

ACCLE Conference Remarks – Integrating the Dimensions of Legal Education

BRYAN P. SCHWARTZ *

I want to make some brief remarks upon legal education before I talk about the experiential course I have introduced here at Robson Hall. That, of course, is the introduction to Israel and international law program (“Mishpatim”) which was delivered in Israel starting two years ago and again this spring.¹ It is a four-credit hour course, delivered by the Rothberg School at the Hebrew University in Jerusalem. The student body mostly comes from our own law school, but we have had participants from others and hope to expand their involvement in the future.

I have been inspired by the comments so far from the general reflections on the matter of legal education generally, and clinical education specifically. The key word I would put forward for your deliberation would be ‘integrated’. We speak about learning about the law or doing law. I would suggest the analogy of reading books about the guitar or playing the guitar. It is my view that these things have to be done together. If you want to be a good guitar player, you are not going to do it unless you are actually playing. You will be a more skilful player, however, if you know something about the theory of chords, and you know of the musical tradition which you are playing, you may know that a note sounding discordant has been done deliberately, you’ve done some atonal work, you know that you are playing in a different scale because this was written in the eastern mode rather than the

* LL.B. (Queen’s), LL.M. (Yale), J.S.D. (Yale). Asper Professor of International Business and Trade Law, University of Manitoba.

¹ This three week program is an academic partnership between U of M law school and Hebrew University in Jerusalem. This course is open to Robson Hall law students, Asper School of Business students, and law students across Canada.

classical western mode – you will be a better guitar player. There is a funny moment in a play entitled *2 Pianos 4 Hands*² where, as I recall, the character has an epiphany along these lines: “You mean we learn these scales because they actually help us play?”³ Yes they do. So does understanding musical theory. If you want to be good at the actual mechanisms of the law, you should have a good knowledge of the doctrine of the law and be able to think critically about it and its social and political context. If you are not aware, for example, that some of this doctrine does not work in the real world because it is too expensive to operate, you do not have a complete education. If you cannot argue insightfully on how the law should be interpreted or changed in light of current or developing social circumstances, you will not be an effective advocate.

One thing that we can do particularly well, perhaps uniquely so at the law school, is to encourage and equip people to think about an even higher order of question, which is at the reflective level. Going back to the analogy, what does it mean to be a guitar player, am I doing it professionally or as an amateur? Is my role as a guitar player to be the conveyer of what the composer intended or am I supposed to bring more of my personality to it?

If I am going to be a lawyer, we at the law school have a chance to think about what it means to be a lawyer. What kind of law do you want to practice? What are the options? At law school we can teach people that there are many different ways to be a lawyer: private law, public law, working for non-governmental organizations. We need to think about the ethical and practical implications, think about your lifestyle – what’s in it for you as well as what’s in it for society. These are the kinds of things we can do in a broad, panoramic perspective at law school. Now we cannot do it exhaustively, but we can get students to start to think about it. We are trying to provide people, or at least we should be trying to provide people, with a set of enduring questions, different fundamental perspectives in each area, an inclination to think honestly and rigorously about what is, and imaginatively and about what could be, and the skills to know where to look for information and fresh ideas and how to evaluate them.

Equipping students with the mindset of a lifelong student is extremely important because after graduation people tend to go into what I call

² See online: <<http://www.2pianos4hands.com/>>.

³ *Ibid.*

assimilative environments. When you enter private practice, whatever you may be told beforehand, you are going to absorb certain attitudes even if they are not consciously stated. Some of them are very admirable: professionalism, accountability, and efficacy. Did I get the job done, did I solve the problem, did I help the client? Did you make things better for the people you are supposed to be serving?

There are some other sides of this which are controversial. If you are working at a big corporate commercial firm you will be constantly evaluated for billables, deliverables. You will assimilate a culture in which the work-life balance is very much in favour of work. You may be in an environment where there is no sharp separation between the private self and the public self – you are always marketing and you are always ‘on’. If students do not think about this in law school and if we as a faculty do not encourage students to think about these issues in law school, you may not even be aware all this is going on and have a basis to reflect on this critically.

Now our business in law school, whatever else it may be, ought to include giving people the questions and the capacity to think about these ethical and professional concerns on their own. We’re not here to propagandize, we are not here, in my view, to say private practice and making money is a bad thing, and the only life worth living is one working for non-governmental organizations. As Norm Larsen used to say ironically, “there’s a lot of money to be made in poverty law.” Self-interest is not unknown in the non-profit sector, nor is altruism absent in private practice. We’re not here to propagandize; we’re here to leave people emerging from here with all sorts of skills: practical, doctrinal, and the capacity to think critically about why they are doing what they are doing.

If you’re going to be a criminal prosecutor with a tremendous amount of power at a young age, at an early stage in your career, you shouldn’t be thinking how do I get the max here, but should I be looking for the max? What should I be doing with my bargaining power (and with mandatory minimums you have more bargaining power than ever), do you want to use that to get the max, or to help people? In terms of career choice people might think, I want to help people who are in trouble so I should be a defence lawyer. But maybe to help people you should be a Crown because you’ll have all types of opportunities to do that if you engage humanely and sensitively. As a criminal defence lawyer, perhaps I should not only be thinking how do I get this guy acquitted, but how do I help this person? Maybe helping them is referring the person to social services or a health care professional, maybe it is

having the person take responsibility for their actions – this may be better for them in the long run than beating the rap.

I am not sure of the answers to all these questions in a general way, and a response in any context would take into account the human and material specifics of a situation. I am suggesting these are the types of questions law school should be equipping people to think about. You should emerge with some critical readings about these things so you can look at the different models and different ideas. And, as well, you should have the capacity to be a lifelong reflector, so when something comes up, you have the skills to deal with it appropriately. You know there is literature out there, that this is where I go from here, I know who to talk to, and I have the vocabulary to talk about these kinds of things.

In terms of clinical education, I am quite concerned about the outsourcing phenomenon. My concern is whether this is going to constantly happen. Are we going to get a model where we are consistently outsourcing legal education? Externships are cool: they are inexpensive, you go work for somebody else, the school does not have to pay the cost of the professor, students like it because they getting practical experience and everybody's a winner, right? Wrong. Unless there is a full time faculty member or somebody else with an academic spirit who is concerned with making sure that the externship is guided by the purposes of making people think critically and reflect on that experience you're just accelerating practice, not adding educational value. If you want to send people to the Crown or the Defence bar, there needs to be someone standing above and apart from it asking what did you think of this, what did you learn? What do you hear people saying, do you actually agree with that vocabulary? You can agree or disagree. We're not telling you to be a Crown or Defence lawyer, to go for the maximum sentence or go for the more lenient side.

What we should be doing is getting you out of this law school thinking critically and reflectively and in an informed way. And not just once, but throughout your career constantly thinking: what am I doing and why am I doing it? And having the ability to do that and learn about that and reflect upon it.

In terms of going back to the concept of integration, let me talk about specialization. Chief Justice Scott said something extremely important in his remarks today, which was that if you want to practice family law you need to know about corporate law and tax law. There are very few people doing general practice anymore; this is almost impossible in this generation. There

is just too much, the law is bigger and fatter than ever before. The *Criminal Code* reads like what the *Income Tax Act* used to read. It's big and fat and complicated. Whatever you are practicing, the body of required knowledge is vast, and the techniques and procedures are complicated, requiring most people to specialize to some extent. Most people specialize even more than 'to some extent'; there are family lawyers, corporate lawyers and so on. But you know what, you want to be a family lawyer you need to know corporate and tax, if you want to be a corporate lawyer you need to know family. How can you be a good corporate lawyer if you do not know that if you are doing a unanimous shareholder agreement there may be family law implications? Now, do you have to be an expert on family law? No but you should know that there may be a family law issue that must be addressed. And if we're not providing a trip-wire education - alerting people to the existence of a panoramic range of issues - then we are graduating people who are a menace to themselves and others. If you do not know that there is a problem, or there could be a problem, you are in trouble and you're in trouble for your client. Before I mark exams, I tell students if they can identify an issue it is worth fifty percent of the marks, because then at least I know that they had the understanding to address a problem themselves or enlist the appropriate assistance. If they were in the real world they'd go out and look it up or talk to someone. So to be a corporate lawyer, you do not need to be a family law expert but you need to know when there is a family law issue and you have to refer it to someone.

We're having a big debate at this law school, because we have a strong mandatory component in second and third year. There is a lot of controversy about that, but I believe to be both an educated good citizen and a competent lawyer you need to know about foundational components of our legal system and society such as corporate, family, and tax. If you want to go out into practice and you think that to be a corporate lawyer you don't need to know anything about family or criminal law, I do not think we have given you the basic building blocks to be an effective and safe practitioner.

They say on talk shows we want to hear from you, and I'd like people in the bar and in the profession to talk to the law school and tell us whether you agree or disagree with the ideas I've put out there, because we're going through this debate right now.

Let me know talk about the Mishpatim Israel International Law Program, a program I inaugurated a couple of years ago. The model is a three week study in Israel, where you get course credits at the Hebrew University of

Jerusalem, a school ranked in the top 100 universities in the world. The model I built off was an Australian program delivered at Hebrew University that focused primarily on constitutional and human rights law.

I tried to take a more expansive and integrated approach. The theme of the course is built around the book, *Start Up Nation*⁴ by Dan Senor and Saul Singer, which is an extremely influential book around the world. It tracks the progression of Israel into this high tech miracle. Israel is surrounded by countries that were boycotting it, with a huge traditional population coupled with the fact that most people are first- or second-generation immigrants, far away markets, and started with really no infrastructure; Israel has managed to become a world leader in innovation, high tech and business enterprise. So, the process is to give the students the book, tell them about a start-up, and then take them to a start-up company. This was very revelatory for me as a teacher; I had never actually seen a bio-medical start-up. In my fantasy world, I had thought it to be much more sophisticated than it was. A start-up is two people in a room which some centrifuges. That's a start-up; and to know that's a start-up - some guy who gave up his dental practice because he wants to create something that will deal with inflammation and the underlying disease is really something. It is just a couple guys taking real risks, just real people and they have bet everything, their careers, and families' nest egg. That's something you don't get out of reading the book.

The book discusses the impact of immigration, and how the experiences of individuals in their countries of origin contributes to their drive to excel. It exposes how the experience of serving in the army tends to teach people to be collaborative, to submit their efforts and themselves to rigorous self-scrutiny. The Israeli army is strangely non-authoritarian and that is thought to be one of the factors resulting in the spirit of independent-minded thought, expression, and action that contributes to a culture of entrepreneurship.

Now, let me return to the concept of integration and consider the Mishpatim program. I did not teach human rights or business in isolation, but instead I said, okay you have this high tech miracle, let us now consider some human rights and social integration issues. How do ultra-orthodox Jews fit into this? People who think that the truth is very much set out in ancient texts and that you should be studying the Talmud during your formative years instead of going into the army. It's a big problem in Israel, and we tried to

⁴ Dan Senor & Saul Singer, *Start-up Nation*, (Toronto: McClelland & Stewart, 2009).

speak with people in that community or those that have studied the problem. How do Israeli Arabs, many of whom come from very traditional environments, and are a national minority in a society with a strong sense of the Jewish mission, participate in this ultramodern economy? We went to Haifa, which is legendary for the positive relationship between Jews and Arabs there, and we talked to people from the Israeli Arab population and the Jewish Israeli population. Another year we spoke to an Israeli Arab who is heading up a government program to promote economic development among the Israeli Arab population and reduce the income gap between it and the secular Jewish mainstream. One of my favourite experiences from the program was when we went to an NGO where the director had spent her life working on workers' rights in Israel. Some of the most interesting things were what she told us about guest workers, and what it is like to come from a place totally outside the Middle East. There were horrific instances of exploitation, and many people lacked legal rights. We learned the whole story of how this was remedied. First, it was taken public and there was a lot of journalistic criticism, then court cases were heard, and finally at the end of the day, the state of workers' rights were greatly increased. We visited a Bedouin village, heard vehement condemnations of Israeli government policy from some quarters, and eventually heard a much different perspective from an Israeli legal academic. We heard from an Israeli Druze who was a senior army officer and now an academic and advocate for his community. We had a session with a Jerusalem Arab who is working on his doctorate in public administration at Hebrew University, has successfully started a major business enterprise, and could tell us about the cultural and political challenges facing commercial start-ups in his community. To sum up, with the program, we explore how legal, social, economic, military, and economic issues interact, and we do so in a way that combines the study and discussion of traditional classroom materials with encounters with experts and ordinary citizens from a highly diverse set of backgrounds and perspectives.

Now, I've gone back and forth twice with groups of people with very different views. It is not that Israelis don't have views: there is a joke that Israelis not only have an opinion about everything, but rather have two, and once they have heard the first version of their own will start to argue with themselves.

Many students come to the Mishpatim program with no context; they may have read about it in the newspaper, but to be in this tiny country and see the surrounding environment, is nothing like you've ever experienced

before. And people have radically different views on what's right and wrong there and if people ask "why Israel", I like to say we have in Israel all the problems of Canada but with an extra level of intensity and complexity. In fact, the government of this province has funded our program in part because we're facing the same problems here. We want to have a high tech culture here in Manitoba; how do you achieve that? How do you fit into the modern economy the traditional peoples of Manitoba? If you know anything about the local politics, you know we have a huge problem with integrating traditional societies and enabling them to enjoy success in this society. We in Manitoba, in Canada as a whole, have our own challenges of fairly integrating guest workers and immigrants into our society. Part of the role I play in the Mishpatim program is to attempt, as various components are delivered, to introduce students to the Canadian equivalent of the issue, and invite students to compare and contrast it with what they have just studied about the situation in Israel.

In creating the program, I had another major challenge. How do you get people with no background to deal with these issues of integration, in a way that they don't feel like they are being propagandized to and feel like they are getting a balanced perspective. This is no small challenge: I have done it twice and the feedback is extremely positive. There are never any complaints that we were not reasonably balanced. It is hard, but I want to share just a few initial thoughts. You do not get a balance by having one extremist here and one extremist there. It is not hard to find extremists; in fact it is easier to find extremists than a genuine expert. Secondly, you would think that the more balanced and nuanced perspective would come from academia – think again. That's not always the case: you can find very ideological and dogmatic people in academia. I found that some of the most insightful and fair-minded views were from activists in NGOs. I think the students get a lot out of that. I was always looking for a diversity of perspectives, people with a point of view, but with an ability to appreciate that there are other views as well. We try to get people from all over the spectrum, but staying outside the margins of extremism was particularly important because students came to Israel with no context. So if you heard something like an Israeli Jew denouncing Israel, regardless of whether they were right on that particular issue, you might think that this is necessarily true, which would give you a distorted understanding of Israel. I try to get people with a reasonably academic approach whether or not they are academics. By "academic" here I do not mean the very worst contemporary sense of "academic", which is an ideological conformist,

untested and untempered by reality, who thinks and speaks in recondite clichés, but rather someone who is informed about many different perspectives and able to explain their origins and critique their logic and factuality; who can identify and explain subtle connections and question conventional wisdom; who can express ideas with clarity, illustrate them with telling examples, substantiate them with facts and figures; who can provide students with a model of clarity, conciseness, and precision in expression.

The logistical challenges involved in this program have been daunting to say the least. Finally, accessibility was very important to me when setting up this program. We wanted a cross-section of the school to go. Typically, it costs \$6000 to \$9000 for a student to attend one of these overseas programs for a few weeks, and that would be inaccessible for most. I wanted the people in the program to be reasonably representative of the students in the school and they are. The only way we could do that was through a number of subsidies from the Canadian Friends of Hebrew University and the provincial government, and a number of other organizations. If you add the problems with creating an intellectually balanced program with the logistical challenges of establishing a program from 8000 miles and 8 time zones away, coupled with the fiscal problem of making sure there are sufficient funds to make it accessible, it is all quite a challenge. You must also be open to constantly monitoring the student experience, obtaining feedback, and adjusting the program components and manner of delivering them.

A concluding thought about integration. A concerning feature of what I have heard at this conference is a tendency to divide law school faculties into well-paid and high-status “academics” and a less well remunerated and officially respected group of clinical instructors. Integration in program delivery cannot be satisfactorily achieved without reasonable integration and equality among those who design and deliver education. Fifty years ago the revolution in Canadian law schools was to move away from programs primarily aimed at professional training and delivered by practitioners and towards programs ensconced in universities and taught by professors. We are now facing a potential revolution in the opposite direction. We need not choose one pure model over the other. Instead, we can aim to provide an environment in which students are encouraged to constantly test theory and practice against each other, to synthesize a variety of skills and perspectives, and leave law schools with a spirit of open-minded and courageous inquiry about the world and about their place in it.