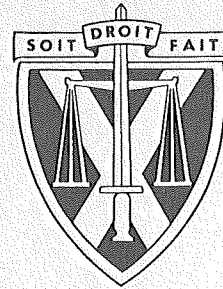


*Queen's
University
Faculty of Law*



*Lecture Series
on Legal Education*

IS REAL LIFE FINALLY HAPPENING?
by
Professor Toni Pickard

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IS REAL LIFE FINALLY HAPPENING? *

When I undertook last summer to give this talk to you, I was especially concerned about the difficulty of speaking to people about legal education when they had no experience of it whatever. Especially when I myself am at such a different place in the spectrum - having had plenty - and feeling sometimes as it goes on and on - that I've had altogether enough, thank you. But in the end I thought it wasn't so hard after all because it's not as if legal education is all that different from anything else - in fact its issues, strains, strengths and contradictions are in many ways like those of the legal system itself, like our social/political life at large, like the issues and contradictions we each have to struggle with as decent and caring people in the world. So I thought I might be able to draw on those similarities as a way of making concrete for you some reflections I have about the legal education you're about to undertake and about which you know nothing at all at present.

Before I start, I want to tell you just a little more about me. I have been teaching here for 18 years now - a variety of "basic" subjects - family law, public law, contracts,

* The text from which a talk to entering students at Queen's Faculty of Law liberally departed. The talk was delivered before classes started, as part of the orientation program. It was the first of the Queen's Faculty of Law Lecture Series on Legal Education. I have modified the text slightly to try to make it more readable by persons other than its author.

restitution - but my main doctrinal interest is criminal law. I also have taught a bunch of specialized seminars, e.g., international criminal law, law and social theory, political perspectives on law, a course on non-adversarial lawyering tasks, i.e., interviewing, counselling and negotiation, and this year I'll be teaching a course on issues and methods in empirical research. My main ambition as a teacher at present is to integrate social theory, political analysis and empirical training into my first year criminal course in a way that is helpful to first-year students. I am, in a way, an odd person to be asked to address you at this point in your entry into the school - not because I'm odd (though there is that) - but because my view of legal education is, on the whole, quite critical, as is my view of the legal system, and the general social/political fabric of our society. On the other hand, I'm not such an odd choice since I have thought about legal education a lot, written about it some, and I continue to try in fairly radical ways to improve its practice. So... introduction over, what do I want to say to you about it all?

I. Life is always real.

There's a way in which people talk about law school as "something they have to get through" before they can get out into the real world where...what? ...where things "really" matter, where "tough" choices have to be made, where they will make money, finally be able to speak their minds, what? I never know.

But whatever is meant, it's a phrase which means people consider the life they live here not real, but something else - certainly not a pause that refreshes - but somehow something we do, without its being real life, a way station on the route to something else, a waiting room maybe. Well I want to say no to that. Emphatically.

For two reasons. First, and this is a long held personal stance, I have always felt that time waiting is time lost. I think we spend too much of our time with the sense that we are preparing for something else. High school for college, college for law school, law school for a career, a career for success or leisure, leisure for ...? And where along the route was "real life". One of your colleagues said last year "wherever I am, they tell me real life is somewhere else". Where do you think it is? In law firms? Corporate headquarters? City ghettos? Art galleries? Battlefields? Nursery schools? Factories? Families? The wilderness? I want to say that real life is happening anywhere and anytime that life is being lived, whatever the people living it are doing. Real life is not finally happening. It is always happening. We are always making it happen.

But I especially want to say for you here and now that law school is real and that it's part of your educational responsibility to treat it as real. It is here that you should begin to try to understand that, just by being, you always participate in the creation of community life, whether actively

or passively. Whether you think things fine and find the educational process sensible and conforming to your expectations - or whether you think things awful, and then act to change them - or not. There is simply no escaping the fact that over the next three years you are responsible for the way in which you personally will be creating this community and its practices. Legal education is not something which is here for you to consume - but a process which you create, for yourself and others.

I want to urge you to understand the law school as an organized community, a mini society, with laws, customs, practices, conventions, policies, principles of organization, entrenched values, an established power structure - all those things that make up a larger community. And during your tenure here you will yourselves be contributing to the entrenchment, or modification of those conventions, policies, etc. - just as when you are legal professionals you will be doing in the larger community.

Our community life here is as fraught with strains and contradictions, as full of injustice, callousness, power plays - as impoverished, commodified and bleak as life in general. And at the same time our community life here is rich in the strengths and kindnesses, the complexities, joys and aspirations to real humanity of our general society. It engenders thoughtfulness, and hope that we may really be able to do better - even if just a little bit better if only we take the time and have the heart and courage to try. I think it is important for you to see that this

is real, and that the way in which you engage your self in your educational life here is as much a part or more a part of your formation as a legal professional as all the legal doctrines, policies and procedures you study.

II. We make our law and our legal education

Law is one of the main ways we work through the continuing and ever changing problems of community life. For you, it will become an especially important way. Much as you may think that the law is already there - that all you have to do is learn it - apply it, use it - that just isn't so. Some rules are there - even some which at the moment are not particularly contentious (though part of the fun of law, and there is lots of fun in it, is the way your soberest, boringest, stodgiest kind of untroubled rule can all of a sudden become contentious, and-whoosh - things change; and that will be particularly so over this next period as the effects of the Charter get worked over and through and out and to death) ... some rules - as I said at the start of this sentence are there - but rules don't do anything by themselves - law has the life and meaning its practitioners give it every day. And by practitioners I don't mean only judges, legislators, and lawyers - but also police, administrative agency personnel, arbitrators, political leaders, mediators, prison officials, building inspectors - etc. - and now I mean you too. Every choice each legal practitioner makes helps create the current fabric of what the law actually is.

So if your idea is somehow that you have come here to spend three years being stuffed full of It, and then you will have "It" and you will dish out bits and pieces as needed when you become lawyers, judges, legislators, business people, and pillars of your communities - try to get rid of that idea. Law will be what we together make it as we go along. Just as the practices of this community are what we make them as we go along. And just as the law is changing fairly rapidly, right now, so are our practices here at the Law Faculty changing. Whether the law (legal education) can become richer and more textured and more responsive to the rapidly changing complexion of Canadian society or not will depend on who you are, what you do, what you care about, stand up for, commit yourselves to and resist. Or not. Every step of the way. Starting now.

III. Some impacts of hierarchy on the ways we think and act

It will not surprise you that law school classrooms like most classrooms, most law firms, most political arrangements and most of life - period - are hierarchically organized. There is the obvious hierarchy of prof/student. Then there are a variety of others which play, particularly in law classes, more or less obviously: legal argument/policy arguments; detached tone/passionate tone; abstracted formulations/concrete narratives; analytic thinking/lateral or polycentric thinking; appellate decisions/non-courtroom legal decisions; and still another series which play here, as everywhere: secular/religious;

white/non-white male/female; heterosexual/gay & lesbian; middle class/working class; objective/subjective. Profs mainly represent the first named quality or identification - the second are expressed or embodied by students...sometimes...less & less often as they are socialized, here into "thinking or acting like lawyers".

Now the prof/student hierarchical structure makes some sense, has some good reasons for being. Just as the Supreme Court is the final arbiter of differing interpretations of a statute, say, offered by different provincial courts of appeal, so the professor is the final voice on which of several suggested responses to a question in class is good, or fruitful, the best basis for moving forward. And how could it be otherwise? We can't have the law meaning different things in different courts, depending on the interpretation of the judges in that court, or different things to different students, depending on their personal interpretations. Law is a social enterprise and has as much as possible to be similarly understood by very varied people, very variously situated, certainly by those who embody it in their life's work - who cause law to have a concrete existence - i.e. you. If "Law" doesn't do anything - if, as I say, people do it, people need shared understandings to work.

So, the power to choose among different possibilities of meaning is centered somewhere, and that somewhere, because it decides among disputed understandings and establishes one as governing -if only for the time being, becomes elevated in our

picture of things. Since the Supreme Court, or the professor, in the classroom mode, has this power to decide on the meaning which will prevail for the time being, despite the differing interpretations of others, and since this is a fearsome power, we try to have wise judges on the Supreme Court and intelligent professors in the classroom. And, let's assume we succeed. Then they choose among interpretations for reasons which seem good to them. The problem is that once the Supreme Court or the professor has spoken from on high, as it were, the tendency is to treat the pronouncement as a statement of what is. The law is what the Supreme Court says it is. The case means what the prof says it means. The other interpretations and understandings are seen to have been wrong, as if from the beginning, rather than rejected for various reasons by the arbiter. And, if you are a lower court judge who had a different understanding of the law in question, or a student whose view of the case was rejected by the professor, you are supposed to accept what the higher authority says and internalize it as your own understanding of the law or case from then on. That is how common understandings, which are necessary to the enterprise, are forged and maintained. Now what problems can there be with that?

a. Loss of input

First there is the problem of the lower down trying to second guess the higher up, rather than to make the best sense he or she can out of the problem presented. That has good and bad

points in the court system perhaps. But in the courts, and even more so in the classroom, a lot is lost by the second guessing game. Most obviously, the opportunity for new ideas. It is virtually impossible to anticipate a higher up's inventive solution or new insight - but if you have one yourself, and offer it, it might be accepted.

b. Disengagement

The loss of possible other answers is a loss for all of us, for the system as a whole, for the classroom, etc., but there is a different effect, felt by each second guesser - and that is the disorientation, the disengagement with the actual problem that's involved when you focus more on being thought right by the professor (appellate court), than on what you think a good solution to the problem is. You come to see the problem mediated through the mind of your professor - as you imagine that mind to be. Your question becomes how does "the law" or the professor look at this - not how do I look at it. In a law school classroom, which can feel like quite an intimidating place, the focus students develop on being "right", or at least "in the ball park" in class, and the fear of exposure as wrong or foolish, becomes a very powerful force for conformity of thought. More so than in classrooms where you are not expected, or required, to offer answers all the time.

So the hierarchy, which makes sense and which itself contributes to our very important ability to share language, understandings and attitudes to law in a way that allows us to be

an effective professional corps, also contributes to the impoverishment of the educational experience, the law itself, and the richness of any particular individual's engagement with "legal" problems.

c. Devaluation of personal knowledge

You may, most likely will, find your classes proceeding as if nothing you studied before, nothing you have learned through your life experience, is relevant. They also tend to proceed as if none of the wide differences among your professors' backgrounds, commitments and life experiences is relevant. This too creates a sense that the law is there, even a pressure to see it that way - that law is a thing to be grasped, and each of us has to put our self aside, has to understand it for what it is. But that is not right. It is right that there are certain understandings shared by most of those engaged with law - that legal stances, decisions, arguments have a certain self-understanding, and that law teachers are out to impart their own understanding of these self-understandings. But like any individual's understanding of him or herself these self-understandings are only partial.

As you start out in law school, perhaps at the beginning of any entry into a self-conscious social practice, you must learn how to lend yourself generously to the understanding that practice has of itself. But the risk is that in struggling to do that, especially in feeling a little inadequate to the task in an intimidating and hierarchical context, the risk is that in

lending oneself, one loses oneself. One struggles to get inside, and succeeds, only to get stuck there. This can create a sense of terrible disjunction with your prior life - or your current life outside the law school. It creates strong pressures to give up things you care about, are committed to. It can make you get confused about what you know, or what it means to "know" something. And then, in those moments in class where you are able to hang onto a scrap of a "personal" outside vision of - a case, say - it can be very hard to get a firm grasp of that scrap, to be able to find a way to relate it verbally to what is being said about that case - and it can be harder still, hardest, to find the courage to put your understanding out into that heirarchically arranged discussion.

All of those difficulties work together to create an emotional state which makes it virtually impossible to adopt the cautious, rational, dispassionate, "objective" tone which is the required voice for legal speech. And your sense of being too emotional about it all may prevent you from speaking at all, make you feel even more inadequate - or, if you find your tongue anyway, may cause the others in the room to not hear you well because they hear the "wrong" tone, passionate and risk-taking-"subjective".

These moments have happened to many, perhaps most, of us at some point in law school - and they are devastating. Few people can find it in themselves to venture forward often in this way. Yet that is just what I think it is important for you to be

able to do. To do it yourselves and to create a classroom atmosphere in which your colleagues can do it with minimal cost.

IV. Hierarchy and mainstream dominance

You will soon realize if you haven't yet, that most law professors, just as most legislators, and judges, and lawyers, and legal actors in general, are white and male and middle-class and heterosexual. Their viewpoints and experiences grow from their lives as white male middle class heterosexual people, and are correspondingly, necessarily, limited. That is not a criticism. It's just true. A criticism one can level is that often many fail to understand or remember the partiality of that experience - or the way in which it affects virtually everything they think or the way it operates to suppress, because of its hierarchical position, other perspectives. Because most influential legal professionals are, and have always been in our system, white male middle class heterosexual people, the self-understandings of law share those partialities.

There is no necessary problem with partial visions. On the contrary, I think. But when a partial vision becomes dominant, not because it corresponds to the experience of the overwhelming number of people in a community, but because it is the experience of those who are at the top of all the hierarchies, and act to maintain themselves there - and when those hierarchies involve, like the legal education hierarchy, training others into the self-understanding of the ones on top,

we have a vision which is dominant in what I believe to be a bad sense.

Now, of course, many of us, most of us (really all of us, but some more than others), are already deeply formed by the dominant culture by the time we get to law school. And it's not as if white middle-class male heterosexual culture is either a monolithic structure or, a clubby space of agreed upon values. But on some issues, seen from the margins - from the perspective of many people of colour, or women, or gay, or lesbian or working class people - experiencing the "debate of an issue" in the terms of and by members of the dominant culture is like sitting in a living room watching a tennis match on T.V. Those in the dominant culture, debating the issue, are like the spectators at the tennis match, seen on the screen turning their heads back and forth in unison, back and forth from one side to the other, seeing only polar opposite points, never resting their gaze at the net line where the observed in the livingroom feels herself to be. And should that observer shout, "hey! I'm here! It looks different from here!", the spectators still never look in the right direction - and were they to do so, they wouldn't hear or see the observer anyway. They are in a different world. The observer simply doesn't exist for them, although they and the game they both watch and create by their roles as spectators exist powerfully for the observer, are the central focus, at the moment, of her attention.

Of course, the observer and the tennis match on TV are in fact in two different worlds, and there is no reason the spectators should see or hear the observer - no possibility they could understand the situation, of which they themselves are a major component part, from the observer's vantage point. Both the observer, and their own role in the spectacle of the match, must remain invisible to them. But when life - more particularly for us - life in a law school classroom creates the observer feeling for some people, in the room, it's not a question of two different worlds. People talk about the experience as one of being "silenced" or "disappeared" from the world they actually inhabit, a world which can and should understand situations from their vantage points as well as the "dominant" one. But issues are framed without any reference to their vantage point, debated without heeding their voices. Being silenced, or disappeared is awful for anyone it happens to - and knowledge of that possible awfulness tends to encourage people to silence and disappear themselves.

Some of us, on the other hand, are rarely disappeared. We so identify with the central perspective, sometimes despite our personal experience or characteristics, that we embody it, we are the Dominant Culture, we give it life. When we are seeing things that way, we are on the top of the hierarchy, with all ensuing pleasure and power and complacency of that position available to us. But very few of us are always "on top" of every

hierarchy. Most of us occupy different places in different ones or at different times in our lives.

V. Making community (law, education)

What is most needed in this world where our understandings are not as shared as we would wish, or as would be convenient, is for us all to listen to each other AND - to listen especially to those who speak from the margins, in whatever way. To lend ourselves - to try to really hear them, though they may be angry, or confused, though we may feel attacked, or think our time is being wasted, though they seem to confuse the issue (o greatest of legal sins!) - and sometimes they will actually be confusing the issue. Of course, for any of that to happen, they must speak. We must speak.

The challenge will be different depending on one's place in the hierarchy. First, it is important for all of us to learn to recognize when hierarchies are in play and doing damage. Then, when you are on the "under" side, or at the margin, it's a problem of staying in there and nonetheless speaking your vision, on those occasions when you can find the courage, and care enough about this community to do so. It is a problem of finding others like you (who may be feeling a need to hide), of having faith that you can be heard, and that it will matter. It is a problem of avoiding hatred and bitterness, of not obliterating the felt experience of the dominant culture for those who have it - of not denying their humanness as you may feel they do yours. It is a problem of courage, caring, endurance, restraint, and of

commitment to real community. Recognizing and accepting that challenge, trying to act on it, is a way of learning to be a good legal professional.

When you are "on top" with respect to a particular hierarchy, or in the center, it is a problem of understanding or remembering that your view, although dominant, is only dominant—not universal, or right, or true, or the way things "really" are. Yet it does dominate. It is a problem of suspending your own sense of things on those occasions when you can find the strength and confidence to do so, of caring enough about this community to want to have that confidence so the others can feel able to speak, and we can all have the benefit of hearing them. It is a problem of being able, through this, to retain your own sense of authenticity, without being defensive, or denying that of others. This is particularly difficult for people who are feeling attacked as participants in a dominant practise or as members of a dominant group. It can help on those occasions to call on your experience as a marginalized person in some other hierarchy. It is a problem of patience, restraint, caring, courage, and commitment to real community. Recognizing and accepting that challenge, trying to act on it, is a way of learning to be a good legal professional.

You are starting law school at a particularly interesting and open time in legal thought. The work of feminist and critical legal scholars, as well as the growing body of work by scholars of colour, is detailing instances, developing

arguments, presenting historical evidence, generating theories, creating visions which profoundly challenge our current mainstream understandings of our legal culture. At the same time, we are just beginning in Canada to work with the new Charter of Rights. The Charter will push us to elucidate the forms of dominance through law, to elaborate the ways in which various people at the margins experience our culture in crippling ways. At the same time it is a vehicle for ending that dominance. In the largest sense, the Charter is a generous and hopeful extension of our commitment to community - one which says the community is everyone who is here - and our practices and structures must be modified if they have the effect of excluding people. To practice the attitude that the community is everyone who is here is hard. But I think it is the central challenge before us. At the law school, in the profession in Canada. And I wish you all well as you try over this next period of your lives to learn to meet it.

Toni Pickard
Queen's Faculty of Law
Kingston, Ontario
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