REFLECTING ON THE 1980s: POSITIVISM VERSUS PLURALISM

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The single most important development in the first century of the University of New Brunswick Law School may have taken place in the 1980s. Over the course of that decade the monistic influences of legal positivism which theretofore prevailed were beginning to be challenged by notions of legal pluralism which could be detected in the first part of the decade but were more prevelant by the decade's end. The ascension of pluralism was due to changes which, by the end of the decade, had encultured an environment increasingly receptive to broader and deeper arguments about law. The changes of greatest consequence to the decline of legal positivism were the enactment of the *Charter of Rights and Freedoms* and the maturation of the faculty.

I have been invited to contribute an essay on the faculty of law over the decade of the 1980s because for much of that time I participated in the life of the law school as both student and teacher. I came first to the faculty at the beginning of a decade as a student. During the middle years of the eighties I was away taking a postgraduate law degree and gaining experience in a variety of law related roles. In 1988 I returned to the faculty to teach for two years, replacing a professor on leave. My reflections of the faculty must necessarily be comprehensive; there are numerous exceptions to the generalizations here made. My attempt is to place the development of the faculty of the 1980s in the context of larger legal and social movements.

My overall enduring impression of law school as a student in the first half of the 1980s is that it was a rigid environment which manifested a predisposition for circumscribed legal discourse and a willingness to observe the various incidents or elements of hierarchy.

The circumscribed nature of legal discourse was reflected in an impatience for argument or comment which was not strictly legal. For example, discussion of social history was eschewed. I recall a classmate asking about the historical background to a case which dealt with the persecution of a religious group only to be told by the teacher that ours was not a class in history. Discussion of political issues were likewise deflected notwithstanding that they had far-reaching legal consequences. When once a student queried the process by which judges were appointed, he received the curt response that this was not an appropriate topic for comment. A discussion of the personal experiences of students was also discouraged. One of my classmates found it easiest to comprehend cases by assimilating them to events which had touched on her own life or those of people she knew. She was told in no uncertain terms that the class had little patience for law from an experiential perspective.

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Within the first two months of law school ideas thought to be extraneous to the law itself had been sifted out. It was apparent that our task was to learn the law, and to learn it in a more or less uncritical fashion. This entailed a study of law primarily for its rules, not for its equity, a point which was made early on. We had been examining a nineteenth century case, the legal proposition of which raised the ire of a student who perceived it to be inequitable. The instructor's rejoinder was that law and justice are different. It was the instructor's view that as law students we should content ourselves with learning the law that we might become competent practitioners; justice could be left to philosophers or until retirement. Thereafter, no discussion of the concept of justice, as such, or any particular conception of justice, took place. Justice arose only incidentally from time to time beneath such veiled epithets as "policy," "equity," or "reasonableness."[1] There is a well known story, perhaps apocryphal, which relates that upon hearing a student's complaint that a particular case was unjust, a teacher remarked that theirs was a faculty of law, not a faculty of justice.

The scope of discourse was not only delimited by express measure; it was also victim to the subtleties of gender exclusive language. I was surprised, at first, to learn that every abstract statement of law, be it common law or statute law, excluded women. I was even more surprised to see how readily this practice was accepted. In my three years as a law student, I cannot recall a single objection to this exclusionary form of legal discourse. The powerful impact of this linguistic myopia impressed itself on me several years later when I saw that a female colleague had begun a letter to a law firm composed entirely of women with the saluation "*Dear Sirs*."

This circumscription in discourse was paralleled by the curriculum. Mandatory courses occupied fully two of the three years one spent in law school. These mandatory courses reflected the faculty's central goal at the time - to prepare students for the practice of law. In consequence, there was little opportunity, in terms of time or course offerings, for a student to pursue a special interest, particularly if that special interest lay beyond a traditional practical area of the law.

Incidents of hierarchy were also very much apparent in the early 1980s. One incident related to the way in which one was to refer to certain legal personalities. For example, when discussing a decision, students, as a matter of convenience, would refer frequently to the judge only by last name, *e.g.* Martland. Some instructors would insist that the judge's title be included in the appellation, *e.g.* Mr. Justice Martland. Criticism of judicial decisions was also to follow a defferential format. When acting as appellate in a moot court proceeding, one was to say "the learned trial judge erred" and not "the trial judge was wrong." The point is that the law school consciously undertook to engender a dogmatic respect for the

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[1]Recourse to conceptions of justice, if only at the intuitive level, are unavoidable in some hard cases. This intolerance to the broader ideas touching on law promoted the ironic statement from a classmate that law school was "anti-intellectual."

legal hierarchy, an undertaking which, as we will see, has had an impact on the depth of legal argument.

The influence of hierarchy could be found even in the school's architecture. Three of the four classrooms had about them the steeped dimension of an amphitheater with desks fixed to terraces in such a way as to focus the student's attention down on the teacher. Bolts and terraces made it impossible to reorganize the classroom environment in a manner more conducive to communal discussion. Even the lone seminar room, which was neither bolted nor sloped, could not resist assigning to the teacher a place of prominence. This was accomplished by a unique pyramidically shaped conference table which focussed attention to its stunted apex at which the teacher could be found.

What explains the constrained atmosphere of the law school in the early 80s? One possibility might be the dominant legal paradigm of the last two hundred years, legal positivism.

One of the central ambitions of legal positivism is to identify law in an objective manner. This is accomplished through empirical study which traces law to authority figures either sovereign or official. This view of law, as the product of authority, results in at least two important attributes. First, law is seen as being capable of separation from morality. Identifying law by reference to authority means that the positivist need not be concerned with the vagaries of morals - in the case of law, political morality in particular. Second, law is perceived on a hierarchical model. It is the combination of these attributes which may explain the rigidity of the law school environment in the early 1980s.

The central consequence of isolating law from morality was that it tended to delegitimize discourse beyond the strictly legal. In short, arguments from morality or justice were seen to be beside the point.[2] Accordingly, the law student was denied access to evaluative arguments, a deprivation which was supported by the curriculum of the day which offered only one jurisprudence course. However, of greater moment and regret are the consequences of this denial. First, as students, we were never systematically exposed to justice. This implies that we failed to grasp the first principles of competing conceptions of justice, some of which underpin the law as we know it. A more important oversight, and a corollary of this failure, was that we overlooked an opportunity to develop the skills necessary to effective and sophisticated evaluative legal argument.[3] The second regret belongs to the public which often looks to the legal culture at large to deliver justice, not merely law.[4] The public would be surprised to learn that al-

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[2]Unless they were woven into a case by a master such as Lord Denning whose wide appeal may be attributed to an overarching concern for fairness.

[3]Recently there has been increased interest in skills development by law teachers. See, for example, B. Smith and A. Hardy, Contracts Law Learning Text, (Saskatoon: Native Law Centre, 1990).

[4]Such appeals are encouraged by both government and law. Legal affairs come within the perview of the Department of Justice, (not Law).

though lawyers are trained to advise as to what the law *is*, few of them have ever been formally exposed to arguments as to what the law *should be*.

Not only was the law/morality dichotomy of law as authority made express in our early days of legal education, it was embedded through the power of constitutional doctrine. The division of powers into legislative (and executive) on the one hand and judicial on the other, reinforced the law/politics dichotomy. Constitutional dogma placed politics in the arena of the legislature while interpretation of legislation was ordained to be the proper role of the judiciary. In short, legislators dealt in politics and its attendant moralities; judges, (and hence lawyers and law students) dealt in the word of the law.[5]

The second constraining attribute of positivism is hierarchy which arises because positivism contemplates superior and subordinate positions. The authority figure, whether sovereign or official, acts in a position of superiority when articulating law or interpreting and applying it to subordinates. As authority casts its gaze down the sides of the hierarchical pyramid, so obedience to authority directs its attention upward.

In the manner in which the effect of positivism's law/morality dichotomy is felt throughout the larger legal culture, so too is the hierarchy of positivism replicated throughout the culture's institutions. Every institution apparently requires a sovereign-like figure head, be it the senior partner in a law firm, the chief justice of a court or the dean of a law school, notwithstanding that many of the substantive functions of each of these positions could be (and in some notable cases are) capably handled by a professional administrator.[6]

The trouble with authority hierarchies is that they command respect primarily for positions on the ladder, not quality of ideas. Unless the superior in the hierarchy is a progressive, the formal structure of the hierarchy will overcome the substantive ideas of the subordinate. In time, the subordinate will assimilate to the orthodoxy of the structure. And so it went (and still goes) in law school.

As a student, I was struck with the efforts of the school to assimilate students to the legal hierarchy, both by act and omission. This assimilation frequently took place under the guise of decorum. The earlier example of some instructors insisting that judges be referred to by name and title comes to mind. One might suggest that attention to formality brings an air of civility to legal discourse. While this may be true, it must be acknowledged that such formalities are frequently misunderstood and serve to reinforce misplaced deference and respect for those in residence at the upper levels of the stratum. Formalism and protocol act to secure to the authority figure an assurance of obedience.

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[5]It has only been recently that judges have looked to extra-legal sources for assistance in interpreting the words of statutes.

[6]Figure-head *qua* figure-head may be of arguable value. However, figure-head as leader raises important questions about creativity and about intellectual independence as it relates to the idea of professionalism.

As the legal hierarchy succeeds in eliciting obedience, conversely it tends to diminish argument and criticism. Respect for form and position translates into deference for substantive judicial opinion. Dissent, to the extent it is tolerated, is diffused by channeling it into an acceptable pattern.

In the law school, in the early 1980s, a by-product of the hierarchical tendencies of positivism was intellectual servility through omission. There existed a presumption that a judge's decision was right - a presumption which arose for want of critical evaluation. By and large, decisions were scrutinized for little more than their substantive rules. Judicial decisions came to be accepted uncritically.

This indiscriminate embrace of judicial decisions shaped and informed the way in which law was taught. If the role of judges was to authorize law and the role of citizens was to obey the law, the role of lawyers (and law students) was to know the law so as to advise citizens and assist judges. A teaching model evolved which effectively delivered the content of the law.

The teacher would assign 2 or 3 cases from the casebook. Prior to the next class the student would (sometimes) read the cases primarily to identify their legal rules. At the next class the teacher would communicate by lecture the "correct" articulation of the rules. The little[7] discussion which ensued between teacher and students was usually limited to questions of clarification regarding rule identity. The student would then write down the legal rule, incorporate it into a set of CANS[8] and later memorize it for reproduction to order on the exam.

The deference, respect and obedience inculcated by positivistic influences was reinforced and, in the minds of most, legitimized by common law and constitutional theory. *Stare decisis*, precedent and the doctrine of Parliamentary supremacy were each the object of attention in the first year grab bag course called Legal Method. *Stare decisis* and precedent assure that the voice of authority echoes throughout the many canyons of the common law while the doctrine of parliamentary supremacy assures that in any competitive din the voice of the legislature will ring loudest.

The combined effect of hierarchical deference and the teaching formula it bred was manifold. It encouraged a superficial understanding of the law, made possible the well-known phenomenon of the student who did little work but suc-

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[7]It should be noted that an overly enthusiastic embrace of the case study method is responsible in large part for a paucity of discussion. There were, and are, so many cases to read that one cannot pause to analyze and digest them properly. This is a result of the misuse of the case study method. Rather than review leading cases fully to comprehend cornerstone concepts and hone legal skills, cases were and are used to source an ever expanding corpus of legal rules. Class time is taken up dealing with cases by quantity rather than by quality.

[8]The anacronym CANS has been around at UNB at least since the 1940s according to a graduate of that time who advises that the letters stand for Consolidated Annotated Notes.

ceeded easily on exams[9], stultified the learning environment[10] and, most significantly, through acquiescence it condoned intolerance to dissent and argument.

The primary legacy of legal positivism at the UNB law school during the 1980s was the creation and fostering of a legal education environment which was permeated by two of positivism's attributes: the law/morality dichotomy and hierarchy. The effect throughout the legal culture of both these incidents is to circumscribe argument. The existence of a law/morality dichotomy limited the scope of argument strictly to legal discourse thereby excluding questions of morality and justice while the incidents of hierarchy, or more precisely, obedience thereto, had the effect of limiting significantly both the desire for and the depth of argument. By the end of the decade, however, both these positions were under attack from within and outside the faculty.

On returning to the faculty in the late 1980s to teach, I found things to be markedly, although not thoroughly, different. The curriculum had been changed to decrease somewhat the number of required courses and a couple of legal theory offerings had become available. Some instructors permitted, even encouraged, students to address them on a first name basis and the 100% final exam had become considerably less prevalent, especially in first year courses. The student body seemed to be more affluent - there has never been so many cars in the parking lot or Easter tans - and just about everyone could operate a personal computer.

The most dramatic change, however, was in the scope and depth of legal discourse. Professors who had hitherto been "black letter" jurists were now presenting various evaluative perspectives to their classes. Students, too, seemed interested in ideas which a few years earlier would have been viewed as irrelevant. For example, I injected the aboriginal perspective into real property and found that it was the most popular aspect of the course. Even more surprising, when contrasted with its status at the beginning of the decade, was the sustained discussion of feminism.

It was feminist initiatives which generated the decade's greatest controversy. In the summer of 1989 the faculty established a committee on gender-related policy. The committee identified faculty hiring policy as a priority and met through the autumn to deal with this matter. In February 1990 the committee presented to faculty a radical and highly debatable proposal for a hiring policy. The proposal had two components: a hiring goal for women and a strategy to achieve that goal. The committee proposed that the faculty set as a goal a faculty

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[9]These students early on realized that if they could learn and apply legal rules they would be ahead of the game. One of my classmates, now a partner in a Saint John firm, would begin each semester about three weeks before exams by sitting down with the year-old CANS of a very good student.

[10]It was not long before most students stopped reading the cases with any imagination or creative independence. For those who read them at all the objective became to see the case in the way in which the instructor saw it.

composition of 40% for women.[11] The strategy was to be one of quotas; in the absence of exceptional circumstances only women would be hired.[12] The faculty, by a substantial majority, adopted the hiring goal for women of 40%, but tabled the proposal that the goal be achieved through quota.

These initiatives were covered extensively in the media and generated ongoing debate both in class and out. In short, feminism achieved a profile in the latter 1980s which, a few years earlier, would have been inconceivable. Feminism also achieved a change in legal discourse by insisting that gender inclusive language be used and by validating personal experience as a gauge of legal propriety.

How, fundamentally, were the late 1980's different from the early 1980s? The answer relates to the notion of legal pluralism.

In the early 1980s, as we have seen, the life of the faculty was constrained and intellectually homogeneous. This rigidity is explicable by reference to the authority paradigm of law as inspired by legal positivism. The two central consequences of this paradigm, the law/morality dichotomy and hierarchy, had the effect of limiting the scope and depth of legal argument thereby leaving unchallenged the received orthodoxy. By the end of the decade, the intellectual life of the faculty was considerably more fertile. Account was being taken of new ideas; ones which were inspired by social, historical and moral influences. The faculty was becoming receptive to a plurality of novel perspectives, the most prominent of which was feminism.

Unconstrained argument - the type which is encouraged by good legal analysis - provides an avenue to legal pluralism. Good legal analysis has two components: descriptive and normative or evaluative. Descriptive analysis occurs at various levels. Positivistic law is interested chiefly in an authoritative legal description. It seeks merely to identify and classify the legal rule of a case but does not pursue the inquiry beyond the surface to the deeper justifications of the rule for fear that it will encounter politics in these subterranean depths. In consequence, there is a shallow analysis of law which fails to recognize the values which underpin the rule. The effect of such willful blindness is to dim dramatically the lawyer's evaluative vision.

The evaluative component of good legal analysis presupposes a deep description of law. It is only after an idea has been identified and articulated at a meaningful level that evaluation is possible or valuable. Regarding law, the level of most meaningful description is the level of values. It is values which comprise competing conceptions of justice and, therefore, it is the values in what the law *is* which must be available for evaluation against conceptions which suggest what the law *should be*.

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[11]At the time of the recommendation women held 12.5% of the teaching positions in the faculty.

[12]At present rates of attrition it would be well into the next century before the goal would be reached, even with quota hiring.

Of course, describing law at a deep level can be highly controversial. Deep argument can help to resolve the controversy or, at least, to expose it. Evaluating law, once it has been most meaningfully described, is even more difficult and controversial. It is difficult because it requires familiarity with a broad range of conceptions of justice and it is controversial because no way has yet been found to best resolve the choice amongst competing conceptions.

In an ironic sense, argument may be most important for its expository power. When deployed to full advantage within the framework of legal analysis, it exposes legal rules as particularizations of political values and then exposes those values as a choice amongst a variety of legitimate contenders. It is this realization which engenders the tolerance necessary to legal pluralism. This realization, born of argument, demands an environment in which robust debate can occur. The paradigm set up by legal positivism must succumb to pluralistic influences which foster broad and deep argument in the absence of rancor.

Legal pluralism is prepared to contemplate a legal rule as *an* answer, not *the* answer. Argument is used first to suggest a deeper description of law, and second to suggest that the law is right or wrong. Recognizing the qualitative nature of moral discourse, legal pluralism takes a generous and forgiving view of an opponent's position and proposals.

This pluralistic conceptualization of law which welcomes argument and is dependent on it challenges the influences of positivism's dual incidents: the law/morality dichotomy and hierarchy. First, pluralism is uninterested in confining its deliberations to the strictly legal. It aspires to good legal analysis and accordingly wishes to deepen and broaden legal inquiry so as to take into account the significance of politics. Second, pluralism seeks to focus on the quality of ideas and not the rung on the hierarchal ladder from which the idea originates. Having disabused itself of circumscribed discourse and obedience to status, pluralism is free to entertain fearlessly a variety of ideas. Under pluralism a tolerant intelligence replaces dogmatism as the mortar of legal institutions.

The rise of legal pluralism in the faculty by the end of the 1980s is attributable to the broader and deeper arguments of enhanced legal analysis wrought of two factors: the enactment of the *Canadian Charter of Rights and Freedoms* and the maturation of faculty members.

We had not yet completed first year when the *Charter* was proclaimed on 17 April 1982. The *Charter* asserts various individual and group rights the abstract articulations of which were legitimized for the first time, and at a constitutional level. Positive law does little to provide particularized formulations of these abstract rights. Individuals and groups were driven to search beyond the extant law for the arguments they needed because little, if any, legal authority existed to define these novel rights. They had to venture outside law into a field of moral ideas, the view of which was unobstructed by hierarchy. They had at last to survey a plurality of pre-legal ideas, many of which spring from the seeds of natural

law and justice and, they had, at last, to confront the types of arguments these seeds would germinate.

The growth of argument inspired by the *Charter* parallels a maturing of the faculty as a whole. At the beginning of the 1980s, the majority of faculty members were embarking on their careers. Any new teacher will attest that a daily digesting of course material, even at a superficial level, can be demanding. By the end of the decade, most of the faculty had considerable teaching experience and some promising scholarly work as well. They had long since grown restless with knowing merely the legal rules of their areas of expertise and had begun to speculate as to their deeper inspirations, a speculation which, in turn, prompted evaluative considerations. In short, as the decade closed, faculty members were more interested in deeper and broader arguments.

All of this is not to suggest that by the end of the 1980s the faculty had completely re-constituted itself as a seat of legal pluralism. In fact, the manner in which some opponents of feminism advanced their position is telling. Rather than listen to and identify the weaknesses of the feminists' position,[13] an attempt was made to quell the debate. Such tactics have no place in a community of scholars in which the free exchange of ideas is fundamental. Their use suggests that the tolerance which is necessary to true and full pluralism has not yet been developed in the faculty as a whole. Nonetheless, it must be recognized that pluralistic ideas are at least on the table and are being given more serious consideration by the balance of the faculty. Further, it must be emphasized that the faculty does not have a tradition of argument on which to call for guidance in the resolution of highly debatable and emotional issues. The challenge of the 1990s will be to build such a tradition, the foundation of which was laid in the 1980s.

[13]In terms of pluralism, a weakness in the feminist position in the faculty arose from a paradox. The fact that feminist arguments were being advanced seemingly had pluralistic consequences. Unfortunately, the radical feminists on faculty who were advancing these arguments were themselves intolerant of claims from different perspectives. It is likely that they feared their own political aspirations would be undermined by an acknowledgement of the legitimacy of other positions. These feminists, all men, contributed to pluralism without being pluralists themselves.