge were thoroughly intertwined.¹⁰⁹ Secondly, the mission of legal education, like that of Christian indoctrination, was at core a project concerned with transforming souls, not minds: its elements included preselection of the elect (requiring "pious fraud" in admissions requirements), acculturation and character development (full-time law schools to serve as seminaries of law), and a Great Mission (as gentlemen lawyers

¹⁰⁷ Irving, J.A. (1950) "The Development of Philosophy in Central Canada from 1850 to 1900", 31 *Can. Hist. Rev.* 252 at 274. I am grateful to Lyndsay Campbell for bringing this to my attention.

¹⁰⁸ See "The disquisitions of learned Judges", *supra* note 6.; Gibson & Gibson (1992) "Sir James Aikins' Seamless Webb: Finding Fortune and Fame as a Lawyer in the Adolescent Canadian West", 21 *Manitoba L.J.* 161-212.

¹⁰⁹ See *i.e.* Cook, *supra* note 26.

dispersed throughout the land working their British cultural mission amongst the polyglot non-British population).

It is noteworthy that significant aspects of educational vision were shared between the Manitoba Law School, circa 1923, and an interdenominational evangelical school of the same period. Prairie Bible Institute ("PBI"), located in Three Hills, Alberta, provided Bible instruction as a core part of its curriculum. Biblical Truths were conveyed to PBI students through a series of questions which the school's catalogue said, were "designed to enable the student to sound the depths of God's Word as an organic body of revelation. The teacher refrains from coming between the student and his subject. The student, by personal first-hand research, but under careful guidance, is pushed into rich original findings. The result is that the Bible is not mediumized to the student, but the student has his own revelation and his own message of the truth."¹¹⁰ In language strikingly reminiscent of James Aikins comments on legal education, Prairie Bible Institute promised that its educational system would lead the student to "secure the Book as *his own possession - his very own*. This is the culminating object of the school."¹¹¹

I do not intend by noting such similarities to suggest in the least either that the Manitoba Law School was modelled on Prairie Bible Institute nor (much less) that Christian institutions took their bearing from innovations in legal education. Both, however, existed in a time and a place where similar background assumptions about the nature of learning, the ends of education, and the

¹¹⁰ As quoted in J.G. Stackhouse, Jr. (1993), *Canadian Evangelicalism in the Twentieth Century: An Introduction to Its Character*. Toronto: U. of T. at 73.

¹¹¹ *Ibid.* at 78.

formation of character constituted the larger ambient environment. The PBI comparison is relevant not just for the importance attached to reading of original texts but also for its emphasis on teaching the truth of God's Word through a series of discussion questions intended to lead each student to "his own revelation and his own message of the truth." Though God's Word was not to be "mediumized" by man, PBI assumed that each student assisted in this way would come to his own understanding of a singular truth. The method was not founded on the presumption that any joyous anarchy of meaning was tolerable or possible. Each individual student was expected to find "Truth" in the singular, to come to an understanding in all respects identical to that of the larger community of privileged interpreters. Theirs was a truth for the world at large.¹¹² It was authoritatively true, conservative. New interpretations, novel "truths" were not within the realm of contemplation.

Socratic method, inner transformation & revealed truth

There is, of course, a remarkable similarity with the case method. In its classic form cases were taught through the so-called "Socratic" method which, like PBI's Bible teaching, proceeded through a series of carefully constructed questions. The ideal-type of a "Socratic" law school

¹¹² "But Prairie at no time seemed to recognize the basic epistemological contradiction between claiming pure inductivism and having study guided by direct questions. Nor did it seem to allow for the prospect that a student might come up with something truly 'original' - something that might contradict Prairie's own statement of faith. In all of this of course, Prairie was not exceptional but rather typical of evangelicals. As has been noted, this 'cognitive style' in Canada awaits further study, but on this sort of epistemological naiveté in Britain and America, see [sources cited...]" Stackhouse, *ibid.* at 237.

instructor is a man (more on the method's masculinity below) who peppers students with questions, telling them nothing, refusing to assume the role of an authoritative lecturer, leading them to discern their own legal "truths". All the while, however, he - like Prairie Bible Institute's instructors - understands that students will be examined on the basis of conformity with the views held by a privileged community of legal interpreters.

Unfortunately, lack of direct evidence leaves us unable to know what actually took place in the classrooms of the Manitoba Law School. It seems likely however that some form of "question and answer" approach to legal education had been contemplated from the beginning and, even if this had not been the case, Socratic method would have influenced the school's pedagogic strategy by the mid-1920's at the latest. At that time Thaddeaus Hébert had become Canada's outstanding early master of Socratic teaching in neighbouring Saskatchewan where he practiced Socratic method as an high art. In classic Socratic style, Hébert called upon students at the University of Saskatchewan for case briefs, questioned them on their reports, called for reconciliation of apparent inconsistencies in case law, challenged their views by offering suppositious cases for analysis and, generally, creatively worked the material so as to leave the class confused. Raising questions, but declining to convey "truth" directly, Hébert quite deliberately forced students to struggle on their own in the search for meaning within the original texts of law. One of Hébert's students, J. A. Corry, humorously described Hébert's students as "victims" of the teaching method.¹¹³ A "victim" himself, Corry thought they all derived a good deal of benefit from the experience.

¹¹³ Corry, J.A. (1981) *My Life and Work: A Happy Partnership (Memoirs of J. A. Corry)*. Kingston: Queen's Univ. Press

It seems reasonable to assume that similar approaches to classroom teaching would have been tried at the Manitoba Law School. Certainly, C. Rhodes Smith (hired in 1925) was no fan of the lecture method of instruction. Lectures, he said, tended "to degenerate into dictation of notes by the lecturer, written down at breakneck speed by the students." Even at its best he thought "the formal lecture ... does very little to develop the power of analysis and gives little practice in expression and argument."¹¹⁴

We simply do not know enough to be certain about how law teaching was played out in the classroom. There would inevitably have been variations in teaching style from teacher to teacher and from year to year, but it does seem likely that the founding fathers of Manitoba's legal education intended some form of Socratic method or question and answer teaching to be appended to the reading of cases. The circumstantial evidence is strong. Their deep familiarity with legal education in the United States (where Socratic teaching *defined* the case method), practices at the law school in the next province, and C.R. Smith's views on the poverty of lecture-based teaching all point in this direction. This suggests a second mechanism in play in the manufacture of gentlemanly, lawyerly, souls.

Just as Prairie Bible Institute's teachers thought that having students read divinely inspired texts on their own, guided by a series of questions focussed on the texts would produce an inner - hence, enduring - revelation of Truth, so too law school teachers believed self-discovery of legal principles aided by interrogation of qualified teachers would led to a deep, enduring conversion to legal orthodoxy. Neither institution seriously contemplated the possibility that its students might

¹¹⁴ Smith, C.R. (1935) "Legal Education: A Manitoba View", *Canadian Bar Rev.* 404 at 408. Smith was, at the time, a lecturer at the Manitoba Law School.

find heresy, not Truth, through such processes. The method was assumed to produce inner transformation, understandings of self so intimately bound with doctrinal truth (legal or Christian) that the transformation would endure for a lifetime, withstand all temptation, be immune from challenge from those who understand not. More than memorization or learning or even literacy training was at stake - the process was intended to be life transforming.

Socratic education as rite of masculine passage

a law course is a serious matter. An arts course is intended for boys, a law course for men.¹¹⁵

A second aspect of cultural transformation, not as directly related to doctrinal orthodoxy, is also relevant. Law's cultural project was a *manly endeavor*. I do not mean this only in the superficial sense that almost all lawyers of the period were men (they were) or that many had misogynist inclinations (they did).¹¹⁶ Australian scholar Margaret Thornton has argued both that contemporary professional culture casts "benchmark men" as the norm and that this orientation has deep historical roots. "Benchmark" males, she says, are "invariably" of British ethnic origin,

¹¹⁵MacKay, *supra*. note 68 at 108.

¹¹⁶ For discussions of gender and the legal profession in this period, see Pue *Law School*, *supra* note 65; J. Brockman "Not By Favour But By Right': The History of Women and Visible Minorities in the Legal Profession of British Columbia" in J. McLaren & H. Foster, eds. (1995) *Essays in the History of Canadian Law, Volume 6: The Legal History of British Columbia and the Yukon*. Toronto: The Osgoode Society for Canadian Legal History.; Yorke, L.K. (1993) "Mabel Penery French (1881-1955): A Life Re-Created", 42 *University of New Brunswick Law Journal* 3.

"White ... heterosexual, able-bodied, middle-class". They are individuals who espouse "middle-of-the-road political and religious beliefs"¹¹⁷ and who enjoy participation in a "culture of fraternity" which draws strongly on "the imagined masculine of liberalism." This imagined masculinity conceives of itself as consisting in equal parts of atomized, self-interested, individuals¹¹⁸ and the sorts of intimate bonds fostered by sports and club life. Powerful notions of gentlemanliness inhabit respectable clubs, informing understandings of masculinity. In early twentieth century Canada, as in Australia and the U.S.A. the admission of a few women lawyers "did not change the fundamental nature of the bar as a male fraternity".¹¹⁹

The Socratic method contributed to masculinist cultures of fraternity in at least two ways. Most obviously the method's reliance on repeated struggles between professors and students lead to it being considered a more 'virile' system of education than instruction by lecture.¹²⁰ Classroom

¹¹⁷ Thornton, *Dissonance*, *supra* note 96 at 40. For further development of these concepts see Thornton (1996) "'Liberty, Equality And?' Endowing Fraternity With Voice", 18 *Sydney L.R.* 555-567.

¹¹⁸ Thornton, *supra* note 96 at 8.

¹¹⁹ Rotundo, E.A. (1993) *American Manhood: Transformations in Masculinity from the Revolution to the Modern Era*. N.Y.: BasicBooks at 213.

For a remarkable effort by women law students to redefine professional understandings on their own terms see *Vancouver Law Students' Annual, 1919-1920*, as discussed in *Pue Law School*, *supra* note 65 at 225 ff.

¹²⁰ Rotundo *American Manhood*, *supra* note 118 at 8.

battles of wits and aggressive contests for "true" understandings dramatized professional processes of survival of the fittest. The Socratic method drew upon and contributed to a larger social common sense in which social Darwinism was important and in which military metaphors informed notions of masculinity and professional virtue alike. Though it seems odd to us, virtue and war were not then seen as opposed ideals, aggression and friendship were not incompatible. In this period it was widely thought that war itself should - and could - be constrained by the gentlemanly instincts of the officer class. Moreover, the cultural ideal of the "Christian soldier" was an important component of respectable male self-image at this time.¹²¹ In such contexts the particular ebb and flow of intellectual exchange, terror, battle, and gentlemanly sword play which characterized Socratic classrooms spoke to the moral development of students at least as much as it did to their intellectual growth. Cultural understandings surrounding masculinity, military virtue,

¹²¹ "A lawyer... by taking up arms as a Christian soldier, could purify his wealth and power by using it to godly ends.... Historian Robert Crunden has observed that many notable progressives came from religious families that cultivated stern Protestant consciences. Resisting pressure to follow careers in the ministry or missionary work, these devotees of reform found secular channels for their evangelical impulses, launching crusades to save society from its worldly sins." Rotundo, *ibid.* at 173.

gentlemanliness and Christianity coalesced in this new educational method.¹²² *Everything* about the Socratic engagement was "masculine".¹²³

Further, the method reproduced masculine culture by association: it imported and reproduced key features of male associational life in the university environment. Rotundo describes a wide field of "young men's organizational culture" including literary societies, debating societies, and the like. In each of these,

The endless process of competitive evaluation that was involved in these verbal clashes represented another refinement of a habit bred by boy culture. Boys constantly evaluated one another on the basis of physical skills. After they grew to be

¹²² See generally Hamilton, J.W. (1995) "Metaphors of Lawyers' Professionalism", 33 *Alta. L. R.* 833-58 for an outstanding assessment of the interplay of metaphoric networks relating to masculinity, Christianity and war in Canadian lawyers' professional self-understandings.

¹²³ The Socratic method bears comparison with a number of rites of masculine formation on both sides of the Atlantic including French fencing studios, English "public" school education, bourgeois sporting culture, and Canadian private schools. The point cannot be developed at length here. See Nye, R.A. (1993) *Masculinity and Male Codes of Honor in Modern France*. New York: Oxford Univ.; Mangan, J.A. "Social Darwinism and upper-class education in late Victorian and Edwardian England" in J. A. Mangan and J. Walvin, eds. (1987) *Manliness and morality: Middle-class masculinity in Britain and America 1800-1940*. Manchester: Univ. of Manchester 135-159; Walvin, J. "Symbols of moral superiority: slavery, sport and the changing world order, 1800-1940" in Mangan & Walvin *Manliness and morality* 242-260; Barman, J.A. (1982) *Growing Up British in British Columbia: Boys in Private School, 1900-1950*. Univ. of British Columbia: Ph.D. - Education (unpublished).

young men, they judged their peers by verbal and intellectual standards instead of physical ones.¹²⁴

The Socratic classroom's "verbal clashes" - and their cultural import - would have been familiar to young men of this era precisely because they replicated patterns of self-improvement common in many other masculine sites. Such clashes which, depending on context and nuance, covered the entire range from playful fencing bouts to something akin to total war, formed the core of a distinctly male culture.

Understood in this way, one of the more mysterious aspects of the case method is intelligible. Legal educators commonly note that Socratic teaching is a notoriously inefficient means of conveying information. Even simple legal arrangements that might be taught in an hour or two of lectures or a few pages of a textbook (for example, that valid contracts require offer, acceptance and consideration) take weeks or months of classroom time when the case method is used. Law students not infrequently complain that teachers deliberately try to confuse them rather than assisting their learning. One conventional explanation is indeed plausible: that information obtained through such deliberately painful processes is more permanently etched in the mind than that communicated through lectures or text-reading. There is in fact, however, no solid evidence to substantiate this view. The educational leaps involved are those of intuition or faith, not science.

Viewed through lenses of masculinity and in relation to projects of personal character formation however the case method makes a good deal of sense. Its mimicry of positivist science and commitment to "facts" reflects "a `masculine' readiness to look brute reality unblinkingly in the

¹²⁴ Rotundo, *supra* note 118 at 70.

face ... and to embark upon the strenuous, tough-minded, intellectual path."¹²⁵ It is active (male) learning, not passive (female).¹²⁶ The *very fact* that it is artificially difficult becomes virtue once we understand that it is the *struggle itself* which is thought to be character building. Success requires hard slogging in a trench warfare of the mind. It is the tempering fire of struggle, not the transmission of information, which ensures that lawyers will be tough, disciplined, manly, and capable of foregoing the many temptations of life in order to focus on the higher goal, the longer term objective. Legal education, rendered sufficiently difficult, becomes training in impulse control - an indispensable component of "character".¹²⁷

¹²⁵ Gordon "Case for Harvard", *supra* note 11 1231-1260 at 1240. Gordon portrays "scientific" approaches as being an attempt to throw off the shackles of religion and moral sentiment in approaching law. This, I think, overlooks the close and complicated relations between empiricism, science, and God in this period, but this is not the place to explore such themes in any depth. My selective quotation from Gordon's work is deliberate and not intended to be misleading.

¹²⁶ For a useful general discussion of the cultural construction of masculinity and femininity in western culture see Thornton, M. (1998) "Authority and Corporeality: The Conundrum for Women in Law", VI (2) *Feminist Legal Studies* 147-170.

¹²⁷ Rotundo, *supra* note 188 at 73 observes that "books of sermons appeared less often during the second half of the century, when they were replaced by a moralistic secular literature (usually scientific or medical) that echoed most of the themes of impulse control that had dominated the preaching of earlier generations."

Understanding legal education against this background helps to make sense of James Aikins' address on the opening of the Manitoba Law School, a large part of which was dedicated to imploring students to apply themselves fully to the study of law, to "control" themselves, avoid "excesses," (including alcohol) and to manifest the virtues of "integrity," "moral fibre," "character,"

6) Summary and Conclusions

This essay has argued that law has a central place in colonizing processes and that British imperialists saw the transplantation of their law - which, though infused with British christianness, they considered a transcendent secular rationality - to new lands as a key component of their larger "civilizing" mission. Canadian lawyers, like others in the British world, believed in "the encompassing ability of law to make or re-make society totally."¹²⁸ In pursuit of this civilizing mission, law's role included the tasks of negotiating, managing, confining, and - ultimately - destroying the *de facto* legal pluralism of colonial spaces. Because legal pluralism at this level emerged not from State decree but directly from the unruly human raw material of Empire, it was necessary for law to transform colonial subjects themselves if "the body politic" was to be inoculated "against the virus of difference".¹²⁹

For a number of reasons Canadian social space - and western Canada's in particular - was particularly unruly, posing especial problems for law's civilizing mission during the first three decades of the twentieth century. Aware that powerful centrifugal forces were at play, Canadian lawyers believed the state to be an edifice made of law and that "law" is itself nothing other than the consensus of opinion. In order to nurture an appropriately lawful, British, consensus of opinion

"honour" and the "habit of industry." (James Aikins "Manitoba Law School, Inaugural Address", *supra* note 86 at 1183-1187.)

¹²⁸ Fitzpatrick *Mythology*, *supra* note 10 at 56.

¹²⁹ Duncanson, *supra* note 19 at 116.

amongst Canada's diverse peoples, some elite Canadian lawyers sought to find means of implanting appropriately cultured lawyers who would carry "law" with them to even the remotest nooks and crannies of this "new" land. Consequently, a "cultural legal education" was developed so as to nurture lawyers capable of bearing this important integrative mission. This, in turn, required new entry standards for legal education, the creation of full-time seminaries of law, and new methods of instruction. Foremost amongst those new educational approaches were the case method and, its near-twin, Socratic teaching. The significance of both lay not in anything we would now consider rational or scientific but in their presumed ability to effect transformations of soul and the development within their students of gentlemanly character and a virile masculinity.

That said, it is important to emphasize again what this essay is *not* about. This has been a descriptive endeavour of modest proportions. I have not sought to pass judgment on the historical actors I have discussed. Nor would I wish to argue either that the way in which they see the world is more accurate than any other or that their cultural missions were in fact as important as they thought. I do not wish to assert that Canadian lawyers were particularly *effective* imperialists, nor that they were more important to projects of imperialism than anyone else, nor even that their efforts had any significant impact beyond their own professional world. This essay addresses *their* world, *their* culture, *their* mentality. It is an attempt to document what they fancied themselves as achieving. As such it is an essay on the internal culture of lawyers, only peripherally concerned with what they may in fact have contributed to refashioning the larger culture of which they were part. It remains possible that the case method did not in fact save Canada or the United States or British Empire from dissensus, legal pluralism, the tug of centrifugal forces, anarchy. To properly assess any such claims would require another, much larger, project.

Moreover, I have not sought to argue that the impetus behind the case method or Socratic instruction was the same in all places and all times. Nor do I wish to assert that the case method has any timeless character or cultural "essence": even identical texts and course structures perform remarkably varied cultural work in different contexts.¹³⁰ There *is* good reason to think that Canadian initiatives were heavily influenced by common sense assumptions about legal education in the United States. Consequently, Canadian understandings in these respects may cast some light on the history and culture of legal education south of the 49th parallel. That possibility too, however, requires another, very substantial, project, if it is to be properly assessed.

Nonetheless, some patterns discernible in the history of Canadian legal education do resonate with themes identified by other scholars focussing on other places and other times. The developments, thought-processes, and cultures described here can be understood as part of the history of "governance".¹³¹ Reflecting on the processes of British Imperialism, Corrigan and Sayer have asserted that:

¹³⁰cf. Viswanathan, *Masks of Conquest*, *supra* note 7 for an analagous treatment of English literature studies.

¹³¹ See *e.g.* Hunt *Constitutive Theory*, *supra* note 24 at 306: "Central to this conception of 'governance' is the idea that government is not only the work of 'Governments'; central to the projects of government are the key institutionalized professions - such as the medical profession - that stand between Government and the population. Or to put it in different terms, this conception of 'governance' traverses the distinction between state and civil society; it is to be found on both, not just on one side, of this evocative dichotomy." That said, it is odd that even sociologists of law have tended to under-estimate (or, simply, ignore) the roles of the legal profession in relation to governance so construed.

... it took a national culture of extraordinary self-confidence and moral rectitude to construe such imperialism as a 'civilizing mission' (and in fact to rule with surprisingly little use of direct armed force, in comparative terms, from the 'Mother Country')... Beside the greed and butchery we must put the reading matter on the East India Company ships, the ethos of the district commissioners and the Indian civil service; not in order to write off (or excuse) the former, but rather to understand the cultural forms, the energizing vision, that could animate and legitimate it notwithstanding. ... cultural forms were key forms of rule....¹³²

Like the reading matter on ships, the books assigned to law students, the reading material of lawyers, and the ethos of the legal profession must be understood in relation to imperialism at least as much as in relation to the internal dynamics of a professional guild.

More than any other arena, more than any other profession, law and lawyers, can provide insight into the ways in which "the transcendent symbols of nationhood" connect "with the humdrum, ordinary and everyday, in such a way that the former can be claimed as representing the latter".¹³³

¹³² Corrigan & Sayer *Great Arch*, *supra* note 12 at 194.

¹³³ *Ibid.* at 196.