Taking Up the Challenge of a Trinity Western University Law School

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INTRODUCTION

In 2012, Trinity Western University [TWU] began the process of opening its own law school.[1] After initially receiving approval from the Federation of Law Societies of Canada [FLS], three of Canada's law societies – British Columbia [LSBC], Upper Canada (i.e. Ontario) [LSUC] and Nova Scotia [NSBS] chose not to approve TWU's law school as valid preparation for articling within their own jurisdictions.[2] These decisions are currently being litigated before the courts.[3]

TWU's proposal to form a law school has deeply challenged the legal community in Canada. Both the legal profession and the community of law schools have struggled with how to come to terms with and articulate a response to this challenge. Part of the reason is because the nature and the full extent of the challenge are not clear. Behind all of the rhetoric used regarding the protection of the public, non-discrimination and religious freedom, lurks a profound vagueness in our understanding of the relationship between legal education, the legal profession and society as a whole.

The issue that has occupied our attention the most is whether TWU should be allowed to open a law school while also maintaining its mandatory "Community

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[1] See the Federation of Law Societies of Canada, "Canadian Common Law Program Approval Committee Report on Trinity Western University's Proposed School of Law Program" (December 2013); and the Federation of Law Societies of Canada, "Special Advisory Committee On Trinity Western's Proposed School of Law Final Report" (December 2013) [FLS Advisory Committee Final Report]. Both reports can be accessed online: <http://flsc.ca/resources/new-common-law-programs-2012-14/>.

[2] Law Society of Upper Canada, News Release, "Treasurer's statement regarding vote on TWU law school" (24 April, 2014) online: <http://www.lsuc.on.ca/newsarchives.aspx?id=2147500101>; Law Society of British Columbia, News Release, "Proposed TWU law school not approved for Law Society's admission program" (31 October 2014) online: <https://www.lawsociety.bc.ca/newsroom/index.cfm>; Nova Scotia Barristers Society, News Release, "Council Votes for Option C in Trinity Western University law school decision" (25 April 2014) online: <http://nsbs.org/news/2014/04/council-votes-option-c-trinity-western-university-law-school-decision> [NSBS News Release].

[3] The British Columbia and Ontario matters are still in the process of being litigated. In Nova Scotia, Justice Campbell recently handed down a decision on the matter, on January 28, 2015 (*Trinity Western University v Nova Scotia Barrister's Society*, 2015 NSSC 25 [*TWU v NSBS*]), which has been appealed by the Nova Scotia Barrister's Society. For further information on these matters, and for regular updates on TWU's law school, see Trinity Western University, "School of Law", online: <http://twu.ca/academics/school-of-law/>.

Covenant", which is effectively a code of conduct.[4] The primary concern of the law societies opposing TWU's law school proposal is that the Community Covenant discriminates against LGBT people by restricting allowable sexual conduct for community members to only that which occurs within heterosexual marriages.[5]

Despite the verbiage that has dominated the dialogue so far, I will argue that the heart of the issue regarding TWU's proposed law school is not actually about balancing religious freedom and LGBT equality rights. Rather, what is at stake is better understood in terms of the nature of legal education, as a *discipline*. TWU's proposed law school challenges the dominant discipline of Canadian legal education, its values and vision of the 'ideal lawyer', by proposing an alternative that is grounded in religious commitment.

It is tempting to see the TWU law school situation as posing a stark choice between two competing visions of legal education – the civil and the religious. But such a view depends on how one understands the relationship between members of the legal community and the values and ideals that guide it. It is possible to move past making a choice between two competing options (pro or anti TWU) by embracing the active role of jurists in shaping the meanings and values by which legal education (and the legal profession) is constituted. This approach militates against taking sides (either on the question of balancing religious freedom and LGBT equality rights, or endorsing one of the competing sets of ideals of legal education), suggesting instead that these diverging

[4] Trinity Western University, "Community Covenant Agreement" (accessed 22 April, 2015), online: <http://twu.ca/studenthandbook/university-policies/> [Community Covenant].
[5] The specifics vary quite widely between the law societies as well as within each law society. *TWU v NSBS*, *supra* note 3, provides one of the clearest articulations of most of these reasons. Also helpful are the transcripts taken during the open meetings at the Law Society of Upper Canada (see Law Society of Upper Canada, "Trinity Western University (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/> [LSUC TWU webpage]).

positions must work together in their differences to constitute the discipline of legal education.

Re-imagining the nature of the challenges posed by the TWU law school proposal in this way orients us towards a vision of the future of legal education that is hopeful and vibrant, fostering meaningful engagement between the legal profession and the various aspects of human life, including (especially) the life of religious faith.

RELIGION VS NON-DISCRIMINATION OR THE NATURE OF LEGAL EDUCATION?

What does the rejection of TWU's law school proposal by the three law societies mentioned earlier imply for the future of legal education? I argue that what is really at stake is the understanding of what it means to protect the public interest, and the way that this notion presses in upon the way that legal education, its regulation and its values, are conceived.

The refusal of the TWU law school proposal by the law societies appears to be primarily about 'making a statement' about the importance of protecting and supporting LGBT equality rights in the legal profession.[6] Most of the arguments for and against the TWU law school have been framed in terms of balancing between LGBT equality rights and religious freedom.[7] The point leading to refusal by the law societies is that the legal

[6] The language of "making a statement" came up in the *TWU v NSBS* decision, *supra* note 3 at para 264. Also see *TWU v LSUC*, 2015 ONSC 4250, at para 118, where it is recognized that the law society is properly concerned to be *seen* to be protecting the public interest.

[7] See, letter from Trinity Western University to Federation of Law Societies of Canada Special Advisory Committee (17 May 2013) in the FLS Special Advisory Committee Final Report *supra* note 1, Appendix B [TWU Letter to FLS].

profession should not tolerate the perspective and practice of TWU's Community Covenant because to do so would compromise its mandate to protect the public.[8]

This perspective emerges out of a growing sensitivity in Canada (and America) to the struggles of the LGBT community.[9] Given the battle waged by lawyers and law societies everywhere to improve the public image of the legal profession, resistance to the TWU law school is meant to show that the legal profession is not out-of-step with matters of public concern and popular opinion.[10] It is difficult to underestimate (or even to quantify) the influence of, for example, the letter sent from the Bank of Montreal Financial Group to the LSUC petitioning directly against the approval of TWU's law school proposal.[11] The sheer quantity of opinions expressed on this matter seems to require the law societies to take a public stand on the issue, even if only to maintain an air of social relevance.

Although rejecting TWU's law school clearly makes a *statement* about the LGBT equality rights, it does not necessarily make a *substantive contribution* to strengthening those rights. In the *TWU v NSBS* decision, Campbell J. found that the disapproval of TWU's law school was not rationally connected to achieving the goal of promoting

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[8] This was the position taken by the NSBS (see *TWU v NSBS*, *supra* note 3 at paras 194 and 240).
[9] In recent news, there have been several notable CEOs in America that have taken a public stand on legal issues regarding discrimination on the basis of sexual orientation. For example, Tim Cook, the CEO of Apple, took a public stand against state laws that protect religious freedom at the expense of rules protecting against discrimination on the basis of sexual orientation (Tim Cook, "Pro-discrimination 'religious freedom' laws are dangerous" (29 March 2015) online: Washington Post <http://www.washingtonpost.com/opinions/>). Other notable CEOs have taken positions against discrimination against gays and lesbians more generally, including Warren Buffet (Interview of Warren Buffet by Poppy Harlow (31 March 2015) online: CNNMoney <http://money.cnn.com/2015/03/31/news/indiana-religious-freedom-law/>).
[10] Campbell J. addressed a similar argument raised by NSBS on the matter of maintaining public confidence (see *TWU v NSBS*, *supra* note 3 at paras 194 and 255).
[11] Letter from Simon A Fish, Bank of Montreal Financial Group to the Law Society of Upper Canada (26 March 2014), online: LSUC TWU webpage *supra* note 5<http://www.lsuc.on.ca/twu/>.

LGBT equality rights.[12] For him, preventing TWU law school graduates from joining the Nova Scotia professional community does not in fact address discrimination against LGBT people within the Nova Scotia's legal community.[13] 'Making a statement' is not in fact 'protecting the public interest'.

The problem is that 'making a statement' through rejecting TWU's law school application alters the way that law schools and legal education are constituted in Canada. In the *TWU v NSBS* decision, Campbell J. found that the NSBS's rejection of TWU's law school was not really about LBGT equality rights,[14] but was an attempt by the NSBS to extend its power over the legal profession to include the regulation of legal education.[15] Since the FLS determined TWU's proposed law school meets the requirements to make it a valid legal education, the NSBS's subsequent rejection of the TWU law school on the basis of the discriminatory effects of the Community Covenant re-casts the definition of legal education to include considerations independent of the substance of the education –

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[12] *TWU v NSBS*, *supra* note 3 at paras 244-264. In this passage Campbell J. discusses several different ways in which the disapproval of TWU's law school is not rationally connected to advancing LGBT equality rights, and it is actually somewhat random and that it is an empty politically/ideologically statement that hurts (religious freedom) far more than it helps (LBGT equality rights).

[13] Campbell J. found that there is no harm to LGBT people if TWU law graduates are allowed to practice law in Nova Scotia: "There is no evidence beyond speculation that LBGT people in Nova Scotia are harmed in any way, however slight, by living in the knowledge that an institution in Langley British Columbia, which like any number of religious institutions in Nova Scotia, does not recognize same sex marriage but which properly educates lawyers who can practice law in Nova Scotia, where discrimination within the profession is strictly forbidden" (*TWU v NSBS*, *supra* note 3 at para 254). In addition, preventing law graduates from TWU practicing in Nova Scotia does not prevent people from entering the legal profession that might discriminate against LGBT people: "Not accepting a TWU degree will not prevent any more bigoted lawyers from practising here than refusing the accept [sic] law degrees from other universities" (*ibid* at para 257).

[14] *Ibid* at para 3.

[15] *Ibid* at para 171. Also see the strongly chosen words of Campbell J. at para 180: "The NSBS action is not directed toward preventing discrimination against anyone in Nova Scotia. It is not intended to prevent anyone from being treated unequally in Nova Scotia. It is not directed toward the academic qualifications of the graduate. It is not directed toward any lack [sic] ethical training with respect to equality rights. It is directed squarely toward a university policy. The policy is the subject of the regulation. The outrage, sense of emotional pain, minority stress or hurt feelings that some Nova Scotians experience from knowing that a person trained at a university in British Columbia that does not recognize same sex marriage can still potentially become a lawyer in Nova Scotia, does not change the fact that what the NSBS is purporting to regulate is a university policy."

a law degree is not a law degree if the institution granting it has discriminatory policies.[16]

This is particularly pronounced in the Nova Scotia case because the NSBS decision to refuse TWU's law school was *conditional* on TWU keeping the Community Covenant.[17] The same idea also applies to the other law societies that denied TWU's law school. Even though they might not have the clearly discernible "on and off" aspect of conditional disapproval, the rejection of TWU's law school depends on a conception of the nature of legal education that includes the non-substantive consideration of institutional discrimination. This effectively folds the law societies' ideas about protecting the public interest into the essence of what constitutes legal education.

If indeed the rejections of TWU's law school are attempts by the law societies to extend their authority in order to regulate the composition of law schools and re-define the meaning of legal education, one might expect Canadian law schools to object and assert their autonomy. Surprisingly, the Canadian Council of Law Deans [CCLD] did not do this, but rather echoed the concern about the discriminatory institutional policy of TWU's proposed law school. In a letter to the FLS committee reviewing TWU's law school proposal the CCLD said,

> Discrimination on the basis of sexual orientation is unlawful in Canada and fundamentally at odds with the core values of all Canadian Law Schools. We would urge the Federation to investigate whether TWU's covenant is inconsistent with Federal and Provincial law. We would also urge the Federation to consider this covenant and its intentionally discriminatory impact on gay, lesbian and bisexual students when evaluating TWU's application to establish an approved common law program.[18]

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[16] *Ibid* at para 170.
[17] NSBS News Release, *supra* note 2. Campbell J. described this as adding an "on and off" aspect to the definition of legal education (*TWU v NSBS*, *supra* note 3 at para 170).
[18] Letter from Canadian Council of Law Deans to Federation of Law Societies of Canada (20 November 2012), online: Canadian Council of Law Deans <http://www.ccld-cdfdc.ca/index.php/reports-and-publications> [CCLD Letter].

What is meant by this reference to 'unlawfulness'? It is simply not true that TWU's Community Covenant is unlawful in Canada. In 2001, The Supreme Court of Canada in *TWU v BCCT* affirmed TWU's ability to maintain its Community Covenant while also offering a complete teacher-training program, taking into account in its decision the *Canadian Charter of Rights and Freedoms*[19] and the relevant provincial human rights rules in British Columbia.[20] Although it is possible to argue that the *TWU v BCCT* decision should not apply here,[21] such a position provides shaky grounds (at best) for making the bold claim of "unlawfulness". So, then what other meaning could be given to the CCLD statement that TWU's discriminatory policy is 'unlawful'?[22]

Perhaps 'unlawfulness' should be seen through the lens of the 'core values' of Canadian law schools? From this view, to claim TWU's Community Covenant is 'unlawful' is to say that the essence of the covenant is inconsistent with the essence of legal education. 'Lawfulness' in this sense refers to something other than established legal principles; it refers instead to the ideals that form the basis of legal education. It speaks to the skills, abilities and habits of mind learned in law school. What is at stake for the CCLD can then be seen in relation to the formation of jurists rather than to the content of legal rules. This raises all sorts of questions, like: what are these 'values';

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[19] *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 [the *Charter*].

[20] *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772 [*TWU v BCCT*] at 811-814.

[21] One common argument against the lawfulness of TWU's Community Covenant is that the state of the law regarding LGBT equality rights has changed substantially since 2001. Campbell J. rejected this argument and upheld the relevance of the *TWU v BCCT* decision to the current situation (*TWU v NSBS*, *supra* note 3 at paras 195-208 and 245). Both the Superior Court of Justice and Court of Appeal in Ontario distinguished the *TWU v BCCT* decision (see *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250; and 2016 ONCA 518).

[22] It should be noted that we do not know whether the CCLD thinks that the FLS decision – i.e. TWU's law program fulfils the requirements of a legal education – is satisfactory. Even if it did think so, the following questions raised regarding the connection between institutional policies and the essence of 'legal education' are still important to consider.

where do they come from; what type of lawyer is a 'lawful' lawyer; what type of legal education is a 'lawful' education; and why are these core values incompatible with TWU's Community Covenant?

This idea of 'lawfulness' also helps make better sense of the rejection of TWU's law school by the three law societies. The intention might not be to claim regulatory power over law schools, but rather to give effect to the law school's self-understanding of 'lawfulness' in relation to its 'core values'. Or, rather, that the law societies share a similar understanding of 'lawfulness' and the related 'core values' of legal education as the CCLD. This draws the ideals of the legal profession (i.e. the protection of the public interest) together with the ideals of legal education and its core values.

THE DISCIPLINE OF LEGAL EDUCATION

So far we have seen that the opposition of the three law societies to TWU cannot be stated simply as a matter of upholding LGBT equality rights. Although there is certainly an element of this at play, it does not fully capture the situation. The CCLD invocation of 'core values' indicates that what is really at stake is the nature of legal education itself. Setting this against the TWU Community Covenant (and its rejection), which is not a substantive part of legal education, suggests that legal education is not only about passing on the knowledge and analytical skills related to the technical practice of law. It is also about shaping the habits of mind, the character traits and ideals of the students. The institutional nature of legal education takes on new significance in the process of student formation.

This draws our attention to the *discipline* of legal education, its values and ideals. The conflict over TWU's law school proposal engages these questions on two levels. On the surface it is a matter of community composition – how do we decide who can pursue legal education? This is directly related to the discriminatory effects of the Community Covenant. Under the surface is also a question of how students come to law and how they are to think about themselves in relation to the law. We can see in the TWU law school situation that these two levels are not separate from each other, but are blended together. Considering the TWU law school situation from this perspective reveals competing notions about what an ideal lawyer is – whether a divided self or a unified self, whether grounded in the ambiguities of law or in the clarity of religious commitment.[23]

Questions related to the institutional character of legal education and its influence over the professional formation of future lawyers are not new.[24] But neither are they settled. The legal profession, like other professions, can be described as a 'discipline'.[25] Since the first step in coming to law is through a university education in law, the initial site of disciplinary formation of the legal profession, and for the reproduction of the discipline, is in law school.[26] This explains the strong reaction of the legal profession to the TWU law school proposal.

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[23] My views on the appearance of the discipline in law school has been informed primarily by Philip Kissam, *The Discipline of Law Schools: The Making of Modern Lawyers* (Durham, NC: Carolina Academic Press, 2003).
[24] See, e.g. Terrance Sandalow, "The Moral Responsibility of Law Schools" (1984) 34:2 J Legal Educ 163.
[25] The general idea of 'discipline' I am working with here is taken roughly from Michel Foucault, *The Archaeology of Knowledge*, translated by A M Sheridan Smith (London: Routledge, 2002).
[26] J M Balkin, "Interdisciplinarity as Colonization" (1996) 53 Wash & Lee L Rev 949 at 956: "Disciplines reproduce themselves through education; they construct the cultural software of new members in order to perpetuate themselves."

It should not be presumed that legal education is merely the handmaiden of the legal profession, using the model provided by the profession to mass-produce future lawyers. The nature of the connection between the legal academy and the legal profession is the subject of ongoing discussion. Some scholars think that the legal academy is primarily a professional discipline, and that it should conform to the needs, ideals and values of the profession.[27] Others argue that legal education is a unique academic discipline with its own ideals, values and ambitions.[28] The connection between the academic and the professional aspects of legal education is irrevocable, and the tension that this union produces gives legal education a particular (and resilient) shape.[29] The benefit of using a 'disciplinary' approach to discuss questions of the core values of legal education is that it provides the opportunity to think about this connection without making a hierarchical (or causal) choice between them. It also reveals active forces related to the core values of legal education that might otherwise remain hidden.

Philip Kissam argued that legal education rests upon a "subterranean" and pervasive system of highly structured practices, including routines, habits and a tacit knowledge that make law school itself a form of discipline.[30] This disciplinary structure profoundly shapes the expectations, ideas and beliefs that we have about learning law,

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[27] See e.g. Harry T Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91 Mich L Rev 34.

[28] See e.g. Stephen M Feldman, "The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)" (2004) 54:4 J Legal Educ 471; Mary Ann Glendon, "Why Cross Boundaries?" (1996) 53 Wash & Lee L Rev 971; Cass R Sunstein, "In Defense of Liberal Education" (1993) 43:1 J Legal Educ 22; Peter J Byrne, "Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education" (1993) 43:3 J Legal Educ 315; and Sherman J Clark, "Law School as Liberal Education" (2013) 63:2 J Legal Educ 235.

[29] See Edward L Rubin, "The Practice and Discourse of Legal Scholarship" (1988) 86 Michigan L Rev 1835; and Balkin, *supra* note 25 at 965, where he argues that it is because of the professional nature of legal education that legal scholarship attracts the use of other methods (it does not have its own), but resists being 'colonized' by another discipline.

[30] Kissam, *supra* note 23 at 4. The practices that Kissam is particular interested in examining are the tacit norms emerging from the unintended actions, and unintended effects of these actions, of law school (*ibid* at 11-12).

teaching law and practicing law. The main consequences of the discipline include the formation of certain intellectual attitudes of analysis, precision, scepticism, confidence and toughness, which privilege conservative values and embody unresolved contradictory messages about legal rules, theories and behaviour that suggest "there is no law."[31] This produces an image of the ideal lawyer who is a quick, productive, error-free, combative warrior that avoids open-ended, risk-taking deliberations about ethical, moral and political issues.[32]

This vision of the ideal lawyer produced by the discipline of law school is closely related to the broader modern social phenomenon of the 'divided self'.[33] The 'divided self' emerges from the effort to hold onto the strong enlightenment notions of rationality, individuality and universality while also making room for the romantic ideals of emotion, language, aesthetics, history and relationships. The result is the division between public (professional) and private (personal) spheres of an individual's life.[34]

The formation of the 'divided self' in legal education is grounded in a profound sense of ambiguity about the meaning of the law – that the law is agnostic and adversarial.[35] On the one hand, the law is presented as systematic and rational, but on the other it is presented as fragmented and decontextualized. Through the methods of reading, teaching and evaluation used in law school, students are constantly exposed to tensions and inconsistencies between legal authorities.[36] The result is the appearance that

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[31] For an overview of these arguments, see *ibid* at 6-11.
[32] *Ibid* at 229-230.
[33] Kissam takes the idea of the 'divided self' from Charles Taylor's book *Sources of the Self: the Making of Modern Identity* (Cambridge, Mass: Harvard University Press, 1989). See Kissam, *supra* note 23 at 231-236.
[34] *Ibid* at 235.
[35] *Ibid* at 18.
[36] *Ibid* at 241. For Kissam's arguments on the way this appears in the various practices of law school, see *ibid* at 27 (re: the core curriculum), 34-35 and 39-41 (re: casebook readings), and 54-57 (re: examination).

"there is no law there" to bind judges, lawyers or anyone else.[37] There is no right answer, and everything can be argued from various perspectives. The 'ideal lawyer' is portrayed as the master of ambiguity, able to represent multiple perspectives with conviction, unbound by the restrictions of one particular view.

The purpose of ambiguity is not to disrupt the discipline of the law. To the contrary, ambiguity helps strengthen it. Throughout law school, students are exposed simultaneously to experiences of powerlessness and empowerment – overwhelmed with the plethora and fragmentation of material, and then instructed in appropriating the tools needed to master the ability to make compelling arguments out of this material. The push-and-pull of the law school experience leads individuals to become 'engulfed' by the discipline, accepting its authority, values and lessons.[38] The relational bonds formed through the process of legal education create a sense of belonging to a community that is collectively working to confront uncertainty, reinforcing the discipline further.[39] This communal experience is important to the full indoctrination of the discipline. Ambiguity and the divided self enable the transformation of students into full disciples, indoctrinated – as future jurists – with this sense of ambiguity.[40]

The notion of "unlawfulness" in the CCLD Letter discussed earlier[41] provides an example of the discipline in action. Describing TWU's Community Covenant as "unlawful" in the face of the *TWU v BCCT* decision injects uncertainty into the state of the law. Posing TWU's Community Covenant (and the Supreme Court decision of *TWU*

[37] *Ibid* at 118.
[38] *Ibid* at 241-242.
[39] *Ibid* at 121.
[40] In a well-known essay, "The Ordinary Religion of the Law School Classroom" (1978) 29:3 J Legal Educ 247, Roger C Cramton describes a set of law school practices that result in similar attitudes. He focuses on the instrumentalist views of the ideal lawyer prevalent in law school, which engenders a deep indifference toward the values of legal education and the legal profession.
[41] *Supra* note 18.

v BCCT that upholds it) against the "core values of all Canadian law schools" draws out the incongruity between the apparent state of the law and the 'values' of legality. This leaves, in the words of Kissam, the appearance that "there is no law" – the law is left looking ambiguous. And this ambiguity, as we have seen, is central to the discipline (or, for the CCLD, the 'core values') of law school.

The threat posed by TWU's insistence on maintaining its Community Covenant shows that it is unwilling to accept the ambiguity of the law, claiming for itself instead a form of clarity. This clarity has two main aspects. First, TWU is clear that its identity and the identities of its students should be grounded in the truths of divine revelation in the Christian scriptures – the basis for the Community Covenant.[42] Secondly, TWU is clear that it has the ability to claim for itself the rights and privileges afforded to it in law as a religious institution. Both of these points push against the 'core values' of the discipline of law school reflected in the CCLD letter (and described by Kissam). TWU's idea that the institution can be unequivocally (or unambiguously) Christian suggests an alternate vision of the 'ideal lawyer' – one who is informed by unambiguous *religious* ideals and values.

What type of 'self' TWU's law school envisions is a more complex question. If the values of the institution are to be sown into the character of the student, then one would think that future jurists coming out of TWU will not be dual but unified selves. However, TWU draws a distinction between the unambiguity of the Christian law school regarding homosexuality while maintaining that its Christian law graduates will not act

[42] See Community Covenant, *supra* note 4. See also, Trinity Western University, "Core Values" (accessed 22 April, 2015), online: <http://www.twu.ca/about/values/default.html>.

discriminatorily towards homosexuals in the course of professional practice.[43] This creates a double standard. The institution can be one thing – openly discriminatory – that individuals cannot be. TWU's vision of the self, therefore, seems to remain divided between its collective (private) identity in the faith and its (public) identity as an individual in the professional world of law.

Despite this lingering division, the line demarcating the divided self has indeed moved. Although complete unity of the self may not be achieved, there is still a shift in the vision of the 'ideal jurist'. The division between professional (public) and religious (private) obligations shows greater encroachment upon the professional and a clear attempt to draw a bridge between the two. The TWU law school is, after all, conceived of not as a church, which is a purely private institution, but as a semi-public entity. It is a religious institution that has a public presence, equipping individuals to take on a profession with a public focus.[44]

The way that TWU's proposed law school straddles the private and the public divide poses a real challenge to the discipline of law schools, providing an alternative set of 'core values' to the mainstream law school discipline and a (somewhat) different vision of the 'ideal jurist'. Allowing TWU to open a law school that constitutes itself according to *religious* ideals purports to replace ambiguity with clarity and the divided self with a (movement towards a) unified self. From this view we are left with what seems to be a pure choice between two sets of values – to affirm and follow the values embodied in the mainstream discipline of Canadian law school or those of the discipline

[43] TWU Letter to FLS, *supra* note 7 at 5.
[44] See Trinity Western University, "Core Values", *supra* note 42. It should be noted that the this straddling of the public/private divide was also pertinent to the decision in *TWU v BCCT*, *supra* note 20, where the propriety of training of future public school teachers at TWU was under question.

of religious commitment. The conflict around the TWU law school proposal begins to take on shades of intractability, reduced to the need to choose our master. And this is causing great anxiety.

FROM EXPECTATION TO EXPERIENCE – THE FUTURE OF LEGAL EDUCATION

In this final section, I want to explore yet another way of re-framing how we think about the TWU law school proposal, with the intention of pointing the way forward and gesturing toward the future of legal education. Instead of thinking in terms of *choice* between sets of values for constituting legal education (and visions of the 'ideal jurist'), I propose that we instead consider how legal education (including its values) is constituted through the participation of students and teachers. This, I believe, produces a vision of the discipline of law school that is dynamic and open (rather than closed protectionist). From this perspective, the challenge is actually for *both* the mainstream Canadian law schools as well as TWU's community to open up to each other.

James Boyd White tells us of a time that he gave an address to a group of high-achieving law school graduates from the University of Michigan prior to their departure into the practice of law (or wherever they were going).[45] In this final pedagogical moment, White charged them to be, and to see themselves as, educators.[46] Often times the question "what type of an education is a legal education?" is framed in terms of the skills, competencies, abilities, character traits or habits of mind necessary for professional

[45] James Boyd White, "Schooling Expectations" (2004) 54:4 J Legal Educ 499.
[46] *Ibid* at 501.

formation or for the formation of democratic citizenship.[47] White's approach was to think about it in terms of our experience of coming to law, and the particular relationship between student and teacher.

In his final charge to these budding jurists, White draws on the familiar disarray of the first year student, of experiencing the gap between their expectations of law school (and the law) and its reality. More specifically, White asks them (and us) to consider what happens when confronted with the gap between preconceived ideas about the law, or expectations of its clarity and purpose, and the experience of its discombobulated complexity and the messy reality of its goals and aims? This type of experience, as he explains, pervades our lives – we will always find that our expectations, no matter how carefully prepared, will be wrong.[48] Take heart, he says, because a legal education spent struggling between expectation and experience is a preparation for life.[49] It also is preparation for fulfilling the calling of the legal profession.[50]

For White, what students *learn* in a legal education is to be keenly aware that every issue has two sides, that every law engages multiple perspectives. The legal professional is not one who has answers to the questions but rather is one who is capable of both pushing the questions deeper, uncovering new questions, and assembling the

[47] For some various examples, see Martha C Nussbaum, "Cultivating Humanity in Legal Education" (2003) 70:1 U Chicago L Rev 265; and Clark, "Law School as Liberal Education" *supra* note 28.
[48] White, "Schooling Expectations", *supra* note 45 at 502.
[49] Also see, for example, Clark, "Law School as Liberal Education" *supra* note 28.
[50] Clients, like first year law students, will have to struggle to come to terms with the gap between what they expect the law (and their lawyer) to be able to do for them and the reality of experience (that the law and their lawyer cannot meet their expectations). One of the central roles of the lawyer is to act towards their clients like their teachers acted towards them in their first year of law school – to help identity expectations and presumptions about the law and to help reconstruct a new understanding of reality in the light of the immense complexity of legal machinery at work in any given situation.

questions in such a way as to make something meaningful out of them.[51] In developing these abilities, the jurist must learn to look both outside as well as inside herself. Looking outside is essential to see the experiences and concerns of others, to be exposed to the plurality of ideas and perspectives bearing on a situation – it is the moment of disarray, of discovering how much there is out there in the world that does not comport with our preconceived ideas of the way things are. Looking inside is the process of making some sense of the mess, to construct out of the pieces an interpretation and an argument, a way forward to address the world.[52]

The teacher has a unique role in helping students do this. The teacher helps uncover the presumptions of the student, the weakness and inaccuracies of their expectations, and guides them in reconstructing meaning in light of their experiences and intuitions. A bad teacher will simply replace the pre-conceived ideas of the students with their own presumptions of meaning. A good teacher will help the students construct their own understanding, to impress upon them their responsibility for constructing a way to confront reality and give meaning to it. There is a risk that the student will simply adopt a new set of expectations and presumptions, even if not at the behest of the teacher. The good teacher, therefore, has the difficult task of tearing down, building up and then tearing down again, providing students with the tools, habits of mind and character traits to carry out this ongoing process.[53]

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[51] White, "Schooling Expectations", *supra* note 45 at 499. Also see James Boyd White, *From Expectation to Experience: Essays on Law & Legal Education* (Ann Arbor: University of Michigan Press, 2000) [White, *Expectation to Experience*] at 20.
[52] White, "Schooling Expectations", *supra* note 45 at 500; White, *Expectation to Experience*, *supra* note 51 at 32-34.
[53] For White, legal education is a moral education, which focuses on acquiring a character worth having. See White, *Expectation to Experience*, *supra* note 51 at 11 and 17.

The ideal jurist (also the ideal student), for White, is one who can tear down as well as build up. She is not one who is determined ahead of time, nor one who is incapable of decision and action. She is not destroyed by the gap that exists between expectation and experience, but uses the resulting disarray to engage with the expectations of others, to learn from those who are different, and to bring the disarray into harmony. She is, perhaps above all, one who recognizes her responsibility in the process, drawing on her own imagination, creative powers and life experiences to make meaning for herself and for others from the material of the law.[54] She is therefore also keenly aware of the limitations of the language and meanings that we can claim in the law, knowing that every newly minted understanding is only temporary and subject to being torn down, and that the process of tearing down and building up is never completed.[55]

One of the things that we learn from White is that Kissam's bleak view of the discipline of law school is only one side of the story. From Kissam's perspective, one might expect that no good lawyer could emerge from the law school experience. But White offers a way of thinking about the nature of legal education that is much more hopeful. Despite the difference in attitude, there are distinct similarities between White's vision of legal education and Kissam's description of the discipline of law school. They both focus on disorientation, having one's preconceptions torn down and replaced with the tools of a new language and new way of thinking about the world (in the law). They also both conclude that the most important lesson that students learn is that there are no

[54] The themes of creativity and responsibility are strong throughout all of White's writings. This can be especially seen in ch 2 of his book *Expectation to Experience*, *supra* note 51 (see especially at 18-19).
[55] The ongoing nature of the process appears most powerfully in relation to White's reflections on the roles of interdisciplinary study, interpretation and artistic performance in law. See e.g. *Ibid* at ch 5, 7 and 8. Also, see generally White, *Justice as Translation* (Chicago: University of Chicago Press, 1990).

'right answers' to legal questions. There is a fundamental ambiguity at the heart of the law – that the law does not contain its own meanings, but depends on the actions and activity of others to give it meaning and shape **[cf%%% J Searle?]**.

The key difference is that White and Kissam disagree about where the meanings of law (or the 'core values') come from. Kissam thinks that they are supplied primarily through the subterranean practices of the discipline of law school. White thinks that they are continuously growing out of the activity of teachers and students struggling together with the material of law, trying to make sense of it. Kissam tracks the propensity of the nuts-and-bolts practices of law school to generate certain "pathologies" of the discipline, whereas White sees the possibility and potential of legal education to form good character. For White, students are active in legal education, composing legal meaning and developing the ability to autonomously ask questions and *make* legal meaning; they are composers, not reproducers, of law.[56] Kissam, on the other hand, points to the way that law school practices render students neutral and passive, making them recipients of legal analytic techniques for working effectively with ambiguity, and separating the external and personal experiences of law students from legal analysis.

Despite his scepticism, Kissam also offers an idealized vision of legal education similar to White's.[57] He describes the ideal self as a 'dialogic self', which, unlike the 'divided self', seeks to integrate rather than separate the various, often times conflicting, aspects of human life and thought. Kissam described this as involving an oscillation between responsibility to act rationally and the responsibility to account for and respond

[56] White, *Expectation to Experience*, *supra* note 51 at 15-21.
[57] Kissam, *supra* note 23 at 243-267.

to 'otherness'.[58] This notion of the 'other' emphasizes that the composition of law and its meaning depends not only on the ingenuity and life experiences of the lawyer (which White emphasizes), but also on the interactions between the legal community and the world 'out there'. For Kissam, attempting to re-frame legal education from the top (as White suggests) has proved ineffective in the past.[59] Instead, it will take a shift from the ground up, embracing greater diversity in learning styles, intellectual methods and modes of lawyering, which will drastically change the current practices of pedagogy and examination.[60]

White's idea of expectation and experience provides a helpful view of the role of law teachers and students in the formation of the "core values" of legal education. In the TWU law school discussion, it seems that both proponents and opponents assume that values are received and that our role is to decide which ones to accept and to follow. White challenges us to see the active roles of all of us in constituting the communities of which we are a part. Legal education does not depend upon choosing one set of values or another. Kissam's pessimism is grounded in the force of the discipline of law school to rob us of our agency, making lawyers the product of the discipline. White's optimism is found in the creativeness, imagination and virtues naturally found in human life, and the capacity for these to overcome the forces of the discipline of law school. For White, the meaning of legal education – its "core values" – are not *found* but *made* by those involved in the educational process (both professors and students). The process is

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[58] *Ibid* at 237-238.
[59] Kissam discusses several reform movements in legal education (see *Ibid* at ch 4), but concludes that these were all subsumed into the discipline of law school (*ibid* at 183-184).
[60] *Ibid* at 249-267. White also admits the weakness and susceptibility of some structural and pedagogical elements of law school, such as the effects of grading and the case method of teaching (and reading) as well as the pressures of applying for jobs (White, *Expectation to Experience*, *supra* note 51 at 12-14).

typified not by ambiguity or clarity, but in the honest and rigorous engagement of students and teachers in wrestling with the various claims of meaning within the law.

CONCLUSION

The TWU situation presents us with a choice. But this choice is not what we would necessarily expect. It is not between religious freedom and non-discrimination. It is not between different sources of values for legal education (and legal practice). Rather, it is whether we will choose to trust each other as active agents in the process of constituting the world that we share. It is whether we are able to see each other and ourselves as creators, open and responsible to each other, to those who are different than us, and to the world in which we live.

Practically speaking, excluding TWU from the community of legal education (and the legal profession) does nothing to strengthen the 'core values' of legal education. If anything, it does the opposite, removing legal education from experiencing 'the other' point of view. This pushes legal education away from life (specifically the pervasive life of faith), insulating it and walling it in. Likewise, for TWU, excluding from the community those who think and live differently, who challenge the institution's dominant view, does not accomplish the goal of strengthening those within the community. By pushing away those who are different, *both* the law schools in Canada as well as TWU, individually and collectively, are actually weakened. Excluding those who are different (TWU excluding homosexuals, or law schools excluding TWU) renders a community

separate from the world and from life, which feeds the view that education is about the passive reception and reproduction of the 'right' perspective. Contrary to this, true strength and insight are engendered when the individual (and collective) accept responsibility to define and defend a certain set of values and beliefs is taken on, when the world "out there" is opened up to, and when the life of the cloistered community (of law or of faith) is extended to participate in the life of the world.

Although the future of legal education might be beset by the subterranean forces of the established discipline of law school, White (and Kissam, to a degree) encourage us not to be dissuaded from pursuing and affirming the integration of law and life, of embracing the creative responsibilities of our profession, and of holding fast to intellectual humility. All of this, I would argue, shows that the future of legal education depends on the Canadian legal community taking up the challenge of embracing TWU's law school, of the TWU community taking up the challenge of embracing LGBT persons, and on *both* demanding their mutual responsibility and accountability in shaping the future of legal education and the ongoing life of the law.

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