

Part 2—Some Pedagogical Insights

Lost in Translation: Social Realities, Insite, and the Law in Legal Education¹

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What comprises a legal education? What is its breadth and depth? What approaches, processes and content fulfill our responsibilities as legal educators?

The first of three elements of the University of Victoria Faculty of Law's Mandate states:

The Law Faculty's mandate is to:

- (i) provide legal education, scholarship and public service with a critical, interdisciplinary, policy-oriented focus that contributes to the attainment of justice and sees law as a dynamic process that cannot be fully understood apart from its context.²

This is a lofty sentiment tucked away in our foundational documents, but how do we translate it into pedagogy?

The *Insite* case appears destined to be taught in first year constitutional law classes. The British Columbia Court of Appeal has issued a provocative judgment, the Supreme Court of Canada is scheduled to hear the case in May 2011, and any decision is likely to contribute to foundational principles of law.

It will become one case in a crowded course syllabus, and be given perhaps one class time of instruction. My concern is what will be lost in legal education in the process. This article develops this concern and, in relation to this case, explores an effort to teach law in the spirit of the Law Faculty mandate quoted above in order to fulfill its vision and objectives of legal education.

This educational effort occurred in the spring of 2010, in a first year class called Legal Process. For two days we focused on the realities of intravenous drug users in the Downtown East Side of Vancouver (DTES) and the *Insite* case that was our legal system's response to this complex human and social reality.

The students had already encountered the courts' response to these realities through an assignment the previous September in which they had analyzed the section 7³ portion of the trial judge's decision.⁴ However, despite the trial judge's extensive presentation of the realities of the DTES, this exercise examined

the realities of intravenous drug users in the DTES through only the perspective of what the judge found was factually relevant to the legal issues. As the organizer of the two-day sessions held in January, my purpose was to invert this. We began by exploring the complex human and social realities of the DTES, including the roles of social and political organizations and institutions. The process was to then understand the nature and functioning of law in this context. This included an openness to how the law fit well and facilitated the concerns and needs of various people and groups, but also to explore where the law was absent, ill adapted or operated contrary to the needs and wellbeing of those in the DTES.

The students first viewed the documentary *Fix: The Story of An Addicted City*, which presents what transpired in the DTES community prior to the creation of Insite. It explores the realities of the DTES and intravenous drug use through the perspectives and experiences of those whose lives would be affected by the closure of Insite.

The film screening was followed by a panel of the following individuals who spoke to the issues related to Insite from their diverse experiences and perspectives:

1. VANDU:⁵ Board members Ann Livingston and Jackie Robinson;
2. Philip Owen: The mayor of Vancouver who was instrumental in the creation of Insite;
3. Heather Hay: Director of Addiction, HIV/AIDS and Aboriginal Health Services for the Coastal Health Authority;
4. Sheila Tucker: Counsel on Appeal for the Coastal Health Authority;
5. Paul Riley: Counsel for the Attorney General of Canada; and
6. Doug Lang: A police officer in the DTES who participated in the documentary *Fix*.

Prior to the panel discussion, the students were

asked to consider the following as each person presented: their goals and objectives and those of the group they represented; whether and how the law was relevant to achieving their objectives; and whether the law operates positively or negatively in relation to their needs and objectives and in relation to the creation of Insite.

The following morning the Legal Process small groups met to follow up these themes. The instructors led discussions that explored how law functions in the DTES, its effects, and how well it is able to respond to the pressing and complex realities and concerns that were highlighted in both the film and in the panel discussion. That afternoon, the students, in groups of four to six students, completed a creative mapping exercise that explored and represented emerging themes and then shared these with their classmates.

The classrooms then emptied, and as instructors we were left to reflect on and evaluate what had transpired and what had been achieved.

The students provided written feedback on the sessions and this was remarkably positive and helpful. We summarized this into charts and spreadsheets to assist us in a follow up meeting to evaluate the sessions. The students' feedback indicated the panel was a highlight of the two days. A recurring theme that emerged was the value of understanding the context for the court proceedings, and the relevance of the material presented in the documentary *Fix*. The flavour of this feedback conveyed an enthusiasm that in my view reveals some deficits in current legal education. Clearly, student enthusiasm alone is an unreliable guide for legal education, as it may not align with legal learning. However, here I think it did. It related not simply to an interest in the concerns of the DTES, but to how the law figures in this landscape. For many students, this nexus is an important motivator in their decision to study law. Too soon in legal education we settle into a one-dimensional approach that is anchored in presenting principles of substantive law, and in which students are disconnected from their experiences prior to law school. This may overstate the point, but I do not think it does so greatly.

A reason for this is that the social context with which students relate is often largely absent from court decisions. Using these decisions as the focal point of instruction, our explanation of social context tends to be constrained by how judges have selected the legal issues and presented the “relevant” facts. This is apparent in reading the British Columbia Court of Appeal decision in the *Insite* case.⁶ The critical actor behind the creation of *Insite* has vanished. It was through the extraordinary efforts of an unconventional mayor that *Insite* came to be. Yet this crucial aspect of social and legal context, that of municipal government, disappears entirely from the legal narrative and analysis.

This is also apparent from the complete detachment of the Court of Appeal’s decision from the social context of intravenous drug users in the DTES and *Insite*. While the trial judgment⁷ is rich in social context, Justice Hubbart characterizes this in paragraph 91 as “a lengthy discussion of the background facts that have little direct relevance to the legal issues before this Court . . .”⁸ This is peculiar because Justice Hubbart bases her constitutional division of powers analysis in part on the principle of subsidiarity, “that law-making is often best achieved by the level of government closest to the citizens affected and thus most responsive to local distinctiveness and to population diversity.”⁹ Yet the argument is left abstract and with considerably diminished force by omission of the context that documents this. A consequence of this omission may be that the Supreme Court of Canada, at a greater distance from these relevant realities, will be less able to perceive and understand how the local social context gives force to the majority’s reasoning.

Thinking ahead, when these judgments with their selective presentation of legal issues and relevant facts are taught in a law school classroom there is a real risk, if not a certainty, that an understanding of how the law functions in the DTES will be fatally diminished. This will have been rendered invisible, and a significant dimension of legal education will be inadvertently omitted. Some students will inevitably be left with a sense of dis-ease that their interest in the legal dimensions of this social and political

reality has been sidelined or ignored altogether.

This returns to my earlier point of legal education connecting into the enthusiasm that the *Insite* sessions tapped in to and what underlies this. Teaching the law as we do through court decisions is an essential element of understanding and learning law, but much about law is missing as a result. Equally essential is understanding the messy and complex intersections of law with human and social realities. While we can contain and compartmentalize the former, the latter do not reduce themselves to conceptually simple frameworks or formulations. Looking ahead to legal practice, contextualizing the law in this way is helpful in teaching students to prepare for legal work, for issues do not arrive in neat packages, the needs of clients are complex and diverse, and the range of circumstances and information that may become relevant is broad.

In addition, connecting into student enthusiasm for the social context in which law operates fits well with the Mandate of our school. It refers to learning law in a way that “contributes to the attainment of justice.” Learning the law by sifting through what the courts have decided are legally relevant facts and legal issues, such as section 7 rights or the division of powers, will not fulfill this work of legal education contributing to the attainment of justice. The learning of substantive law is integral to legal education. However, when the human context is diminished by the legal method and this method dominates our teaching, it inevitably alienates those students for whom legal work should pursue justice. It will require more perseverance than it should, and more than some students possess, to maintain this link.

Even if the priority for legal education remains a study of substantive principles, this two-day session on the context within which the law operates was a success. The British Columbia Court of Appeal issued its judgment the day following the sessions, and in the community event organized by my colleagues shortly afterward to discuss this decision the room was crowded. Faculty and students participated in an engaging canvassing of how the Court of Appeal defined the issues and articu-

lated the law. The group participated in exploring the assumptions inherent in the decision and its ramifications.

I do not mean to suggest that all cases can or should be taught with the rich contextual approach advocated here. This would skew legal education in one specific direction at the expense of other important perspectives and content. However, the weight of legal pedagogy currently skews legal education in the direction of a one-dimensional presentation of the principles of substantive law. What is lost as a result is an understanding of and engagement with the essential human and social realities of law.

One of the benefits of incorporating this approach in to legal education and its content is to provide many students with much-needed relevance and to engage their legal education with their personal backgrounds, experiences, values and beliefs. Without overstating it, in the year since the Insite sessions I think that I have seen the positive effects of the session carry forward in the lives and legal studies of some individual students and I have also seen it ripple out through other aspects of our school's life and work.

Notes

- * Senior Instructor, Faculty of Law, University of Victoria.
- 1 This article addresses the requirements of legal education through referencing a two day program for first year students in the Faculty of Law at the University of Victoria. The program was part of a course called Legal Process and it studied the role of law in the social realities of the Down Town East Side of Vancouver (DTES) as it affects those who use intravenous drugs. The program was offered on January 13th and 14th, 2010. While the program attempted to explore these realities in some depth, this was limited by the time allocated. While this article advocates incorporating the approach to legal education that was followed, such programs explore many dimensional realities that will affect students in diverse ways. Careful thought, planning and preparation are important. One student approached me afterwards to say that the DTES

is their home and it was difficult to sit through small group discussions where the dominant focus was realities of intravenous drug use and not the other aspects of the community which is their home. Another student stated in their written evaluation that they and their family have difficult personal history with the issues covered, and this highlights the risks inherent in sessions such as this. This kind of response was anticipated, and in the afternoon prior to the all day sessions the students met in small groups and were told the nature and purpose of the sessions, the topics that would be covered, and the materials that would be used. However, this clearly was not sufficient to prepare this student for the sessions.

I would like to express my appreciation to my Legal Process colleagues for their willingness to instruct a program that they did not create. They gave me a free hand to craft the program as I thought best, and while they were consulted as it developed, the planning was made easier by the latitude that was provided. I also greatly appreciate their willingness to be creative and innovative in their approach to legal education, particularly in light of the comments above concerning the difficulties inherent in the program. In particular, my thanks to Professor Rebecca Johnson for developing the mapping exercise assignment for the afternoon of the second day that formed the culmination of the sessions.

- 2 **Strategic Plan, Faculty of Law, University of Victoria, February 2003.**
- 3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 7. Section 7 states:
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
- 4 *PHS Community Services Society v Canada (AG)*, 2008 BCSC 661, [2008] BCJ no 951.
- 5 Vancouver Area Network of Drug Users.
- 6 *PHS Community Services Society v Canada (AG)*, 2010 BCCA 15, [2010] BCJ no 57.
- 7 *Supra* note 7.
- 8 *Supra* note 6.
- 9 *Ibid* at 172.