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HALF A LEAGUE ONWARD: THE REPORT OF THE LORD CHANCELLOR'S ADVISORY COMMITTEE ON LEGAL EDUCATION AND CONDUCT

By H. W. ARTHURS*

IF AN Order of Merit is ever initiated, if a pantheon is ever constructed, if poems are ever penned to celebrate brave—but unavailing—contributions to the cause of legal education, the First Report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC) will surely enjoy a place of honour.

The Report is, in many ways, exemplary: it is terse (100 pages or so), fluent, sensible, well-informed, enlightened, and (so far as a foreigner can tell) politically astute. It acknowledges things as they are—near-desperate, for example, in the crucial matter of financial resources—yet charts a clear route towards high intellectual and moral objectives. It reassures—by validating lawyers' claims to professional competence, civic mindedness, ethical sensibility and indispensability for national progress—without hesitating to remind us that the world is changing under our feet. It looks forward and outward—towards general educational trends and to the experience of other professions and jurisdictions—without underestimating the difficulty of changing entrenched legal professional and academic attitudes, institutions and practices in England and Wales.

Thus, I begin my review of the ACLEC Report by recording my genuine respect for its positive qualities. Since I have been involved in legal education—man and boy, practitioner and administrator, perpetrator and critic—for over forty years, I may be somewhat jaded; but truly, I doubt that I would give higher marks to *Law and Learning*,[1] my own contribution to the *genre*, than I do to this report. What I will propose, however, is that the Report does not address certain issues which are crucial to any reform of legal education.

The Report can be quickly summarised.[2] It aims to respond to "the changing needs of legal practice ... and the changing shape of legal education" by means of structural and substantive reforms which produce six outcomes: greater flexibility, variety and diversity in programs, curricula and methods of instruction; the introduction of

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1 Report to the Social Science and Humanities Council of Canada, by the Consultative Group on Research and Education in Law (Ottawa: SSHRC 1983). I served as chair of the Consultative Group.

2 See P. Leighton, The Lord Chancellor's Advisory Committee on Legal Education and Conduct's First Report (1996) 30:2 *The Law Teacher* 201.

multiple entry and exit points to ensure greater accessibility for students from diverse backgrounds and with diverse needs and resources; better preparation of students for a wide range of occupational destinations; greater intellectual rigour at all levels; a greater measure of common professional education and training; and a more effective partnership between universities and professional bodies.[3] It is crucial to the achievement of these outcomes that law schools should provide "an independent liberal education in the discipline of law, not tied to any specific vocation."[4] As a corollary, the Bar and the Law Society should remain formally at arm's length from undergraduate education, and from the first stages of professional training.[5] However, recognising their obligations to their students and to the professional bodies, their "partners", law schools should accept greater responsibility for imparting a broad range of skills and insights which are important to practising lawyers, but which are also useful in other law-related careers.[6] Finally, to ensure that the law schools are discharging their responsibilities to all concerned—the professional bodies, students and the public—new accountability mechanisms should be introduced.[7]

By the standards of English legal education, these are somewhat bold recommendations, but they are in keeping with educational trends in law and other professional disciplines in England and elsewhere. One might expect, therefore, that the recommendations will be promptly adopted and implemented and, in due course, that they will improve the quality of legal education and legal practice. But alas, precisely at this point—the transition from recommendations to reforms to outcomes—the Report reveals its greatest weaknesses.

These weaknesses are foretold in the very introduction of the Report, where the Committee argues for changes in legal education because a profession whose education has been "broad and intellectually demanding ... is essential to the well-being of our nation ..., fundamental to ... the maintenance and extension of the rule of law ..., and crucial to our country's commercial success in the face of global competition".[8] This is not the place to recapitulate recent studies of the role of law and lawyers in the new economy[9] or the effects of landmark

3 Report at 22–23.
4 Report at 57.
5 Report at 58 ff.
6 Report, chapter 5.
7 Report, chapter 7.
8 Report at 3. In part, the Committee is quoting its own discussion paper.
9 See e.g. M. Cain & C. Harrington (eds.), *Lawyers in a Postmodern World* (New York: New York University Press, 1994); Y. Dezalay & D. Sugarman (eds.), *Professional Competition and Professional Power* (London & New York: Routledge, 1995); G. Teubner (ed.), *Global Law Without the State* (Dartmouth, 199–); H. W. Arthurs and R. Kreklewich, "Law, Legal Institutions and the Legal Profession in the New Economy" (1996) 34 Osgoode Hall L. J. (forthcoming).

civil rights decisions of the United States Supreme Court.[10] Suffice it to say that ACLEC's estimate of law's importance is not shared by all scholars. While this introductory rhetoric can be read as a propitiatory nod in the direction of power and influence, a similar failure to locate legal education reform within its socio-economic, academic and professional environment is evident at many points. Since this environment is in many ways uncongenial to the reforms proposed, this represents an important, arguably fatal, flaw in the Report. To put the matter another way, the most problematic aspect of the Report is its assumption that because reforms are officially mandated or formally agreed, they actually will happen, and because they happen, they will achieve their intended results.

This assumption, of course, is not unique to the ACLEC Report. It is a central conceit of the legal system; it characterises much of what legislators enact, judges decree, lawyers argue or advise and legal academics teach and write; arguably, it is implicit in the very notion of the rule of law. But despite its unassailable pedigree, two or three generations of socio-legal scholars have shown that this premise is highly debatable. "The gap" between law on the books and law in action has become so familiar that it is (or should be) a primary concern for anyone planning to *construct*—or deconstruct—legal rules and remedies. Nor can "the gap" be explained, for the most part, by failures of legal design or execution. Rather, it usually results from systemic forces external to law. It is puzzling, therefore, that statutes should still be enacted, judgments pronounced, clients advised—and reports written on legal education—as if law had the power to rule, as if formal prescription will necessarily prevail over politics, culture, economics or demography. Would that it were so: many noble experiments would have achieved justice and progress, many evils and nuisances would have been suppressed, with no more trouble than a trip to the House of Lords or, at worst, a quick passage through Parliament. But it is not so: not for law in general, not for the ACLEC Report. Indeed, the failure of the Committee to come to grips with this fundamental difficulty of implementation *itself* speaks eloquently to the continuing reluctance of legal academic and professional culture to absorb the insights of socio-legal scholarship.

I do not wish to overstate my criticism. This failure can be explained by the nature of ACLEC, an official body seeking to achieve something like consensus amongst its members and with stakeholder groups. Such a body could hardly be expected to say that post-Thatcherite England does not resonate with the social aims of the Report—equality of access to legal education and practice, the use of law to enhance justice and

10 See e.g. G. Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, 1991), R. Leo, *"Miranda's Revenge: Police Interrogation as a Confidence Game"* (1996) 30:2 Law & Soc. R. 259.

personal freedom—and is unlikely to provide adequate funds to advance those aims, as witness the decline in tunding for legal aid, higher education and other social programmes. But if this point is a fair one, it means that many of the sensible reforms proposed by ACLEC are going to fail, and that others will generate perverse and unintended consequences.

Let me take as an example the task of quality assurance which is to be assigned to a new "audit and assessment body"—the hostage law schools must give to fortune in exchange for their newly enhanced autonomy.[11] "Quality assurance"—a splendid idea in principle—has acquired a certain currency, these days, as a device for reducing public expenditures and for taming public sector institutions. However, even if "audit and assessment" is not merely the imposition of financial discipline by another name, the quality assurance process is fraught with problems. After all, the process can only be justified if it achieves its tutelary purpose of securing conformity to certain standards. Thus, the initial selection of standards becomes a crucial element in policy formation, an occasion of great importance in declaring and enforcing official ideology—all the more so because it is seldom recognised as such. The ACLEC Report illustrates the danger. In its discussion of quality assessment, the Report recommends "a clear set of guidelines or minimum standards" for law schools, virtually all of which related directly or indirectly to teaching functions.[12] These guidelines make no mention of research or scholarly activities. However, if legal studies are to be more explicitly incorporated within the mainstream of liberal education, if law professors are to generate new knowledge about law both in the public interest and for the benefit of the profession, if law schools are to prepare practitioners to assume the important public responsibilities outlined in the introduction of the Report, law schools ought surely to be evaluated as centres of scholarship.

True, the quality of legal academic scholarship can be measured by other academic or state bodies, such as the Higher Education Funding Council. But since the Report recommends a special quality assurance process for law schools, notwithstanding that other bodies also measure their teaching performance, ACLEC's failure to include scholarship amongst its proposed evaluation criteria suggests that—consciously or unconsciously—it deems scholarship not to be of much concern. Such policy choices or ideological statements, however inadvertent, have downstream implications. For example, a law school deciding whether to allocate marginal resources to teaching or to research—by setting higher or lower teaching loads for its staff—almost certainly will respond to ACLEC's signal. It will reinforce whichever activity generates

11 Report at 101 ff.
12 Report at 101.

favourable quality assurance reviews, because favourable reviews will in turn attract more and better students, professional praise and, likely, grants and gifts. But the exercise will be self-defeating in the end if—because quality assurance emphasises teaching and excludes scholarship—staff fail to devote themselves to the thing taught: knowledge of law in its many social manifestations and intellectual forms.

There is a further problem. The ACLEC Report suggests that law schools should be measured against their own self-defined aspirations. However, because quality assurance must appear to be objective and impartial, assessments and audits tend to measure and count using standard units of comparison. Thus, the quality of law faculties might be measured "objectively" by reference to the academic credentials of incoming students, or to their performance on standard tests or on the job market. If scholarship were to be considered, as under the ACLEC proposals it is not, quality might be measured "objectively" by the ability of law schools to attract grants and contracts, or by the number of publications they generate or by the frequency with which those publications are cited by judges or in the professional literature. In the political economy of legal academe, such "objective" quality measures might have perverse consequences. For example, an institution which enrols large numbers of students from disadvantaged circumstances is likely to admit many with less than stellar credentials, and consequently will experience weaker academic results and less success in job placement than institutions with more meritocratic or elitist admissions policies. An institution which hires unconventional, interdisciplinary scholars is likely to be less "productive" because such scholars may experience difficulty in obtaining grants, signing on with publishers and attracting a professional readership. Thus, in an era of intense competition for scarce resources, quality assurance may work against pluralism, against accessibility, against innovation.

Let me turn to another instance of ACLEC's failure to fully address the implications of the context within which its proposals might be implemented. General economic conditions and the restructuring of the legal profession associated with globalisation, European integration and the deregulation of financial markets have contributed to a fragmented, stratified and volatile market for professional services.[13] The ACLEC Report recognises this, in a general way, by its discussion of "the changing market for legal services"[14] and by noting several times that increasing numbers of law graduates do not enter conventional legal careers.[15] ACLEC's innovative response is to propose a new professional course to meet the needs of students destined for professional practice

13 R. Abel, The Legal Profession in England and Wales (Oxford, Basil Blackwell, 1987).
14 Report at 12 ff.
15 Report at 22, 42–43, 58.

as well as those destined elsewhere, and a new credential, the "Licentiate in Law", which is meant to have currency both in and beyond the legal profession. For some students, ACLEC says, the Licentiate will be an exit point, the end of their legal education.[16] However, given the state of the legal services market, the Licentiate may well prove not to be negotiable as a terminal degree, and those who hold it may find themselves in job ghettoes. And who will be found in these ghettoes? Almost surely those who can least afford to go on, those who have the least expectations of ultimately finding attractive professional jobs, those who are usually marginalised because of race, colour or other characteristics.[17] Already devalued as an anomalous credential, the Licentiate would then be further discounted by employers precisely because many of those who held it were members of minority groups. Ironically—in view of the transparently good intentions of the Report—the terminal Licentiate may ultimately come to be regarded by those who hold it as a mere consolation prize for thwarted aspirations.

Central to the Report—indeed its most attractive and positive feature—is its recommendation that "the [undergraduate] degree course should stand as an independent liberal education in the discipline of law, not tied to any specific vocation",[18] the logical corollary of which is that "law schools should be left to decide for themselves, in the light of their own objectives, which areas of law will be studied in depth, which only in outline, which (if any) shall be compulsory, and which optional, provided that the broad aims of the undergraduate law degree are satisfied".[19] Having explicitly rejected the notion that legal education is or should be "highly instrumental, even anti-intellectual", [20] the Report makes clear its support for pluralism in intellectual perspectives, curriculum development, teaching and assessment methods, for variety in the length and structure of degree courses, and for interdisciplinary programmes of study. But there is destabilising potential in the Report's premise that law schools and law teachers should enjoy maximum freedom: students will also be free to choose which law school to attend, which subjects to study, which intellectual perspectives to pursue.[21]

Consequently, the new enriched and diversified undergraduate curricula proposed by the Report may indeed be adopted by some law schools; but these schools may well fail to attract newly-empowered

16 Report at 74–75.
17 The Report at 43 notes that "certain groups are disadvantaged when they seek to enter the profession, especially by the difficulty encountered in finding training contracts".
18 Report at 57.
19 Report at 64.
20 Report at 58.
21 "We expect that in practice law schools will respond to the market, that is to the demands made by students and the providers of legal services." Report at 64.

student "consumers", who may prefer more conventionally-minded institutions. After all, no one has actually asked students why they choose to study law rather than other subjects, why they apply to particular law schools, or why they exercise their options amongst non-compulsory subjects as they do. However, these are important questions in the new academic "marketplace". The Report seems to assume that most students will be either high-minded or rationally self-interested, that they will select the law school with the most stimulating curriculum or the one that is most likely to move them towards a particular career goal or to maximise their career options. Similar considerations, the report assumes, will guide their selection of subjects, and their daily decisions to devote scarce time and energy to particular aspects of the syllabus. Thus, for example, the Report is at pains to ensure that a variety of pedagogies and curricula are available to provide a full range of choices for intending practitioners, as well as for students who are "looking for intellectual excitement" or who "see [law] as a platform for entry into a wide range of legal and non-legal occupations".[22] Is this an accurate picture of the factors which motivate 18-year-old student "consumers", newly enfranchised in a marketplace with a newly-enlarged range of wares? If so, they are certainly different from most consumers in the degree of information, foresight and objectivity they bring to their choices.

Worse yet, unless they are very different from most people in English society (and most societies) today, students are not likely to be much motivated by the values embedded in the ACLEC Report—"the essential link between law and legal practice and the preservation of fundamental democratic rights",[23] or "the philosophical, ethical and humanitarian dimensions of law".[24] What they want, in all likelihood, is a job, preferably satisfying and well-paid, in a labour market characterised by almost universal insecurity and widespread deskilling. If jobs are indeed their prime concern, student-consumers may effectively veto the reforms favoured by the Report, by seeking out law schools whose programmes are quite explicitly "highly instrumental, even anti-intellectual", and by opting massively for courses and pedagogies which they believe—rightly or wrongly—are professionally negotiable, in the sense of impressing potential employers with their ability to perform legal tasks. If this happens, more ambitious, idealistic and unconventional projects of legal education will be denied the consumer support they need in order to remain viable, and a sort of Gresham's law will soon put paid to the high hopes of the ACLEC Report.

I have tried to show how an uncongenial economic and political environment might threaten the implementation of the Report. I now

22 Report at 58.
23 Report at 12.
24 Report at 15.

propose to extend the argument to certain negative features of the professional and academic environment.

The Committee rejects what Bob Hepple, one of its leading members, calls "the false antithesis between 'liberal' and 'professional' legal education".[25] But the issue is not so easily dismissed. True, academic or "liberal" education is an important part of preparation for modern professional practice; and pedagogic encounters with the challenges, agenda and ethos of professional practice can and should be constructed so that they are intellectually challenging. True, separation of the academic stage of legal education from the professional creates distinct "spheres of influence"[26] for the universities and the professional governing bodies, reinforces the worst features of both and precludes the interpenetration of ideas and values. All true. But it is not true that because the academy and the practising profession happen to have an interest in the same students at different locations on an educational continuum, their interests are congruent. In fact, the academy and the profession exist for different reasons, have different values, do different work, even operate on different understandings of what is meant by "law". They are in certain respects each other's inevitable adversary.

The *raison d'être* of the academy is the disinterested pursuit of knowledge through the fostering of independent, critical intelligence; that of the profession is to make specific forms of knowledge and skill available to, and for the benefit of, its clients. Neither of these positions is unworthy; indeed, both are necessary. But they are not identical or even, in many instances, compatible. The academy and the profession are frequently and understandably aligned on different sides of some very fundamental issues: the nature of legal knowledge, the changing technologies and structures of practice, the appropriate social role of the profession, even the proper objects of the legal system. The profession has historically sought to control legal education because it wishes its views in these matters to prevail over those of the academy. Specifically, it wishes to control the socialisation of its own recruits, to fix the boundaries of their professional behaviour, and in an indirect sense, to regulate thereby the production of legal knowledge.[27] Conversely, law schools are likely to welcome ACLEC's current proposal for an enlarged, virtually autonomous, academic role in the creation and transmission of legal knowledge, precisely because this will in the long term enhance academic influence over the character of the legal system and professional practice. All law schools must do to secure this influence is to integrate academic and vocational training—a bargain with Faustian

25 Bob Hepple, "The Renewal of the Liberal Law Degree", Inaugural Lecture, Faculty of Law, University of Cambridge, 14 May, 1996 (unpublished).

26 W. Twining, *Blackstone's Tower: The Enghsh Law School* (London: Stevens/Sweet & Maxwell, 1994).

27 I have developed this argument in H. Arthurs, "A Lot of Knowledge is a Dangerous Thing: Will the Legal Profession Survive the Knowledge Explosion?" (1995) 18:2 Dalhousie L.J. 295.

potential, if ever there was one. Vocational education—however intellectually rigorous, as ACLEC insists it must be[28]—involves an epistemology, a methodology, an ideology, which is very different from that of the liberal study of law as a social and intellectual phenomenon. It involves, at very least, the potential dilution of the time, resources and energy devoted to liberal studies. And quite likely, in view of the perceived relevance of practical knowledge, students will tend to favour the vocational over the academic, however the two are combined or sequenced.

The North American experience confirms (to mix a metaphor) that whoever sups with Faust ought to use a long spoon. The virtual autonomy of American and Canadian law schools from formal professional regulation does not translate into immunity from professional influence. To be sure, in many law schools—especially the best of them—liberal education and scholarship are taken very seriously indeed by some faculty members and some students. For most students, however, legal education exists in the shadow of professional practice and culture. Specifically, legal education is dominated by the most powerful and mythic figures in the profession—practitioners in the corporate mega-law firms and "white knight" criminal, civil or constitutional litigators. The profession provides the ideal-types, the paradigms, which legal academics and law students are expected to reproduce or, in rare cases, react against. Law schools, in turn, recruit faculty members from these streams of legal practice[29] and direct their best graduates towards legal careers within them. The *real* syllabus of law schools, the syllabus most students opt to follow, the perspective they tend to adopt in the classroom, is largely shaped by implicit and explicit suggestions to students to *identify* with one of these two somewhat atypical, but very powerful, ideal-type practitioners. Nor is legal scholarship itself immune. Much of the best is directed to the larger concerns and daily requirements of these two types of practice. Indeed, even alternative and oppositional forms of legal education and scholarship tend to be linked to alternative and oppositional practice careers.

In the result, the profession remains a dominant influence, arguably *the* dominant influence, upon North American legal education and scholarship. The themes of liberal education and disinterested scholarship are present to be sure, sometimes played elegantly and with distinction, but they are contrapuntal and fleeting, not dominant, not formative,

28 Report at 23, *fn* 3.

29 Patterns of recruitment are varied. On the one hand, significant numbers of legal academics hold advanced degrees in other disciplines, or have undertaken interdisciplinary law studies. On the other hand, law schools often recruit ex-practitioners to academic careers, or employ practitioners as part-time instructors, typically to teach subjects which have some salience for professional practice. But the categories are not rigid, and faculty members are often willing and able to teach "out of character".

and certainly not transformative. While the technical competence of legal practitioners overall is arguably higher today than ever, this is as much a tribute to greater selectivity in law school admissions as it is to improved curricula and pedagogy. And more to the point, it is striking that after thirty years of the most profound intellectual, ideological and pedagogic changes in the history of legal education, neither in Canada nor in the United States has the profession made significant progress towards the lofty goals proposed for it by ACLEC and its North American counterparts. Indeed, in some ways, because of the exogenous developments I have mentioned, it may be farther away than ever.

Although the practising profession has been largely impervious to the benign influences of liberal legal education and of intensified and diversified legal scholarship, in North America law has become more and more deeply embedded within the university as a "normal" academic discipline. In consequence there are now at least some countervailing tendencies which somewhat dilute the hegemonic power of legal-professional culture. Academic perspectives, values, practices, standards and rewards have ensured that legal education does not remain wholly under the influence of the profession. Thus, it is the university environment and the academic project which nurture and sustain the minority of faculty members and students who persist in seeking a broader and deeper understanding of law than they can obtain as mere lawyers-in-training or judges-in-waiting. Overall, the progress of the liberal law degree, insofar as it has been manifest in North American legal academe, can be measured primarily by the distance that law schools are able to take from the perspectives, values and needs of the practising profession.[30]

Indeed, at one point the Committee comes close to acknowledging that the English experience supports a similar conclusion. The Ormrod Committee—elsewhere criticised for having "legitimated" and given "an institutional basis" to the dichotomy between the academic and vocational stages in legal education[31]—is praised by ACLEC for having given university law schools "a clear and crucial role in providing the intellectual foundations for intending lawyers". ACLEC concludes that since "both 'core' and 'contextual' knowledge have become the special preserve of the law schools ... by common consent, initial stage legal education ... today [has become] dramatically better intellectually than it was 25 years ago", that this dramatic improvement is "reflected in the

30 The one apparent exception to this observation is the role played by clinical legal education (CLE) which first appeared in North American law schools in the late 1960s. CLE, however, was as much a project of anti-establishment lawyering as it was of innovative pedagogy; its practitioners were, and often still are, highly motivated and intellectually ambitious. Despite these advantages, CLE has managed only limited penetration into law school curricula and budgets, an historical precedent which ACLEC might have done well to consider.

31 B. Hepple, *supra* note 25.

academic contribution through research and teaching", and that the expansion of law schools and of staff complements during this period has been "matched by an impressive growth in the range and depth of legal scholarship".[32] ACLEC is right so far as it goes: but it does not go far enough. Improvements in legal scholarship and undergraduate education are not separate phenomena which "reflect" or "match" each other: the first is the cause of the second. Hence my concern that ACLEC may have proposed two mutually exclusive projects: the revival of liberal legal education, and its reintegration with the tasks of vocational education.

This brings me finally to the importance of scholarship. Law as an academic discipline has progressed largely by joining its professional tradition of analytical rigour and cheerful pragmatism to the more empirical, reflective, synthetic and integrative approaches of other disciplines in the social sciences and humanities. But law's progress within the academy has not been easy, pervasive or uncontroversial. Most law professors are still only modestly equipped to make a serious contribution to scholarly discourse: many are content to pursue conventional forms of legal research and publication, which bring generous rewards in the form of professional recognition, consulting fees, book contracts and student approbation; only a minority have had more than passing encounters with other disciplines; and very few have served their scholarly apprenticeship in doctoral programmes. These characteristics ensure that the majority of law teachers will continue to feel a greater intellectual affinity with the practising profession than with their academic colleagues. Until this affinity, this nexus, with the profession is diminished, I would argue, law teachers are not going to be able to produce the corpus of scholarship necessary to support them in the task of sensitising prospective lawyers to issues of ethics, public policy or business realities. Still less will law teachers become original, creative and effective contributors to the great debates about law and its relationship to culture, society, the state and individual freedom and well-being.

In this more general sense, the ACLEC Report has failed to take on board the crucial issue of legal scholarship, and to appreciate that the implementation of even modest reforms depends upon the emergence of a generation of legal academics even better educated, and more productive and ambitious, than its predecessors. Given reduced public spending on higher education, given the widespread denigration of liberal academic values in general and of the social sciences in particular, given ACLEC's silence on the importance of scholarship to the reform

32 Report at 26, paraphrasing and quoting R. Stevens, "Legal Education in Context", in P. Birks (ed.), *Reviewing Legal Education* (Oxford: Oxford U.P. 1994).

of legal education, the transformation of the legal academy does not appear to be imminent. And because of this, an otherwise magnificent assault on the entrenched professional batteries of legal education is unlikely to achieve its objectives.