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University? Or Every Great University Needs a  
Legal Studies Programme

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# Does Law Have a Place in the Modern University? Or Every Great University Needs a Legal Studies Programme

Roderick A. Macdonald \*

**Abstract:** Universities are facing increasing pressure to be relevant for students entering the job market. Many see the idea of a liberal arts education as doomed to disappear. Yet law faculties are under increasing pressure to become less professional and to broaden their curriculum with interdisciplinary courses in the liberal arts. Might it be that the study of law will reclaim the central role that it played in the University a millennium ago?

## INTRODUCTION

It is a special pleasure for me to be presenting this Lecture tonight at LSE. My affinity with this noble institution extends three generations.

I commence with the generation of professors who were my teachers and mentors. Two great scholars from LSE bulk large in my education, as authors of tracts that were obligatory reading in my Liberal Arts degree programme. Many of you will find resonances in my remarks about the University with the thought of Michael Oakeshott, whose ideas about teaching and learning are an inspiration today in my post-graduate Legal Education Seminar and for my approach to

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graduate supervision. But, while we share an understanding of what the University should aspire to be, we have quite different political views. Particularly in my teaching of administrative law at McGill, I am much more optimistic about the capacity of government to establish institutions and processes enabling humans to achieve a more just society. In this optimism, my perspective is shaped more by another distinguished Professor at LSE (coincidentally a former lecturer at McGill University and immediate predecessor of Oakeshott), Harold Laski. I knew neither, but am pleased to acknowledge the intellectual heritage they have passed on to me.

LSE is also home to two very good friends and colleagues who are my contemporaries. The Head of the Law Department, Professor Martin Loughlin, with whom I have shared cameo appearances at academic conferences since the late 1970s, must surely count among the finest Anglo-American administrative and public law scholars of the past half-century. Martin's deep understanding of the political economy of the real administrative law lived every day in agencies, boards, and commissions is matched by his incisive legal mind. This, I can assure you, is a lethal combination for intellectual adversaries and a model for mere mortals like me. Let me also acknowledge Professor Michael Bridge, who was an inspirational teacher, scholar, and colleague at McGill during the 1980s, and who taught me much about how to see, as the expression goes, 'the universe in a raindrop'. Michael is recognised around the world for his work in sales law and stands out as the leading voice for secured transactions law reform that addresses the complexities of modern financial transactions, while remaining faithful to the legacy of the common law.

Finally, I am thrilled to note that the staff cohort at LSE comprises two of the most wonderful students I have had the privilege of teaching. Kristen Rundle, who completed an outstanding LLM thesis in administrative law under my supervision, is now about to publish the fruits of her doctoral dissertation, a project, I flatter myself to think, that first emerged during her time at McGill. And then there is Grégoire Webber who patiently suffered through my undergraduate courses in public law only a few years ago. Grégoire, I hasten to add, is an epitome of the best Canadian-born public lawyers of his generation. You will grant me, I am sure, that one of the extraordinary recompenses of a career in law teaching is the pleasure of charting the achievements of one's students as their scholarly trajectory surpasses one's own.

I mention these intellectual mentors, longstanding colleagues, and recent students to make a central point about the contemporary University at its best – and about LSE as an instantiation of that aspiration. The University is at once a place of the past, the present, and the future. It is a site for conversation and contestation about intellectual excellence, about multiple dimensions of diversity – be this disciplinary, socio-demographic, political – and about engagement with the community – from the local to the global. In a word, in this conception, the University is a paradox of time and place: it exists now, but it also exists 'out of

time'; it exists right here, but it also exists both 'nowhere' and 'everywhere'. This is back story – these are the premises underlying the themes I'd like to develop in this public lecture.

I shall begin by recasting my advertised title, which is posed as a question – 'Does law have a place in the modern university?' This question I re-frame in the form of the assertive thesis stated in my sub-title – 'Every great university needs a legal studies programme'.

I argue that a legal studies programme should be a core component of every great University. Let me be clear about the scope of this claim. I speak tonight of a legal studies programme – of an endeavour, not of a particular arrangement of a tuition, or a label. The programme in question may be a standard undergraduate BA programme in a department of law; it may be a joint major programme combining law and business administration, or law and social work, for example; or it may be an interdisciplinary law and society programme; it may even be, as in North America, a higher degree programme open to students who have already completed an undergraduate degree. The nomenclature and the institutional form are less salient than the inquiry undertaken. Indeed, let me emphasise that it is the *questions* pursued in legal study as I conceive it – be these substantive, procedural, institutional, or professional – that matter.

These types of questions are inescapable in modern society. I shall come back to them in my final section. For the moment I shall merely foreshadow the inquiry with specific examples drawn from the everyday subjects of legal reflection.

A first point is that students of the law (whatever their age) must confront, in the particular, how *human beings organise knowledge*. Here is an example. Recently there has been much debate about same-sex marriage. This debate immediately engages a policy question 'why do we think of marriage as a two-party heterosexual union?' Close analysis of the psychology of conjugality and the socio-economics of high-affect human interaction leads us quickly to see that many of the policies supporting state recognition of marriage apply equally to all 'close personal adult relationships', whether conjugal or not. If we ask this type of question, we see that inquiry goes well beyond same-sex conjugal relationships. We would also want to ask why do we not support longstanding relationships between two siblings who cohabit? Or a similar relationship between an adult child and a parent? Or even all relationships of dependence and interdependence?

Students of the law also are required to reflect on the *forms and limits of the institutions* through which everyday human interaction is facilitated or disciplined. This often leads to a preoccupation with the pathologies of human conduct and dispute resolution: Why do we presume that courts and adjudication must be the backstop to any consensual process aimed at resolving conflict? Do we need specific rules, for example, about when a party is in breach of a contractual undertaking, as a precondition to turning a human failing into a specific litigious right? What conception of social institutions drives our desire to use law to create disputes by 'naming' wrongs?

Here is a third example. Students of the law are routinely compelled to consider issues of *justice*. Inquiry might start with the question why the damages awarded for a given personal injury caused by a person's negligence – for example, a pedestrian injured by a reckless bicyclist – should be the same regardless of the relative economic well-being of the parties. Why should the amount payable by an indigent cyclist who collides with a millionaire bond-trader be the same as the amount the millionaire bond trader cyclist would be required to pay an indigent pedestrian? (I'm assuming, of course, that the occasional millionaire bond-trader does ride a bicycle in London.)

Devoting academic – both teaching and research – resources to and encouraging direct scholarly engagement with these types of questions is a wise investment for a University, and not just because of their importance to society. Posing them explicitly and puzzling through the implications of the responses one offers as hypotheses for further reflection are, I believe, fundamental because these questions are intrinsically self-reflexive. It is difficult to address them in the abstract without, at the same time, seeing their application to one's own life. As will be apparent as I proceed, I believe that attention to these questions, by ricochet, has the additional advantage of better enabling the modern University to defend itself against its enemies, both external and internal.

My argument this evening proceeds in four steps.

I *commence* by briefly identifying some of the principal contemporary threats to the University, both external and internal.

I *then turn* to a consideration of the aspirational University, its ambitions and its purposes – obviously as viewed from my own perspective.

In a *third section*, I explore basic themes in University life as features of the quest for virtue.

My *final section* addresses the special contribution that a legal studies programme can make to sustaining this conception of the University.

## PRINCIPAL CONTEMPORARY THREATS TO THE UNIVERSITY

There is widespread agreement, at least within the scholarly communities in which I circulated, that the modern University is under assault. The usual suspects and the usual critiques are familiar. Here is a partial list: (1) Governments addicted to determining expenditures by measurable outputs, who insist on shaping the definition of productivity in Universities; (2) Business enterprises that claim graduates know nothing of importance and have no marketable skills; (3) Trade unions that see universities simply as elite institutions serving an exclusionary class system; (4) Religious and cultural minorities, whether of long residence or of recent arrival, for whom equal access to higher education is a myth; (5) Publishers

of populist newspapers seeking to increase circulation with an easy target to bash, who delight in anti-intellectualism.

Much goes unsaid or unacknowledged in this multi-pronged attack. In fact, each prong is actually a proxy for a different claim. Behind the 'value for money' argument often lie governments suspicious of sources of information and analysis they cannot control. Behind the business critique is a desire to externalise the cost of training and retraining employees to be efficient cogs in the 'knowledge economy'. Behind the concern expressed by organised labour are a frustration about class mobility and a disquiet about a social system that conceives knowledge as too precious to 'waste' on mere workers. Behind preoccupations about social exclusion may be found concerns relating to the quality of primary and secondary public education. And behind the journalistic assault on Universities lies Rupert Murdoch – and I shall say no more about that.

Some of these critiques and unspoken claims speak truth. Others do not. All need to be addressed. Few are. In general, these criticisms should not be feared. To the extent they have popular resonance, they at least show that the public considers Universities important enough to be worthy of attention. Further, they can be addressed. But they can only be properly attended to if the will to do so is present. And that, I fear, is at the root of the problem.

I believe that the threat to Universities that has the most potential for damage does not lie in criticisms voiced by those outside its doors. The threat is internal. It is a disease. It is capable of afflicting all, without regards to status, position, or politics. At different times and in different places, students, faculty, support staff, academic administrators, and Boards of Regents have caught the virus. And like all viruses, it propagates itself best when certain conditions are present. The virus must be virulent. Even better if unrecognised and unnamed. The host under attack must already be weak. The carriers of the virus must be part of a closely packed, not diffused, population. There must be neither an available vaccination, nor an easy and cheap post-infection treatment. These propitious conditions for viral propagation are all present in the University.

What, you may ask, is the virus that dares not speak its name? It is smugness. It is complacency – a delusional self-satisfaction among administrators, professors, and students. Surprisingly for an institution in which unbridled inquiry is meant to flourish, many of us are in denial about the seriousness of these external critiques. We have no adequate response to them because we are too busy or simply disinclined to ask 'what is a university?' and because we too often disdain to respond helpfully to a concerned public that genuinely seeks to know the answer.

I acknowledge that many – if not all – units of the University have the capacity to take up, and several are now actively engaged in serious inquiry into the pertinence of these critiques. But I want to make the case that a well-conceived legal studies programme can play a crucial role, and has a central responsibility for inoculating the University against the virus of complacency. In order to do so, I need first to explore in some detail the question that I have suggested that many of

us, as members of academy entrapped by denial, have largely avoided: ‘What is a University?’

I turn now to that question.

## WHAT IS A UNIVERSITY?

Often the question ‘what is a university?’ is answered by a quest to discern its purposes. The assumption is that universities have to be ‘good for something’. I say this assumption is misguided, and not just because the purposes usually identified are too limited. No doubt they are. We know that the code words ‘good for something’ really mean ‘good for getting a job’ – surely not the primary ambition of a university. However, it would be just as wrong to say that universities are simply ‘good for advancing knowledge’.

Of course, I believe that a university is a place where people do acquire habits of mind and habits of action that will be highly valued in employment settings. I have in mind here the list of attributes upon which we are called to comment in writing letters of reference: creativity, mental agility, time management, the ability to express oneself clearly and cogently, industry, initiative, the desire to learn in interaction with others, and so on. But these same habits will be also be highly valued in any setting involving other people – in voluntary organisations, in politics, in neighbourhoods, and even in families. Notice the point. The *consequences* of a good university education may be that a graduate is more marketable. But enhanced marketability is not the *purpose* of the university. Indeed, the habits of mind and character acquired by university graduates can enable them to make contributions in settings beyond the workplace.

Likewise, I believe that a University is place where knowledge is gained and shared, where scientific discoveries are made, and artistic works are generated. But again, this is not the *purpose* of the University, although it is a happy *consequence* of the activity that is central to university life.

A University is not a factory that is organised and managed to produce a product like, for example, skilled labour, knowledge, and scientific discoveries. A University is not a place where old knowledge is deposited by members of the academic staff into the new and empty vessels that are students, and new knowledge is created by them only because it is useful. Teaching and learning have multiple vectors. No head is ever empty. No one’s role is to passively wait at the filling station for a tank-full of knowledge. None of us have such complete knowledge and wisdom that we have everything to teach and nothing to learn from students, administrators, secretaries, and janitors.

Some years ago, I attended a ceremony at which a former student was sworn in as an Appeal Court judge. The newly minted judge was kind enough to say that the best course she ever took at University was my undergraduate Administrative

Process course. Before I could swell up with pride about being singled out for my great knowledge and expertise, she explained why in a manner that severely mitigated the *hubris*. In summary, she said: ‘In this course, we were all teachers and we were all learners. Professor Macdonald acknowledged the whole class as having contributed to ideas in one of his articles. But this understates the point. The best lesson I ever received about distributive justice and institutional design came from Mrs. X – a mother of three – who made a class presentation on the “family as regulatory agency”.’ ‘Surprisingly’, she continued, ‘I have never practiced “administrative law” as such. But every field I did practice – family law, real estate, successions – I came to see as a field of administrative law.’ She concluded, ‘I don’t think I learned any particular “thing” during my law school career. In retrospect what I really took away from my legal education was a deeper understanding of myself.’ I admit that these comments were perhaps a bit over the top, but I believe the sentiment was genuine. She saw that what mattered was not something she learned or some skill she acquired that was intended to enable her to do something in particular.

Like Oakeshott, I believe that a University is not an ‘enterprise’ association dedicated to the pursuit of some universal good and imposing this quest on its members. A University is a richly-textured assemblage of environments, opportunities, and inquiries that encourages all its members to seek excellence, without stipulating the specific content of that excellence. Every activity – teaching, learning, research, scholarship, and everyday collegial interaction – is an occasion for nurturing this ambition.

The excellence that characterises a great University is not just a rarefied intellectual excellence, or theoretical wisdom (or in the words of Aristotle, *sophia*). It is also practical wisdom (or again in Aristotle’s words, *phronesis*). However much governments, educational administrators, and corporate managers believe that objective criteria may be stipulated and measurement techniques perfected, excellence in the University cannot be measured. Neither points on a grid, nor inventories of prizes, awards, and funding monies received are determinate of the greatness of a University. For excellence in the University is above all *moral* excellence. Borrowing once more from Aristotle, we might say this moral excellence is *arête* (virtue).

## THE QUEST FOR VIRTUE

I have already suggested that a University is not a purpose-driven monolithic institution. Plurality and diversity characterise its structure and activities. This said, many people conclude that there are particular types of inquiry, particular disciplines, perhaps even particular jobs that alone are conducive to the pursuit of virtue. This is a false conclusion. Every unit and every programme in a University has a role to play. Virtue does not belong only to the humanities, still less only to



philosophy. Of course, *virtuosity* in performance – skill (or *techne*) – may take different forms; there is no template that can be applied indiscriminately to the humanities, to the sciences, to medicine, to engineering, to business administration, or to law. The character of the inquiry and reflection that conduces to virtue has, however, no disciplinary limits.

In the University there are a number of habits of the heart and habits of the mind that we attribute to those whose attitudes and actions might be characterised as virtuous. Some speak to how we conceive knowledge. Virtue in our search for understanding implies a reverence for the accumulated wisdom of the past tempered with an acknowledgement of its contingency. Virtue calls forth a commitment to the protocols of free inquiry, disciplined by methodological rigour and respect for evidence. It demands respect for new knowledge and new frameworks, and humility in the face of the challenges such knowledge and frameworks pose to orthodoxy. But virtue demands more. Virtue means seeking a performance of one's commitments that speaks of who we are.

Acting virtuously does not simply mean doing a job in order to make a living; acting virtuously is a way of being alive. What do I mean by that? The psychologist Barry Schwartz captures the idea this way: Virtue demands moral will – the desire to act with integrity and justly towards everyone. Virtue also demands moral skill – the ability to reason about how to act appropriately in the life situations we confront every day. Here is a personal story that parallels an example given by Schwartz.

I began my career at a University where the academic staff became unionised shortly after I was hired. Our first collective agreement spelled out at great length academic duties, drawing distinctions between the tasks that could be assigned to, and were the responsibility of contract teachers, tenure track teachers, tenured teachers, and holders of Chairs. Every task was described in measurable, physicalist terms. Be present at one's office during the work week. Teach three 45-hour courses each academic year. Prepare teaching materials. Set and correct examinations. Write and publish 'X' number of articles per year. Serve on no more than one University and two Faculty Committees. And so on. 35 job rules, and not a single one of them spoke about a human relationship.

I understood and supported the impetus to unionisation, but the outcome of the bargaining process left me cold. Was this what I understood my vocation as University teacher to be? To perform an inventory of tasks in which a human being was never mentioned, and human interaction was merely implied? But as I considered my conundrum, I came to realise that no list of tasks could ever capture what it means to commit oneself to a virtuous performance of one's calling as an academic. At age 27, I had the desire to excel, and I may even have had both theoretical knowledge (*sophia*) and pedagogical skill (*techne*), but I had neither the experience nor the maturity to fully exploit that desire. I lacked practical wisdom (*phronesis*) through which these other talents could be marshalled in pursuit of virtue. No collective agreement could ever spell this out, because it is

not possible to reduce to ‘job rules’. It is acquired as habits of mind and habits of the heart are acquired – in practice and through apprenticeship.

Let me trace out the specific implications of this conception of virtue by reference to five hypotheses about how to understand and attend to virtue in the University as an idea – realised in some way in every University, and realised in some larger ways in the great Universities.

The University is a *system of offices, roles, processes, and commitments*. All are important not for themselves but for the liberation of human energy and capacity they make possible. A University is a site of constantly circulating inputs and outputs: people interacting with people exploring ideas and experiences.

The University is a *social institution with porous structures and processes*. Structures and processes are important for their capacity to absorb experiences and ideas of the ambient culture external to them. The university enables best when it does not suffer from operational closure. Experiences and ideas from unusual places are as powerful as those flowing from structures specifically devoted to generating such ideas.

The University is at once *nowhere, everywhere, and right here*; it exists both right now, and eternally. To imagine that the university must be responsive only to a particular configuration of society as it exists in London today is to imagine that the university exists only in London today. Ideas may come and go; their popularity may wax and wane. But they remain as the legacy of the past that shapes the inheritance of the future. And ideas circulate world-wide, as the University today becomes a repository of multiple sources of knowledge and insight – as much in the liberal arts as in the sciences.

The University is *anti-instrumental*. The achievements of its members should be understood for the value and meaning of the doing itself. When recognition is instrumentalised within an institution, the quest for recognition comes to trump the quest for virtue. A University or an academic staff without virtue is preoccupied with tabulating how it has influenced others; a virtuous University comprises an academic staff that acknowledges the influence others have had upon it.

The primary challenge for the University today is how it can create the conditions of excellence that inspire staff, students, and faculty to seek these cardinal virtues. This means learning how *to celebrate the virtue of the uncelebrated* – of those who have not sought recognition – and to recall what they have stood for, as reflected and remembered in the quest to live virtuously of those who live on when they are gone.

## VIRTUE IN THE STUDY OF LAW

You have been very patient with me as I have set the stage for a defence of my central thesis: every great University needs a legal studies programme. I actually

have little to add to what has gone before. Most of my defence of legal studies rests on my convictions about the nature and ambitions of the contemporary University. If I have failed in persuading you that this vision for the University has merit, my arguments about the special role and responsibilities of legal studies programmes will be equally unconvincing.

But suppose I am right about the university as an instantiation of Oakeshott's conception of a 'civil' association – a community of learners in quest of virtuous lives. Why do I believe that a well-conceived legal studies programme is a privileged site for pursuing this ambition, and inoculating the university against the virus of complacency? What about legal study will give the University the strength to repel unfounded criticisms, and the courage to confront and respond confidently to critiques that do have merit?

I make four claims. These touch, in order, (1) the primary objects of legal inquiry, (2) the methodology of legal inquiry, (3) the types of knowledge and insight that inhere in legal inquiry, and (4) the moral demands that law imposes on its students, whatever their age or experience. In developing my hypotheses, I come full circle to my introduction. If my basic conception of the University finds particular resonance in Oakeshott's thought, my understanding of legal studies follows paths of inquiry traced by Harold Laski.

Here is my first claim. Studying law is a powerful inquiry into *inter-personal and social relationships*, into the complexities of people in interaction with each other. Not just casual encounters, although many legal relationships are of this type. Not just hierarchical impositions of power, although some legal relationships are like this. Law is concerned with the institutions and processes through which human beings fashion just relationships. The study of law demands understanding of human beings as purposive, and of human institutions as means-ends complexes. The student of law learns to be a wise counsellor on questions of institutional design. Not a social engineer seeking to dictate human conduct, but an architect of agency-promoting, facilitative social structures that are on offer to citizens and governments.

Second, legal study is grounded. It proceeds from the *particular to the general*. Legal learning is grounded in the practice of understanding and solving specific problems that arise in everyday life. Abstract, theoretical knowledge is a canvass on which students of law learn to paint particular proposals for addressing novel situations beyond the contemplation of general rules. Law is concerned with the conditions under which human freedom can be pursued within a series of offices, roles, and rules. The law student acquires the discipline to ask not 'what does the law permit me to do?' but rather to reflect on answering the question 'what should I do, all things considered?'

Third, legal study involves acquiring a range of capacities and skills for mediating the *experiences of the quotidian with the ideals of the transcendent*. Law graduates are dispersed into all sectors of society, both domestically and internationally. Many do not practice the profession in its traditional forms. But

the goal of a well-conceived legal studies programme is that all graduates take with them the everyday lessons of law and the lessons of everyday law. And they do so with a clear understanding of what it means to be committed to the virtuous deployment of their knowledge and expertise. Knowledge of the law enacted by Parliaments and applied by courts is a small part of the endeavour. A law student learns to traverse the terrain of law that is promulgated by international organisations, and by the local chapter of the Red Cross society. And a student of the law also learns to understand the internal law of multi-national corporations like Reebok, the informal law of a neighbourhood, and the legal *mêlée* of the University. Every setting demands attention to issues of legitimacy, due process, and justice; how one engages with everyday law in quotidian sites is the litmus test of legal virtue.

Fourth, studying law offers members of a community a *powerful lens* through which they may view and judge themselves and their community. Law is not just a thing. It is more than a practice. Law is a human accomplishment. Over time, various dimensions of formal (or official) law and informal law come to express a society's values and convictions, as well as its prejudices and pathologies. Students of law learn to act virtuously within the confines of legal practice. They learn to frame arguments that bring scrutiny to accepted norms, accepted processes, and accepted outcomes. But students of law learn to stand outside the law as well. True engagement with law is inescapably self-reflexive and self-critical.

These are four dimensions of legal study that lend themselves to the task of inoculating the university against the virus of complacency: a focus on institutions and processes within the University as means-ends complexes that need continual questioning; a focus on moral justification for action, and not just legal authority; a concern for holding the everyday, the implicit, the customary up to the scrutiny of the transcendent, and the reverse; and a willingness to be self-critical, with the courage to confront the critiques of others.

## CONCLUSION

I should now like to conclude. Every field of inquiry in the contemporary University should be devoted to the pursuit of virtue, of moral excellence. As such every unit can be a site of the self-critique that inheres in a great university. Regrettably, it is now rarely the case that every unit carries this burden. The leaders of many great institutions have surrendered to the whims of political accountability and the instrumental logic of business demand for so-called skilled labour. Often they have done so smugly and in self-delusion, believing they remain faithful to the foundational aspirations of the University. Too many of the composite units of our Universities have quietly acquiesced, as have their academics and students.

Especially troubling to me, so have some legal studies programmes. But many have not. I acknowledge that Universities are facing insistent demands to be relevant for students entering the job market – whatever that means. Many academics worry that the idea of a liberal arts education is doomed to disappear. Even law faculties and law departments are under increasing pressure to become mere antechambers to the legal professions. Only today the *Times* Higher Education section reported that Pearson is in the bidding to acquire the College of Law. We can assume that a University-based law programme will be the next target.

But the inquiries and aspirations of legal study are incompatible with passive compliance. No respectable legal studies programme can avoid the self-critique inherent in genuine engagement with the law. Legal studies departments can be, and have the responsibility to be, sites of reflection on the purposes of the university, as an institution, as a collection of roles, and as a community. Faculty and students of legal studies departments can also take the lead in translating such reflections into specific institutional practices and policies. In holding fast, legal studies programmes can be the anti-virus with which the University can be vaccinated before the malign virus fatally weakens it. And I might add, as a personal coda to these reflections, that from Laski and Oakeshott, through Loughlin and Bridge, to Rundle and Webber, I can see in LSE a vindication of my claim that ‘every great University needs a legal studies programme’.