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DEFINING LEGAL STUDIES IN CANADA

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Abstract

Legal Studies programmes in Canada trace their origins to intellectual and ideological movements after WWII, including both the Law and Society movement and a more explicitly Marxist Critical Legal Studies movement. In keeping with the liberal arts tradition, Legal Studies programmes draw on the humanities and the social sciences in equal measure. Distinctive research methods and scholarly objectives, including interdisciplinarity, critical engagement and student-led inquiry, emerge as defining features.

Introduction

The proliferation of Legal Studies programmes at Canadian universities reflects a trend toward more interdisciplinary and practical undergraduate education. However, law as an object of scholarly analysis has an ancient pedigree within the liberal arts, long predating law schools and the legal profession as such. This perspective is instructive, particularly for legal scholars tasked with differentiating Legal Studies programmes from law schools. Legal Studies should not be defined in terms of what it is *not* (i.e. not law school); it should be defined in terms of its distinctive scholarly aims and methods of inquiry. In this essay, we review the ancient, modern, and recent history of Legal Studies, identify its distinctive objectives and research methods, and argue that each feature in its own way promotes student agency.

Legal Studies as a 'Gentlemanly Liberal Art'

Law schools for aspiring lawyers and **practitioners in the common law tradition** are a relatively recent addition to the University. Historically, aspiring lawyers in the United States served as apprentices or clerks with practitioners, or they studied at proprietary schools run by practitioners until (and for six decades after) Harvard University established its law school in 1817. In England, aspiring barristers were for centuries trained within the professional guilds and Inns of Court of London, not at Oxford or Cambridge. Oxford University did not offer a Bachelor of Jurisprudence degree until the mid-1870s. Dalhousie University subsequently established the first law school for aspiring common law practitioners in Canada in 1883.

Legal studies for aspiring priests and diplomats **in the civil law tradition**, by contrast, have a pedigree as ancient as the University itself. Indeed, the study of Roman law predates the

founding of the world's second-oldest university at Oxford, where Vacarius (c. 1115-c. 1200), likely a graduate of Bologna (founded in 1088), delivered lectures on Justinian's *Institutes* as early as 1149. 'By the founding of the American colonies, Roman and canon law had been taught at Oxford and Cambridge for five centuries,' note Daniel Coquillette and Bruce Kimball (2015: 22).

The body of knowledge comprising the liberal arts includes the work of Plato and Aristotle, Isocrates, Cicero and Quintilian. Much of this material was 'lost' after the fall of Rome in 476 BCE and 'rediscovered' in the course of the Crusades. The re-entry of this 'pagan' material into medieval university libraries posed a serious problem for the Catholic Church. Following in the footsteps of Augustine of Hippo, whose work served as a foundation for his *Summa Theologica*, Thomas Aquinas synthesized classical Greek thought and Catholic doctrine, convinced that the spiritual power of grace led a person educated in the liberal arts to seek higher truths (Guttek, 2005). The hierarchical curriculum associated with higher education in general and Catholic education in particular owes much to Aquinas, with liberal arts (theory) at the top and the development of practical skills (practice) at the bottom.

Legal studies as a course of study in the liberal arts for undergraduates not seeking to enter the priesthood can be traced to the Reformation and more specifically to Henry VIII, who for political reasons banned the teaching of canon law at Oxford and Cambridge. Canon law was then replaced with Roman (civil) law, which postulants for the priesthood were not permitted to study. Hence fellows in the Bachelor of Civil Law (BCL) programme at Oxford were atypical in that they were not required to take holy orders. This made the BCL particularly popular amongst 'younger sons of families of good estates' who took the degree 'purely to avoid going into the Orders,' and particularly for 'the undergraduate who desired to complete his statutory exercises with as little trouble as possible' (Barton, 1986: 595). 'The abolition of university lectures in canon law in the sixteenth century had already rendered the university course much less useful to the lawyer whose future practice would be largely in the ecclesiastical courts,' notes J.L. Barton (1986: 594). Moreover, after the Glorious Revolution in 1688, the ecclesiastical and admiralty courts were largely superseded by the Court of King's Bench, from which the common law as we know it is largely derived. 'Attempts were certainly made during the period to encourage the study of the civil law [at Oxford],' notes Barton (1986: 597), 'but they seem to have been intended primarily for the benefit of students in the faculty of arts.'

So it was that courses on English law were not offered at Oxford (or Cambridge) until William Blackstone began as the first Vinerian Chair in 1753, almost a half century after Thomas Wood had argued in *Some Thoughts Concerning the Study of the Laws of England in the Two Universities* (1708) that 'instruction in the elements of English law was a necessary part of the education of a gentlemen' (Barton, 1986: 600). Blackstone accordingly treated his subject 'as a gentlemanly liberal art that had little connection with the actual

complexities of legal practice' (Coquillette and Kimball, 2015: 23).

Legal Studies in Canada

In Canada, it is customary to open a discussion about contemporary legal education with a reference to 'Law and Learning' (1983), the report of the Consultative Group on Research and Education in Law [CGREL] for the Social Science and Humanities Research Council of Canada. Named for Harry Arthurs, the Chair of the Consultative Group, the *Arthurs Report* assessed the limitations of formal legal education in terms of 'deal[ing] with the phenomenon of the law' in a more scholarly, and not exclusively technical or doctrinal, manner (CGREL, 1983: 4). Given the centrality of law to various facets of life, national consultations revealed an aversion for critical reflection in law schools and a disconcerting incapacity to understand and challenge law in a broader sense. From the perspective of formal training in law schools, this was a problem. From the perspective of growing legal studies programmes, this was an *opportunity*. In fact, the *Arthurs Report* strongly supported 'the development of a vigorous component of legal education identified with the humanities and social sciences', where scholarship would be free from 'professional goals' (CGREL, 1983: 59). While these were encouraging words, the debate continues regarding how Legal Studies programmes in Canada should define themselves in relation to law schools.

Twenty years later, Diana Majury, an original member of the Consultative Group, lamented the lack of focus on teaching in the *Arthurs Report*. 'Why do we not think and talk and write more about teaching and curriculum and course content?' (Majury, 2003: 55). By her account, if there had been any change in overall approaches, it had been more pronounced on the Legal Studies side, where there had been a growing trend toward professionalization.

Very simply put, Legal Studies programmes in Canada do not issue professional law degrees, and cannot pretend otherwise. The dilemma remains, however, about 'how much "law"' Legal Studies programs should teach' (Kazmierski, 2014: 297). At the core of this dilemma is the need to establish a clear vision of what Legal Studies scholarship is, rather than what it is *not*.

Law and Society, Critical Legal Studies, and Sociology of Law

There are a number of overlapping fields of study with respect to law, hence a significant amount of confusion exists when it comes to differentiating these discrete areas of study. At minimum, there is a tension between more social and political theory-focused and more policy-driven social scientific approaches to the study of law. With this general tension in mind, we can develop a better working understanding of the evolutionary trajectory of the various fields, providing us with some vital context as we go on to position particular Legal Studies programmes within this landscape, and shape particular curricula accordingly.

As the larger umbrella term, 'Law and Society' [L&S] generally refers to the type of scholarship that queries both the social processes and social effects associated with the making, application, and enforcement of law. The L&S tradition took shape in the United States as a response to 'legal formalism' in the late 1950s (Garth and Sterling, 1998). With social welfare reforms, the emergent managerial corporate form, the war in Vietnam, and the Civil Rights movement, much stood to be gleaned from the study of law from a social science perspective (Friedman, 1986). Because this approach tends to begrudge the practice of meta-theorizing, one of the tenets that informs L&S scholarship is a perceived commitment to cultural relativism (Friedman, 1986). This is an extension of the premise that law emerges from different contexts toward different ends, depending on time and place, and it is the L&S scholar's job to measure the internal aims of the law against its external effects across social institutions and eras.

Other than an intriguing hush that accompanies any mention of the 'Law and Society Movement' between 1989 and 1996, proponents of this loosely conceived academic tradition are usually quite self-reflexive. This was particularly obvious when it came to defining L&S scholarship against the seemingly short-lived (at least in the US) 'Critical Legal Studies Movement' in the mid-to-late 1980s. Against the backdrop of the 1970s economic crisis and the cresting Civil Rights movement, a more law-focused sociological (and explicitly Marxist) tendency emerged (Cain and Hunt, 1979; Tushnet, 1978; Hunt, 1977). It is worth pausing here to point out that Alan Hunt, inaugural Chair of the Critical Legal Conference (UK) in 1984, played a prominent role in the establishment of the Legal Studies programme at Carleton University, Canada's oldest Legal Studies programme. It is not going too far to say that the British tradition of critical legal scholarship he helped establish has since had a significant impact in the development of Legal Studies programmes in Ontario universities. This is evident in the implicit tension within and between law-related programmes across the province, some wearing this critical/British inheritance more prominently (Carleton University, arguably), and others tending to adopt a more L&S/US-focused identity (York University, arguably).

In this era, Hunt and other early critical legal scholars dissected the connection between law and ideology to gain insights into the relation between law and the prevailing socio-economic order. The unifying force of critical legal studies at this time was its suspicion of key tenets in liberal legal theory. Tenets such as legal autonomy, procedural objectivity, and the promise of predictable outcomes were held up as the main mystifying ingredients in law (Hunt, 1986), all of which were assessed with the aim of understanding the ideological nature of legal authority. We can add to this mix the rediscovered works of Soviet legal scholar Evgeny Pashukanis (2007) and ground breaking legal contributions of E.P. Thompson (1993; 2013) to the history of capitalism in the United Kingdom. By 1981, 'Marxist theory in general and Marxist interpretations of law in particular' were considered 'central to the sociological enterprise' (Spitzer, 1983: 104).

Soon after, however, critical legal scholarship was marked by a 'shift of focus from economic relations to [a] focus upon political and cultural relations' (Hunt, 1986: 11). This is coeval with the more generalized move toward postmodernist theory in academia, which prominent scholars view as a complement to the rise of neoliberalism (Harvey, 2007; Jameson, 1991; Linebaugh, 2009). As Paddy Ireland (2002: 125) observes, with this change in critical legal circles, 'the fundamental constitutive practice of social life ceased to be material production and became discursive construction'. With the rise of Derrida and Foucault came the splintering of both L&S scholarship and critical legal studies over the last three decades, leading to the establishment of more overtly policy-oriented approaches in L&S, and the critical legal tradition, giving rise to such fields as Feminist Legal Theory, Critical Race Theory, Queer Theory, Critical Disabilities Studies, Critical Development Studies, and critical cosmopolitanism. While the traditions of critical scholarship have evolved differently in the US and Britain, in both instances there has been a sharp turn away from the Marxist foundation.

Lawrence Friedman (1986) discusses this shift in his oft-cited essay, 'The Law and Society Movement', in which he describes L&S membership as comprising more empirically minded scholars committed to the policymaking aims of the social sciences. This is meant to contrast to the 'crits' (as they were labeled), whom Friedman saw as seduced by a desire to 'expose ideology', more interested in 'trashing' liberal legalism and in the intellectual acrobatics of meta-theory than in 'show[ing] how anything actually works' (Friedman, 1986: 766). Hyperbole aside, L&S scholars take the law as it is and examine how it functions in society and to what ends, whereas the 'crits' question the very legitimacy of law from the outset and are more theoretically driven as a result (Silbey, 2002). Curiously, today, neither group rushes to claim any normative stakes and both distance themselves from the 'sociology of law' approach (Hunt, 1986), which arguably still has stronger roots in Britain. The critical legal approach in general still resonates in Britain, as evidenced by the fact that the Critical Legal Conference continues to this day. Its American counterpart has long been eclipsed by the Annual Conference of the Law and Society Association.

Despite this apparent shirking of normativity, however, L&S scholarship did start out with a clear political aim in view. This is evidenced by a sampling of the articles included in the inaugural issue of the *Law and Society Review*, which clearly depict the pivot between theory-driven sociological approaches to law, and more policy-focused social scientific approaches (Carlin, Howard & Messinger, 1966; Auerbach, 1966). L&S scholars saw themselves as capable of influencing the legislative direction of the State, and as such, as having a role to play in defining the identity of the nation and its citizens. Though a political revolution was not in their sights, L&S scholars did seek to occasion at least a disciplinary revolution within the legal profession and in social studies (which was the climate that produced the *Arthurs Report*), and scholars at that time consciously oriented themselves

toward that vision. This deliberate orientation emerged from the intuition that it was not enough to claim a gap exists between law in the books and law in action, but from the need to empirically demonstrate the bases and consequences of these gaps. Though more compelling radical theorizing was scarcely *en vogue* by the 1990s, there was a tendency for a conscious movement towards more self-implicating critique.

Defining ‘Legal Studies’ in Canada – Easier Said than Done

What of ‘Legal Studies’ in Canada, then? Neither strictly social scientific nor sociological, ‘Legal Studies’ is definitively interdisciplinary in the tradition of ‘Religious Studies’, or even the discipline-flouting ‘Political Studies’ (as opposed to Political Science). While some see ‘Socio-legal Studies’ as more aligned with ‘Law and Society’ than with the ‘Sociology of Law’ (more theory-focused) tradition (Brockman, 2003), others use ‘Legal Studies’, ‘Socio-legal Studies’, and ‘Law and Society’ interchangeably. For examples of this, it is worthwhile to visit webpages of various offering majors in Legal Studies-type programmes, including Amherst College, home to a premiere programme in the interdisciplinary study of law. Amherst avoids both terms altogether. Although the fluidity with which various programmes use these identifying terms is confusing, the tie that binds each programme is the proclaimed interdisciplinarity of its approach. However, this identifier alone offers only minimal clarity; more needs to be done to distinguish how the individual Legal Studies programme conceives of and supports its interdisciplinarity, and how this serves broader intellectual and educational objectives.

Given this inherent interdisciplinarity, Legal Studies programmes in Canada face unique challenges, especially when it comes to identifying core competencies and associated research methodologies. In his essay describing the experiences of teaching legal research methods in the Department of Law and Legal Studies at Carleton University, Vincent Kazmierski (2014: 299) identifies two objectives for Legal Studies education. First, Legal Studies programmes promote critical and interdisciplinary understanding of law ‘as an integrated part of our larger political, social, economic, and cultural structures’; second, they ‘demystify’ law to encourage responsible citizenship. He finds that specific legal research methods courses are the cornerstone to achieving these twin objectives.

At Carleton University, there are two ‘methods’ courses, one at the second-year level, and another at the third-year level. The second-year course offers a foundation in research methods relevant to an interdisciplinary liberal arts degree in general, and law-related degree in particular. It instructs students on how to locate primary and secondary sources and understand the ‘interrelationship between theory, practice and research’ (Kazmierski, 2014: 302). Meanwhile the third-year course permits the individual instructor to focus on their particular area of interest, and then tackle this subject matter using a range of methods. These research methods courses encourage students to approach law from a variety of perspectives, rather than mistake legal research as strictly case-based (Kazmierski,

2014: 303). This exposure to a diversity of methods serves the interdisciplinary nature of the Legal Studies programme, and in doing so, anchors the two broader objectives stated above.

From the Kazmierski study, interdisciplinarity anchored in the instruction of assorted methods of inquiry is one significant way of distinguishing Legal Studies from law school. This approach offers a substantive basis for the differentiation by promoting curiosity regarding the intersections between law and a range of disciplines. However, it is still a fine line: Does this fundamental reliance on the instruction of doctrinal legal research simply end up perpetuating assumptions that Legal Studies aims to critique, including the idea of law as singularly authoritative and autonomous? (Sargent, 1991) What is the point of teaching doctrinal legal research if only to demystify or undermine it?

Neil Sargent, another professor in the Department of Law and Legal Studies at Carleton University, grapples with these questions in an effort to posit a different way of understanding Legal Studies. The case-centred nature of doctrinal analysis offers a degree of scientific predictability amplified by the comforts of a monopoly on technique, but this also operates as 'a powerful brake' on the 'imagination of legal scholars' (Sargent, 1991: 4), or what in other legal education contexts is referred to as 'creativity' (Gleason and Campbell, 2015: 6-7). The postmodernist or deconstructionist turn in critical legal scholarship helped resist this tendency, focusing instead on understanding law as 'historically and political contingent', rather than autonomous and objective (Sargent, 1991: 7). Sargent concludes that the tension between the doctrinal and critical is irresolvable, for as soon as Legal Studies tries to reject the doctrinal, it veers into an existential crisis.

Beyond Legal Studies as 'Not Law School'

Critical thinking is a long-standing learning objective in the liberal arts tradition, but the *Arthurs Report* points to four specific benefits of critical reflection specifically as it relates to legal education. The first speaks to the 'intrinsic' value of critical reflection as a hallmark of a well-rounded education. The remaining three have practical dimensions: Critical reflection (a) promotes creative ways of adapting to change; (b) encourages individuals to seek change; and (c) fosters inventive and resourceful ways to accomplish change (CGREL, 1983: 50). The *Arthurs Report* implies that these latter three benefits are lost in the landscape of formal legal education, although they are among the more important skills for successful lawyering. This is precisely where Legal Studies programmes can stand out. Perhaps a way of navigating the tension that Sargent raises is to recognize this critical approach as a specific, value-added element of Legal Studies programmes. The explicit goal, meanwhile, is not to operate as a recruitment vehicle for law schools by promising to produce better trained lawyers (Kazmierski, 2014), but rather to celebrate this unique feature of Legal Studies scholarship as an end in itself. Again, learning from the evidence in the Kazmierski study, this could be reinforced through a Legal Studies research methods course that addresses connections between theory, doctrine and practice.

Indeed, Legal Studies programmes in Canada dilute their own integrity if they tacitly uphold the false premise that law schools have a monopoly on 'skills' or 'the practical'. This premise was undermined in the *Arthurs Report*, which noted that 'surveys of lawyers in practice ... suggest that they regard law school education as even less useful than [bar admission courses and apprenticeship arrangements]', and that '... legal practice is so varied, the roles of lawyers so diverse, the needs of different clienteles so unconnected, that the articulation of a common core of required legal skills and knowledge is a daunting task indeed' (CGREL, 1983: 49). In the wake of such a finding, it is not surprising that some law school educators have championed more creative approaches that better reflect this variability (Gleason and Campbell, 2015:15-6).

Constance Backhouse (2003: 38), a law professor at the University of Ottawa, underscores the basis for this new approach, observing that '[t]wenty years later, the situation is, if anything, more complex', and noting how '[w]e don't know what lawyers do, but we do know that what they do is diverse and transforming daily'. Although questions swirl around the precise nature of the legal profession, the homogenising effect of formal legal education proves difficult to uproot in the North American context. Lesley Jacobs (2003: 64), a Law and Society professor at York University, remarks how '[l]aw schools admit individuals who hold outsider perspectives and over the course of their three years in law school come to "think like lawyers"'. This undercurrent of elitist exclusivity is not new, as Daniel Coquillette and Bruce Kimball (2015: 21) attest in their recent book on the history of the Harvard Law School: 'The language, literature, and cultural mores of early colonial elites were, in part driven by a denial of political facts and geographic reality'.

With respect to the Canadian context, increased concern about this stubborn undercurrent has been met with calls for a decolonisation approach in law schools. For Roderick Macdonald and Thomas McMorrow (2014: 729), 'decolonization' in the metaphorical sense means resisting, *inter alia*, the 'herd mentality', as they note by way of an example: 'the haste and the vigour with which common law schools in Canada have renounced the Bachelor of Laws (LL.B.) degree in favour of the Juris Doctor (J.D.) [...] reinforces the assumption that American standards and practices are superior to Canadian ones' (2014: 732). For these authors, combating this tendency involves promoting agency and a less instrumentalist vision of what law schools should become (2014: 738). Beyond metaphorical encounters with colonialism, Shiri Pasternak asserts the need to decolonise notions of legal authority in general, which involves interrogating the norms of legitimacy that underpin Canada's jurisdictional claims on Indigenous lands (Pasternak, 2014: 146-7). What links both articles is the shared emphasis on the necessity of resisting decadent habits of legal thinking, an undertaking Legal Studies programmes in particular are well-positioned to endorse. Indeed, Legal Studies programmes may be forthright in their commitment to building a diverse skill set and an adept mind. What could be more practical? Such is the

benefit of critical reflection, especially when anchored in interdisciplinarity and buttressed with sound training in methods that bridge the theory with the practical.

Based on these observations, Legal Studies students would benefit from an expanded notion of what it means to be a 'legal practitioner' rather than a mere consumer of law, as we are everyday producers and practitioners of law. This is to say that in the overt and covert ways that we interact with law on a daily basis, we are making and unmaking it, giving meaning to it and receiving meaning from it, reinforcing it and undermining it. In a variety of sometimes discrete or other times conspicuous social exchanges, we are defining ourselves in relation to law and legal norms. Perhaps, then, it is not strictly a matter of demystifying law itself, but demystifying our own (legal) agency in the everyday.

David Sandomierski, who has taught this type of an approach in a senior level 'Legal Inquiry' course at McMaster University for over four years, uses the term 'demystify' as part of the course that blended doctrinal law (formal) and everyday law (informal) as sources of instruction. The emphasis was on 'participatory agency', which, as Sandomierski (2014: 324) explains, 'is especially important because it helps undercut prevalent pathological perspectives about law', adding '[i]f, on the other hand, citizens learn that law is an amalgam of contingent responses to transversal problems of human governance, that law is not so difficult to understand, and that even formal law derives from human interaction, then many more people can participate in enhancing society through law'. Though admittedly 'ambitious' in scope, if these types of goals are integrated across the curriculum and enhanced by sound instruction in research methods, they could add significant dynamism to Legal Studies overall.

A commitment to student-led inquiry in the form of 'constructivist approach' could prove extremely beneficial in terms of reinforcing critical reflection, especially by encouraging students to 'build their own understanding, knowledge and learning' (Gleason and Campbell, 2015: 7). Furthermore, it could provide Legal Studies students with a chance to discover interdisciplinarity through practice. By making this commitment central to Legal Studies, we would not only support but also enrich what is generally understood to constitute 'experiential learning'. Taken a step further, with these conceptions of agency and inquiry reflected throughout the curriculum, experiential learning becomes an essential and less peripheral facet of the Legal Studies educational experience.

The most important lesson from the literature is that Legal Studies education should not be about doctrinal instruction to fan the flames of our students' desire to gain access to the privileged world of law. At the same time, unless we articulate a clear vision and identity, one that promotes integrity and agency in interdisciplinary scholarship, it will be difficult to avoid being regarded as a mere pathway to law school. It is therefore incumbent on all of us

who wish to be part of dynamic and relevant Legal Studies programmes in Canada to set aside worries about what Legal Studies is *not*, and think of what it is and what it could be.

Summary

Legal Studies as a course of study in the liberal arts has an ancient pedigree. Vicarius (1115-1200) delivered lectures on Justinian's *Institutes* at Oxford as early as 1149. After the Reformation, civil law replaced canon law for undergraduates not seeking ordination, while the study of common law began in 1753 with William Blackstone's appointment.

Legal Studies programmes in Canada trace their origins to intellectual and ideological movements after WWII, including both the Law and Society movement and a more explicitly Marxist Critical Legal Studies movement. The latter movement later shifted from economic to postmodernist political and cultural relations, while the former movement drew empirically minded social scientists focused on policymaking and policy analysis. Legal Studies programs in Canada are inherently interdisciplinary, 'de-mystifying' law for engaged and effective citizenship while at the same time promoting a critical understanding of law as a political, social, economic, and/or cultural construct. In keeping with the liberal arts tradition, Legal Studies programmes draw on the humanities and the social sciences in equal measure. Distinctive research methods and scholarly objectives, including interdisciplinarity, critical engagement and student-led inquiry, emerge as defining features of Legal Studies programmes in Canada. Taken together, each feature in its own way promotes student agency in a manner consistent with the aims and purposes of higher education in general and the liberal arts tradition in particular.

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