SEMINAR DISCUSSION: DEVLIN

Chair: Barry Cameron*

Richard Devlin: What I did at the beginning of my first year course is to take the students through two models of education and acknowledge that law school is a professional school and that there may be two approaches to learning--one called instrumental learning and one called critical learning, and I suggest that at least in my class we are going to try and do both, but it pays for some of the students when you tell them at the beginning of the year where you are coming from and where you are going. I think that can be some sort of basis on which to start a conversation with your students. In relation to other departments and other members of Faculty, I am not sure of how you go about starting the conversation even. We do talk different languages, some of my colleagues don't know what I am talking about, although I try to be as explicit as I can. Other ones do understand, and I do think that, at least within my law school, there is a little bit of movement, it just isn't far enough or fast enough. I suppose I should comment that students also resist doing this, and there is an ethos of consumerism that this is their umpteenth year of university, they are paying for it and they want to get the rules. I think that we can deal with that and we have to recognize that as a legitimate perspective from the students. We shouldn't dismiss that and I think that some of the people I work with within Critical Legal Studies do dismiss that perspective. But I think that we can pitch it to the students to say that we are trying to give you an opportunity to do things better and you will be a better lawyer if you are a critical lawyer. You can serve your clients that much better if we are talking about being a practicing lawyer or if you are going to go into government, or whatever, you can do things with your critical knowledge as well. And so we can pitch it to them, but that's a political strategy also, how you sell your course to your students.

Barbara Pepperdene (Sociology, UNB): What you're saying struck me as generally highlighting a paradox, a dilemma or at least a tension that is within all professions, particularly modern professions that are based in a body of knowledge both as a substance of what they do in the market and as a discipline. It struck me that this paradox, dilemma or tension exists both in law school and in practice and that is the dilemma in the acquisition of knowledge which is empowering. The idea that when one acquires knowledge, one acquires that which empowers them to do things as opposed to that other side in professions, the appropriation of knowledge and it strikes me that the appropriation of knowledge is not empowering except for those in control either of the knowledge base that decide what is the knowledge of the profession and/or those in charge of the means of developing and expressing that knowledge base. It strikes me this is the difference between the nineteenth century ideal of professions--which is entry by examination--and credentialism, which tests whether one has satisfied somebody else's definition of what knowledge is to be appropriated.

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Devlin: I agree with the idea of tension and because it is tension we are in a good position. If it was a contradiction, then you are either/or. Because of the tension there is some hope at this point. That is why Critical Legal Studies is known for its critique, it is not known for its suggested alternatives. I want to start making some of the suggested alternatives. Not an awful lot of what I said here is original in a sense, I think it is drawing on several different ideas and perspectives and trying to give them some element of focus and to try to push the tension further and to see how far we can go with that push. So I like the idea of tension and that is my understanding as well.

David Howes: I wonder about an older notion of justice, of justice as hard, not something that it is easy to love; in fact something that might seem terrible to have to put up with at first and then only being able to recognize its beauty afterwards, and this is Socratic inevitably. But what of that idea of justice as hard?

Devlin: I don't think that. It is difficult to be in solidarity with your students, in other words you have to be in your office at times when you would rather be at home writing or reading or something else. But I don't want to be suggesting that we necessarily have to go through a sort of masochistic stage to get to the next stage of things being better. I get a lot of pleasure from doing what I do, but I also work very long hours and that has other costs in my life. I'm not pedagogical in the personal, it is difficult on lots of different levels. Yes it is not easy. But I find I get an amazing response from some of my students after a while, it does take a while but there are serious relationships that are built up. I have drawn on liberation theology here to a certain extent but that doesn't mean I subscribe to the religious opinions of that, and sometime the Catholic need some sort of self--inflicted punishment somewhere along the way to feel . . . I don't think we have to do that.

Tom Condon (History, UNBSJ): I guess I was a bit overwhelmed by the range of the critical *tour de force.* I find myself assenting to some of the insights that you enunciated, saying maybe to others and having deeper questions about some. I guess I recognize that you are trying to concretize it in one area in terms of Indian education in the legal field and I guess I find myself disappointed that it becomes kind of mechanistic, selected quotas, . . . of faculty members' time to devote to counselling, pretty mechanical. It seems to me that the more difficult questions are not the kinds of how do you do this or that or how do you deal with some of it--evident critiques that you have advanced but how can you in the example that you have chosen, really make some change, how can you not corrupt and co-opt in the process of trying to deal with the elements of your critique and maybe limit it to Indian education.

Devlin: I see sort of two questions there, the first being mechanical critique, the how to do it and the second one the danger of corruption and co-option. On the mechanical element of it, I did make a big jump into a very specific suggestion. That was intentional. The critique of the crits is that they never tell us how to. Recognizing that at least a significant amount of the audience

here today would be lawyers, I wanted to say something about how to--so that is the reason why I have something as mechanical. I do suggest a quota of five to ten native students per year per school. At this point there may be something like fifteen per year in Canada. What I am trying to do is dramatically expand the numbers. That would be a major jump, for example Dalhousie this year took in three native law students. We failed with every other law student we have ever taken in, which is a major indictment of Dalhousie Law School and we know it. My suggestion is what do we have to do to make sure it doesn't happen to these same three students. So that is the how to. On the corruption/co-option point, I am really worried about that. Law has this tendency for imperialism. It becomes hegemonic if you want to use neo-Marxist terms and it tends to smother other processes that people get involved in. We have to be really careful about that and not to give law too much leeway. However I do think it is up to the native people to decide whether they are being corrupted and co-opted, it is not up to us. The purpose of this paper was to suggest that we create spaces for those people, they can make the choices. If I spend too much time worrying about corruption and co-option and saying, well maybe this isn't the best approach for you to pursue your political agenda, your needs, your desires, that may end up as being paternalism once again. I am very worried about what you said and I am very conscious that we can't deny that law may have a detrimental impact upon these people. I am hoping if they develop as a critical mass, and that is only one example, I think there are lots of other examples of where we should do the same, . . . black people in Nova Scotia. Perhaps we can sort of cut back corrupting the co-opting influence. It is a political strategy, it is not a right answer. Does that answer your question?

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Steven Turner: Let me pursue what I think is a closely related question. I am unclear in my own mind about the relationship of your deviationist alternative for a law school to what we might call the strategies of empowerment that Harry Arthurs talked about last night. If I understood the strategy of empowerment, it was that disenfranchised groups are seeking to gain the tools which legal study provides in order to empower themselves, to turn the tools of the law against traditionally empowered groups. I suppose with respect to the vision that you set out this morning, I would like to ask you what do you see as the main purpose that we are trying to achieve in bringing native students into the law school. Is it to equip them with the tools to pursue the strategy of empowerment perhaps beyond law school, or is it to pursue a rather different vision that you very eloquently developed to give them the opportunity to create a new discourse within academia itself? I suppose at one level those two strategies might be compatible but perhaps not at the immediate level; it seems to me that they are very different and might be pursued in very different ways. Which do you see as foremost?

Devlin: I know that to me thoughts about solidarity . . . are most important in my life but I still want to create spaces that they can make the choice. If they want to pursue law in its traditional forms, that's their choice. I would prefer if they brought elements of their value structure to law.

Paolo Freire has a quote, this Latin American educational theorist, that says: In gaining knowledge and power, they also help liberate their oppressors. I have some sense of some of the value structures that underpin native people and their communities. It would be nice if that could become part of our legal educational process. But that's not my agenda. All I want to do, and it is very modest in a sense, is just make some spaces. But what those spaces mean is that those who have privileges, those who are part of the elite, won't get those same opportunities that they used to have. It is a zero sum process. Some of the power elite will be at least moved out of that particular bastion or citadel. Again, I am just creating space, anything more might be dangerous. Can I ask a question, why have most of the participants so far been non--lawyers? Is there a reason for that?

Yvette Michaud: I am a lawyer. You have made comments that liberalism has taken us a long way towards enhancing individual freedom maybe at the expense of the welfare of the community, and then you have given us one vision or one option that you think could empower one particular group. Have you addressed the question of how collectively something could be reconstructed maybe to counterbalance this excessive weight that you see us giving to individuals at the expense of the collectivity. Are there people starting to put options of reconstruction in that area?

Devlin: One of the things that I am personally interested in is Jesse Jackson's idea of a rainbow coalition as a political strategy. And the idea behind a rainbow coalition is that groups of people who are different . . . will recognize their community in their differences and how that difference is their connecting link. And that would be very much the underpinning of Jesse Jackson's political campaign. Tomorrow morning I am off to Washington to go to the Critical Legal Studies Conference, and one of our key speakers that we tried to get was Jesse Jackson. There is a sense that we have to look to each other and see what our differences are. And in that we can recognize both our individuality and our sense of community.

Michaud: I guess I will try to be a little bit more precise. I guess what I was trying to find out is, are there some suggestions that you could make that could come from the top, like you are suggesting for natives that maybe this conservative group that is the law school and the legal world could do something to change from the top. Is there something that, let's say judges, departments of justice, law schools, should be doing to try to instill a bit more of this care for community or the welfare of everybody?

Devlin: You will get some students who really push their agenda and I try and have conversation with these students saying that your right to speak also has an element of responsibility, when you are responding to another student, you should try and think about the impact of what you say is on that other student. That gets real problems going in the class, I'm sometimes accused of being authoritarian because I suggest that you take into consideration the feelings of other people. That immediately ends up in a free speech argu-

ment. I actually end up getting quite good student evaluations but there tends to be some huge wars, sometimes in my office, sometimes in the corridor . . . the accusation is I push my agenda too hard, my response is so does everyone of my colleagues. It's just the explicitness of our different agendas. Does that respond a little bit to your question? My suggestions--there isn't a master plan, we do a little bit here and there and maybe it will make things a little bit better for some people. If that is what we achieve, it is a start.

Shauna McKenzie: Just to follow on with the debate which was started by Barbara Pepperdene, I was always impressed when I went through law school that much of knowledge dealt with private law subject matter and individual property matters and then after that we are now dealing with the superimposed reconsideration of a broader scope of law . . . a wider base of considering individual needs which you are also bringing in as a basis of critical theory. But I have heard the backlash that we no longer can take it within the private system, private rights can only go to the Court of Appeal, for example. The Supreme Court is now being taken over by these individual rights of the *Charter* but that other body of law is now being displaced, and it's our first area of major concern, for individualism was through that consideration of private rights. I dealt with the Bar Admission course, young students coming from law school. They were so much caught up in wondering how they can practice their material without still really appreciating where they are going to go with the understanding of some of their own values. They see the *Charter* as perhaps another area of defining interest but they won't see it so much in their private practice. They don't see that it is going to be able to go through the court because it is too expensive and so the whole thing becomes just another issue, another matter that never really reaches a new deeper understanding in consciousness. I guess my question is again dealing with mechanics, co-option, you say. I still feel there are so many thoughts and languages that are being used to understand what we are trying to cope with in dealing with a greater sense of community, but the law school itself is still slotted with different bodies of knowledge. I feel that your sense of critique is not a knowledge, it is perhaps a new understanding of values, but I just don't know how the two are ever going to become merged as relevant and integrated. I find that our sense of liberalism gave us a new sense of security with our knowledge, the *Charter* has superimposed and created tension that is perhaps resented, and I am wondering how you start to see, when you talk about your politics or your theory of care, whether that too will just be superimposed and we won't be able to see how it integrates through all areas of appropriation of knowledge.

Devlin: For example I teach Contract Law and I set Contract Law up in an artificial sense of trying to resolve the tension between the individual and the community and I teach things like fairness/unconscionability as one end of that spectrum and more formalistic ideas within contracts at another end of the spectrum.

McKenzie: I think your discussion was talking about a kind of social revolution. I don't know what the reaction has been generally to what the *Charter of Rights*

was intended to be or where it would take us as perhaps a guide or reinforcement of thoughts. Many of us are saying it is a reinforcement of some social values that we do have in our society, but many of us are saying that it now has to continue to challenge so many of the norms and so many of the norms are now having backlash factors and repercussions. We have heard the comment last night, maybe if it is in the wrong hands or the wrong people we will have a law that will become a much more distorted forum, and so you wonder where to take it.

Devlin: The main beneficiaries of s. 15 have been men. There is always the danger of disconnection, I think. You've got to plan, you think that if we go that way it might work. You have only got limited power, though, and somebody else might come along and redirect your whole enterprise. It is a real danger. The alternative is, don't do anything. We are lawyers, I don't think we should give up on law. I'm not a legal fetishist by any means and I agree with President Arthurs last night that law will not solve a lot of our problems, but I don't think we should give up either. There is a feminist critique called *Dancing Through the Mine Field* and that is what you are doing, and I like the idea of dancing in a sense. At least it's got some life in it. And that is what I'm trying to do. Yes, there are real dangers here and I believe in other things beyond law . . . but we also are lawyers. I don't think we should divorce the political and personal or professional and personal. We should do a little bit of both.